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THE SCOTS

REVISED REPORTS

COURT OF SESSION

SECOND SERIES—VOLUME XII

CONTAINING

DUNLOP Vol. XXIII

1860 to 1861

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SCOTS REVISED REPORTS.

COURT OF SESSION.

(SECOND SERIES.)

DUNLOP.

No. 1. **XXIII. Dunlop 1.** 27 July 1860. 1st Div.—Lord President.

The NATIONAL EXCHANGE COMPANY of GLASGOW, Pursuers.—*Gordon—A. Moncrieff.*

PETER DREW and MATTHEW DICK, Defenders.—*Lord Adv.-Moncreiff—Fraser.*

Bank—Falsehood—Fraud—Directors—Managers.—What must be proved under an issue of inducement by a joint-stock company to purchase shares by false and fraudulent representations as to the state of the company?

The truth of a report by directors to a joint-stock company depended on the value of the securities held, which consisted of stocks of other companies. Nothing inconsistent with the report appeared in the books of the company, which were kept in the ordinary way, but the value of the stocks was variable, and comparison with the prices current would have shown that as at the date of the report the securities had greatly fallen in value. *Directions*—(1.) That the representations in the annual reports of the directors were the representations of the company; (2.) Gross neglect on the part of the directors in making proper investigations into the state of a joint-stock company, coupled with reporting to the shareholders that investigation had been made, will render the representations in the report false; (3.) That a report was not to be regarded as false, nor necessarily as fraudulent, because of the directors not having at the time sifted the value of the securities; and (4.) That, if the sifting would have involved a degree of investigation beyond the ordinary duties of their office, or if—having taken place—the directors thought well of the securities notwithstanding a depression, which they looked upon as momentary, the representation was not fraudulent.

Representations by an individual director of a joint-stock company, not at the time acting in his official character, are not representations by the company, nor are the representations of the manager, made not in the discharge of his duty as manager;—*Aliter*, if his representations are made in the course of doing something which the company have entrusted to him to do.

A manager of a joint-stock company cannot, as such, give advice to a friend as to whether he ought to buy or sell stock.

See *ante*, vol. xii. p. 950; xiii. p. 770; 9 S.R.R. (H.L.) 551; and vol. xviii. p. 614; vol. xix. p. 689; vol. xx. p. 837.

The issues in this case were adjusted on 16th February 1856, *ante*, vol. xviii. p. 614. They were as follows:—

[3] that it was empowered to carry on other branches of business, such as agency and brokerage. It was a company of a complex character, and having complex interests in its transactions; as, for instance, if there was a party desirous to purchase some of the stock of the company, and to have a loan of money in order to enable him to do so, or to purchase other stocks, the company had an interest to promote the transaction, because its profit was made by lending money to the parties who so chose to deal. That was the great source of its profit. It had an interest in promoting the transaction, because it obtained commission as well as ordinary interest upon the money so advanced—5 per cent of interest, I think, and 3 per cent of commission, making altogether 8 per cent. It was thus promoting its own object and business by encouraging such purchases. It had further an interest, inasmuch as it participated in the commission or brokerage of the transaction,—I am not speaking at present in reference to the separate issue before us upon the subject of brokers; I am talking of the general interest that the company had to promote transactions of purchase. It is made a matter of discussion in this case whether the particular transaction that you have heard so much of, viz., the purchase of certain shares by Messrs. Drew and Dick, and the advance of money by the company, was a single, entire, and undivided transaction, one part of which would not have been gone into irrespective of the other,—whether it was an arrangement as a whole with the company, whereby the defenders were to purchase certain shares, and the company were to make certain advances. You will presently see the importance of attending to the character and position of the company as dealers.

The company now pursue for payment of the price of 240 shares of the stock of the company, and of the expenses connected with the purchase of these shares. It is not now made matter of question that, at the time we have been inquiring into, Messrs. Drew and Dick did make purchase of, and that there were transferred to them, the shares in question. The Lord Advocate stated so, both in his speech, and when I put it to him particularly at the end of his address. Nor is it now a matter of question that the price of these shares, and the expense attending the sales thereof, payable by the purchasers, were advanced and paid by the pursuers for and on account of the defenders. That also is a settled part of this case. Purchases were made by the defenders, the price was advanced, and the expenses connected with them were paid by the pursuers as on behalf of the defenders. That is the whole matter raised under the pursuers' issue, and had it not been for the question raised under the defenders' issues, I do not suppose, and I have not heard, that there would have been any question that the defenders were liable to the pursuers for the sums so advanced.

But the defenders say that they were led into the whole transaction of taking that loan and making these purchases by the fraudulent conduct of the company, by the fraudulent representations made by the company as to its credit and solvency and as to the state of its affairs; that these representations induced the defenders to purchase the shares which they did purchase. That matter is raised by the defenders under the first of their issues. You are to be satisfied upon that issue, in the first place, that there were false representations made as to the solvency of the company, and as to the state of its affairs at the time of that transaction; you are to be satisfied that there were false statements made in reference to that matter—in stating that the affairs of the company were in a state of solvency. You must be further satisfied that these statements were fraudulent,—not merely that they were erroneous, but that they were fraudulent. And you must be satisfied, in the third place, that it was these fraudulent statements that induced the defenders to make the purchases,—that they would not have made the purchases but for these false and fraudulent statements. These three points are to be made out under this first issue for the defenders. There is a second issue, as to the matter of brokerage, which we must attend to also. But on the first issue for the defenders, which is the one we are at present considering, the question arises as to what were the false statements that were made by the company, and which operated upon the minds of the defenders. The defenders have told you that they consisted of two parts—in the first place, of the statements contained in the reports made by the directors to the company at its annual meetings, especially the meeting in September 1847, and I think that as regards the annual reports we may at present confine our at- [4] -tention to that one without going further back; and second, of the representations made by the manager of the company, Mr. Barlow, when Mr. Drew

"Whether 240 shares in the National Exchange Company of Glasgow, or any part thereof, were sold and transferred to the defenders in terms of the deeds of transfer, Nos. 5 and 6 of process; and whether the prices of said shares, and expenses attending the sales thereof, and payable by the purchasers, or any part thereof, were advanced and paid by the pursuers [2] for and on account of the defenders; and whether the defenders, or either of them, are indebted and resting-owing to the pursuers in the sums contained in the account set forth in the schedule hereto annexed, or in any part thereof?"

Issues taken by the defenders:—

"1. Whether the pursuers did, by false and fraudulent representations as to the credit and solvency of the National Exchange Company and the state of its affairs, induce the defenders to purchase the said shares of the said National Exchange Company, or any part thereof, and to accept transfers of the same?

"2. Whether, in the purchase of the said shares, the pursuers acted as the brokers of the defenders; and whether, in violation of their duty as such, the pursuers misrepresented the condition of the Company's affairs, and thereby induced the defenders to purchase the said shares, or any part thereof, and to accept transfers of the same?"

The case went to trial before the Lord President and a Jury on the 25th, 26th, and 27th days of July 1860.

The evidence led consisted of that of Matthew Dick, Peter Drew, the brokers through whom their shares were bought, professional accountants who spoke to the state of the Company's affairs, and J. H. Barlow, who had been manager of the Company, but had gone abroad, and whose deposition was taken upon interrogatories; —and of a number of documents. The whole, so far as necessary for the purposes of the present report, are quoted *ad longum* in the charge of the Lord President, who addressed the Jury as follows:—

Gentlemen of the Jury, you are now to deal with the evidence and arguments you have heard in this case, which is a very peculiar one, and requires your careful attention. No doubt it has had your attention during the progress of it, and it will now require your careful attention in making up your minds on the evidence. It arises out of very peculiar circumstances. The pursuers of the leading issue are the National Exchange Company of Glasgow. The company, for the interests of the company, are the pursuers. The company seems to have come to a stop, but still it exists to the effect of winding up its affairs, if not to other effects, and the interests of the company are represented by the pursuers in this action. The defenders, on the other hand, are Messrs. Drew and Dick, who were partners of the company, and the matter we are now inquiring into has reference to a transaction of the purchase of shares by the defenders—not a transaction entered into by the company directly in the prosecution of the company's business, but a transaction of the purchase of shares by the defenders, and in regard to which they say they were fraudulently misled by the company, or those who were entitled to represent the company. You will observe that it is not a purchase of shares by Messrs. Drew and Dick from the company. Cases of that kind have frequently occurred. A company has stock which it wishes to dispose of, and a party desires to purchase the stock, and purchases it from the company itself,—in that case the company is the seller of the stock, and stands to the buyer in the relation of seller; and representations made by the party selling may have a different effect from those of a party in the position which we are now considering. I need not tell you what the effect in that case would be. I am only warning you that this is not the case of a purchase from the company. It is the case of a purchase from an independent seller, or independent sellers. We have the names of them in the papers here, but the names are of no consequence at present. They are various parties who were in the market selling their stock, and Messrs. Drew and Dick went into the market to purchase that stock, and they did purchase it, at a certain rate; and the question is raised here as to whether they were fraudulently misled by the company in reference to this transaction. It is of some consequence,—indeed, it is essential, to keep in view the particular nature of this company. It was not a mere common banking company. That was not its sole character. It possessed other characters. It was a company for lending money, and lending money specially upon the security of shares or stock, either of itself or of other companies; and it appears from a clause in the supplementary contract, I think,

[3] that it was empowered to carry on other branches of business, such as agency and brokerage. It was a company of a complex character, and having complex interests in its transactions; as, for instance, if there was a party desirous to purchase some of the stock of the company, and to have a loan of money in order to enable him to do so, or to purchase other stocks, the company had an interest to promote the transaction, because its profit was made by lending money to the parties who so chose to deal. That was the great source of its profit. It had an interest in promoting the transaction, because it obtained commission as well as ordinary interest upon the money so advanced—5 per cent of interest, I think, and 3 per cent of commission, making altogether 8 per cent. It was thus promoting its own object and business by encouraging such purchases. It had further an interest, inasmuch as it participated in the commission or brokerage of the transaction,—I am not speaking at present in reference to the separate issue before us upon the subject of brokers; I am talking of the general interest that the company had to promote transactions of purchase. It is made a matter of discussion in this case whether the particular transaction that you have heard so much of, viz., the purchase of certain shares by Messrs. Drew and Dick, and the advance of money by the company, was a single, entire, and undivided transaction, one part of which would not have been gone into irrespective of the other,—whether it was an arrangement as a whole with the company, whereby the defenders were to purchase certain shares, and the company were to make certain advances. You will presently see the importance of attending to the character and position of the company as dealers.

The company now pursue for payment of the price of 240 shares of the stock of the company, and of the expenses connected with the purchase of these shares. It is not now made matter of question that, at the time we have been inquiring into, Messrs. Drew and Dick did make purchase of, and that there were transferred to them, the shares in question. The Lord Advocate stated so, both in his speech, and when I put it to him particularly at the end of his address. Nor is it now a matter of question that the price of these shares, and the expense attending the sales thereof, payable by the purchasers, were advanced and paid by the pursuers for and on account of the defenders. That also is a settled part of this case. Purchases were made by the defenders, the price was advanced, and the expenses connected with them were paid by the pursuers as on behalf of the defenders. That is the whole matter raised under the pursuers' issue, and had it not been for the question raised under the defenders' issues, I do not suppose, and I have not heard, that there would have been any question that the defenders were liable to the pursuers for the sums so advanced.

But the defenders say that they were led into the whole transaction of taking that loan and making these purchases by the fraudulent conduct of the company, by the fraudulent representations made by the company as to its credit and solvency and as to the state of its affairs; that these representations induced the defenders to purchase the shares which they did purchase. That matter is raised by the defenders under the first of their issues. You are to be satisfied upon that issue, in the first place, that there were false representations made as to the solvency of the company, and as to the state of its affairs at the time of that transaction; you are to be satisfied that there were false statements made in reference to that matter—in stating that the affairs of the company were in a state of solvency. You must be further satisfied that these statements were fraudulent,—not merely that they were erroneous, but that they were fraudulent. And you must be satisfied, in the third place, that it was these fraudulent statements that induced the defenders to make the purchases,—that they would not have made the purchases but for these false and fraudulent statements. These three points are to be made out under this first issue for the defenders. There is a second issue, as to the matter of brokerage, which we must attend to also. But on the first issue for the defenders, which is the one we are at present considering, the question arises as to what were the false statements that were made by the company, and which operated upon the minds of the defenders. The defenders have told you that they consisted of two parts—in the first place, of the statements contained in the reports made by the directors to the company at its annual meetings, especially the meeting in September 1847, and I think that as regards the annual reports we may at present confine our at- [4] -tention to that one without going further back; and second, of the representations made by the manager of the company, Mr. Barlow, when Mr. Drew

went in October to consult him in reference to the transaction of loan and purchase. These are the two occasions on which the false representations are said to have been made, and it is to what passed upon these occasions that we have now to direct our attention.

In regard to the statements in the report, whatever their character may be, these were the statements of the directors to the shareholders. They are the official statements of the directors to the company—to its assembled members. A company of that kind makes its statements through its directors, and it is responsible for the statements so made by the directors. If the directors on that occasion did make statements in that report which were in the first place false, which were, in the second place, not only false, but fraudulent—fraudulently made,—and which, in the third place, were the inducing cause of the defenders making that purchase, then the company is responsible under that issue. You have to ascertain whether the statements in that report are of that kind. The representations, I have said, and I may repeat it—the representations by the directors in their report are the representations of the company; and if you find in these representations false statements that are also fraudulent statements, and that also were the inducing motive to the purchase, then that is what the defenders have asked you to find in this issue. I am talking now of the statements in the report. I have not yet come to speak of the statements of the manager. Now the false statements that are alleged to be contained in that report are false statements as to the credit and solvency of the company, and the state of its affairs. The representations alleged to be false are those contained on page 23. "Your directors beg to lay before you the following as the result of their second year's operations. The nett profits made by the company (which have been much diminished in the brokerage department, in consequence of the depressed state of business generally, and particularly in the share markets) during the year ending 31st July last, amount to L.22,510, 16s. 5d., from which they propose to pay a dividend at the rate of 8 per cent, clear of income-tax, which will require the sum of L.16,983, 17s. 4d., and to carry the balance of L.5526, 19s. 1d., to the credit of the reserve account, which will then amount to L.21,125, 15s. 3d." It is contended that that was a false representation of the condition of the company; that it represented the company as being in the condition of making a large amount of nett profit, and being in a condition to divide 8 per cent, clear of income-tax, and of carrying a balance of L.5500 to the reserve account. That is stated to have been a false representation. It was false, it is said, in these respects,—in the first place, that the condition of the company had been by that time greatly shaken by the failure and bankruptcy of some of its debtors, and by the depreciation in the value of the securities which it held, and that in making that report, sufficient allowance was not made either for bad debts in bankruptcy, or for the depreciation in the value of the securities; and it is said to have been false or erroneous in this other respect, that it carried forward into the account, as assets of the company reckoned available, not only the original debts due by parties who were insolvent, but also charges of interest and commission and so forth upon their accounts, so as to swell the apparent assets of the company to an amount which, being set against its obligations, gave the appearance of a balance which would warrant such a dividend, but which was fictitious, because these assets were more imaginary than real. As to the general principle of putting to the debit of the debtors of the company the interest due upon their debts and commission, making 5 and 3 per cent, together 8 per cent,—the general principle of balancing their accounts by putting these charges to their debit, and carrying on the balance against them as an asset of the company, no question, I understand, is raised, nor can I conceive any question raised, because that is the proper way of stating the account with the debtor and bringing it forward. But the complaint is, that the parties who were stated as debtors, though their accounts were made up on the proper principle of making up accounts with solvent parties, were parties who were not solvent, and were parties who were known not to be solvent, and that in such circumstances these balances should not have been carried forward as good assets. It would probably depend, not merely upon the solvency of the parties, but upon a combined view of their solvency and of the value of the security which was held for the debt, whether the balances should have been carried forward, yea **[5]** or nay. For the company do not appear to have lent to any of those parties who are given here as instances, money without security,—security of stocks and shares; and if the security was ample to cover fully the debt due to the company, although the

individual party might be bankrupt, that amount of assets would be perfectly good; and therefore it is not merely the insolvency or bankruptcy of the party that would make it improper to hold out these things as assets of the company. You must add to that, the circumstance that the securities held by the company were not fully sufficient to make the debt a good debt. The defenders say that they have shown that to be the case in various instances, and that it was the case at July 1847; and several accountants have been examined, one fully, and others held as concurring with him, who tell you that they have examined into the state of the company's affairs at that time, and that there were various instances of that condition of matters as regarded the securities of the parties; for instance, Robertson was bankrupt,—his securities did not cover his debt; Robertson, Tweedie, and Cuthbertson were also bankrupt, and their securities did not cover their debt; Tweedie and Cuthbertson, separately, were bankrupt, and their securities did not cover their debt; and there were other instances of the security not covering the debt as at that date. Now, in reference to that, it is proper to keep in view that the securities in which this company dealt, and which it was its business to deal in, were things which were, and might be expected to be, of a very fluctuating value. They were securities in the shares of stock of various kinds, which might be up one day and down another, and it might not be a matter very easy to ascertain at all times what was the exact amount that might be relied upon as the true value of such securities. It was not necessarily the selling price of to-day or of yesterday. It depended, to a certain extent, on the expectations and prospects, as well as upon the actual selling price of the day, and it might be difficult to arrive at an exact opinion as to what was the real value of these securities. But it appears that, valuing them at the current price of that day, there were certain uncovered balances due by certain of these parties. So far then, in that view of it, the representation of the condition of the company was to that extent an incorrect representation. That is to say, it assumed as correct and good the whole balances due by Robertson, and the whole balances due by Cuthbertson and Tweedie, and by Robertson, Cuthbertson, and Tweedie, and Monteith, and some others who were in the same condition. What the expectations were from the securities, we do not exactly know, or what were reasonable, except that Mr. Gourlay, who examined the matter, was of opinion that there was nothing equal to the amount of the debt to be expected from these securities. It has been said that we have a document which shows us how that was regarded by the company itself at that time—the document, No. 97 of process—and it is said that it appears from the minutes antecedent to the preparation of the report of July 1847, as well as from a letter written by Mr. Gourlay's clerk, and the evidence of Mr. Gourlay himself, that No. 97 was a document prepared with reference to that report of July 1847. It is not given in evidence directly by any person that the document No. 97 was prepared in reference to that report. (His Lordship then analysed the evidence bearing upon the preparation of this document. After which he proceeded):—I do not know when it was made up; and my own feeling is, that it would be very unsafe (if it is an important part of this case in any respect), to rely on the opinion that the paper No. 97 was made up at that time. But there were some materials furnished, from which the report was made up; and the report was prepared by the manager, and approved by the directors, and then submitted by them to the company; and in the particular instances which you have now heard, the balances due by certain parties were assumed as good debts, while they were not covered entirely by the securities. The value of the securities at the moment did not appear in the company's books. It was a thing changing every day. One gentleman examined made it up from the London prices current, and another gentleman made it up from the Glasgow prices current. But that value did not appear from the books or records of the company at the time, though it is now ascertained by Mr. Brown, who seems a very intelligent gentleman; and I must say, the Glasgow accountants showed to very good purpose in this case: they showed that they were perfectly masters of their business in all its details. Mr. Brown drew his conclusion as to the actual condition of the company **[6]** from other information he possesses now, as well as from what he gathered from the state of the books at the time. But all the accountants concurred in this, that looking to the books, the statement in this report of 16th September 1847, was quite a correct statement—quite consistent with the books of the company. But then the Lord Advocate says the books were fraudulently made up. I do not find any evidence to that effect. The evil, if there was an evil,

consisted in not ascertaining from other sources the more proper value of these securities. I do not see any ground for holding that the books were fraudulently made up. The books were kept, as the accountants told you, on the ordinary principles, and it appears that according to the books as submitted to the directors, the report was the fair result of them. The objection now taken on the authority of the prices current, and such sources of information, is that the value of the securities should not have been held as sufficient to cover the debts. Well, then, under these circumstances, taking the books as their guide, the directors approve of this report, and submit it to the meeting, and they recommend a dividend of 8 per cent, which is a representation undoubtedly that the company is in a flourishing condition—8 per cent, and L.5000 over.

I have now spoken to you as to the circumstances in which that is said to have been a false statement. We are next to consider the circumstances in respect of which it is said to have been a fraudulent statement. It was a statement consistent with the books. But it is said that if other sources of information had been applied to, if the value of these securities had been better sifted, it would have been found that they did not cover some of these debts,—that by so sifting them it might have been so discovered. It does not follow necessarily that by not taking that course of sifting the value of these securities, the representation of the directors was a fraudulent representation. It may have been an incautious proceeding. It may have been that they were not so astute as they should have been, or might have been, but it does not follow that because they did not apply then to the same sources of information to which the accountants have applied now, that therefore their conduct was fraudulent. But if they were grossly negligent in their duty, if they grossly neglected those examinations which they ought to have made, and if they set forth to the company and to the assembled partners that they had made that thorough investigation which they had not made, then it was a false representation and it was a representation which it is very difficult to keep out of the category of legal fraud in reference to the partners, because it was leading the partners to believe that an examination had been made which had not been made, and thereby leading them to rely and act upon the report. But if it required a degree of investigation, or an appeal to sources which, in the ordinary or reasonable execution of their duty, they did not require to go to, or if even having gone to them, they honestly entertained a more favourable opinion of those securities, notwithstanding the momentary depression of them in the market, and honestly and reasonably thought that they would be perfectly adequate to cover the balances, then there was no fraud whatever in the representation. You are asked to find that, in the circumstances which here occurred, the directors made a fraudulent representation,—not only an erroneous representation, but that they were acting fraudulently in the matter (the directors being the company, for the company is bound by the directors) in giving in a report of that kind. You have heard all the circumstances brought out in the evidence, and you are to decide as to that matter.

Further, it is said that that fraudulent representation was what induced Messrs. Drew and Dick to make the purchase in question; that had it not been for that fraudulent representation in September 1847 they would not have made the purchase in October. We have the evidence of Mr. Guild that, on 16th September 1847, the price of National Exchange Company shares was L.3, 12s., and on 17th September, L.3, 10s.; and the question is, whether the representation made in September 1847, when the shares were selling at L.3, 12s., was the fraudulent representation which induced Messrs. Drew and Dick in October to purchase at L.2, 10s., or whether they were led to do so by other considerations of probable benefit by speculating in shares of that company? I am not talking now of the statement of Barlow at the time the purchase was made. That is a different matter. I am talking of the representation in the report. It might be that Mr. Drew took the [7] two together, and you will have to consider that view also. But, in the first place, are you satisfied that it was by a fraudulent representation, made in the report of September, that Mr. Drew was moved to make the purchase in October at L.2, 10s., or whatever the price was? He tells you he was led to do so by two things,—by the statement in the report, and by the communication made to him by Mr. Barlow. He received a copy of the report, as all the shareholders did, and therefore it was published. There is no doubt that Mr. Drew is entitled to found upon it, and he was entitled to rely upon it as a report of the directors.

In October Mr. Drew went to Barlow and consulted him, and asked him how it happened that the shares were down, and said that he was disposed to sell his own shares—Barlow, he says, then took up a copy of the report, and said, Why there is the report you have heard read, there is the 8 per cent dividend, there is a surplus of L.5000; there are rumours afloat, but they are groundless, as to the condition of the company, and so far from selling, I think it is a case for buying. Mr. Drew says it was these two things,—the report by the directors and the conversation with Barlow,—that induced him to make the purchase. Well, if the company are responsible for the statements of Barlow, and if Mr. Drew was induced to make the purchase from the combined effect of Barlow's statement and the report of September, and if these are both fraudulent, then of course this issue must be affirmed. He says he was induced to purchase in consequence of these two things. Here is Barlow's statement, according to Mr. Drew's evidence. He says:—"On 11th October 1847, I had a conversation with Barlow, and asked reason why shares were falling. He said there was no good reason, and that it was a groundless report that had been got up. He took up a printed copy of the report of 1847, and explained the items, and showed that company in a prosperous condition. A dividend of 8 per cent, and a balance of about L.5500, which, if divided, would have raised the dividend to 11 per cent." That is a mere arithmetical statement, and there is no fraud in it; it is a mere representation that they had divided 8 per cent, and had L.5000 over. "I told him that I would sell our shares, 1130, if not satisfied as to state of the company. He seemed alarmed at that, and tried to satisfy me as to state of company; and said that, so far from selling, I ought to purchase, and he would advance the money to enable me to do so, and I would not require to make any advance till I sold at a profit. I was satisfied with his statements, and the statements in the report. He offered to advance L.3000. I agreed to make additional purchases." Now, that is Mr. Drew's statement as to what took place. Mr. Barlow's statement is not quite confirmatory of Mr. Drew's on that subject, as I read it. The deposition of Mr. Barlow upon that matter, in his answer to the 18th and 20th interrogatories, is,—"Many persons consulted with me, as manager, about purchasing shares in the National Exchange Company stock, and about that company advancing the price of such purchases on their behalf. In particular, Mr. Peter Drew consulted me about that matter. To the best of my recollection, I suggested to Mr. Peter Drew that he should go into the market and buy, through whatever broker he thought fit, and the company would pay for them." And again,—"After the stock had begun to fall in the market, I was consulted by Mr. Drew, and by a great many other persons, about the cause of the depreciation of the company's stock in the market. I cannot say what answer I gave to the inquiries, or what reason I assigned for the depreciation. I endeavoured at all times to evade answering the questions, so as to observe my duty to the company, and at the same time to adhere to the truth. My position was exceedingly embarrassing. I am sure I never gave to any person any undue encouragement to purchase shares. I have endeavoured to evade purchasing with the funds of the company, pleading generally as my excuse that we were too poor to part with the money. I am satisfied that I never used any such expression to Mr. Drew, that there was no real ground for the depreciation of the stock, or that a mere groundless rumour or report had arisen about it. At the time the stock was very low, I have some recollection of a conversation with Mr. Drew, to the effect, that if any one chose to purchase a number of the company's shares, it would be a good speculation; but I did not do so at an earlier time. At that time I believed that the then price of the shares, and the wreck of the company, and the banking privileges I had secured for it, would render a purchase at that depression profitable." That appears to have reference to another purchase by Messrs. Drew and Dick about the end of the year, at 10s.— [8] certainly not misled into it by the report in any way, and which fell through by reason of the stoppage of the company. Then he says, in answer to another question,—"I think Mr. Drew asked me, if he and Mr. Dick purchased shares, the company would advance the money. I believe they were then solvent men. I am quite sure I did not encourage them to buy. Mr. Drew repeatedly called on me to ask me to lend money for the purchase of shares, which I put off as long as I could, as the company had not money to spare. Finally, believing Messrs. Drew and Dick to be solvent men, I consented to advance them money to purchase what shares they wanted. Mr. Drew seemed

anxious, and was continually trying to find out what was my opinion as to the depreciation of the shares, by the willingness of the company to make purchases. I cannot say what reply I made to his inquiries as to the cause of depreciation, further than this, that I did not offer any opinion whether he should purchase or not, and never gave any direct encouragement to do so. I cannot recollect the number of shares they purchased after any such conversation." Now, gentlemen, that statement is certainly not confirmatory of Mr. Drew's, but the opposite. Barlow says that he did not give any such assurance as to the condition of the company, did not state any such opinion, did not give any advice to purchase, did not hold out any inducement or encouragement to purchase. As to the statement, "I am sure I never gave to any person any undue encouragement to purchase shares. I have endeavoured to evade purchasing with the funds of the company, pleading generally as my excuse that we were too poor to part with the money;" and as to the Lord Advocate's observation upon evasive answers, I say nothing, because this is not stated to have occurred with Mr. Drew. But there is here a conflict between Mr. Drew and Mr. Barlow as to what passed at their interview. There is one witness on one side, and there is another on the other. Their statements are certainly anything but confirmatory of each other in regard to the matter; and if you cannot make out between them what is the true state of the matter, then you cannot hold that the alleged misrepresentations were made. In such a state of dubiety, you cannot hold that fraudulent misrepresentations were made. You must have evidence satisfactory to your own minds upon that point—that is, as to the conversation with Barlow. If you are satisfied that these representations which Mr. Drew has spoken to were made, and that they were fraudulently made, then you will have to consider what the effect of such statements by the manager would be. Now, in regard to the manager, the general propositions which I state to you are these, that the representations by the manager in the course of discharging his duty as manager, are representations by the company; and, further, that representations by him made by the direction or authority of the directors, in reference to the affairs of the company, are representations of the company. Whether he had directions or authority from the directors of the company, is a separate question. I am now stating what are those representations by the manager which would be held to be representations of the company. But, further, I have to state to you, on the other side, that representations by an individual director, not at the time acting in his official character, are not representations by the company, and that representations by the manager not in the course of the discharge of his duty as manager, and not made under the instructions or by the direction of the directors, are not representations of the company. As, for instance, a private opinion expressed by the manager to a friend who consults him as to the affairs of the company, in regard to purchases not from the company, is not a representation of the company. On the other hand, again, if in the course of doing that which the company authorised to be done, and entrusted to the manager to do—if, in the course of doing that, he follows out the matter by making statements in reference to the company, and so induces a party to come into the transaction with the company—statements which he has a general authority to make—general statements as to the condition of the company—or if he induces parties to go into transactions which necessarily imply the solvency of the company, being employed by the directors to make such transactions, that is then transacting for the directors and for the company, and the company are holding themselves out through him as in that condition which he represents them to be in. This brings the circumstances and facts of this case into a position which requires your careful attention. Mr. Barlow was not employed by the company to make sales of their stock in this case. He was not selling. Mr. Drew came to [9] consult him as to the condition of the company, and as to what was the reason that the stock had fallen. I do not know that Mr. Barlow was, in his capacity of manager of the company, entitled to give private advice on that matter. If Mr. Drew came to consult him as to whether he ought to buy or sell, I think the manager is not, for anything we see in this contract, or anything I know of the management of banks, entitled to make the company responsible for advice so privately given to a friend. I think it is not the province of the manager to give such advice. I think it would be wrong in him to do so. But so it is that there was no selling of stock here by the company; but then Mr. Barlow was in this transaction acting to a certain extent,

and in reference to a part of it, as the representative of the company, because it was part of the business of the company to make such loans, and it was part of the transaction that was going on, that a loan should be made, and therefore was, in making the loan, representing the company, and the company had an interest in having the loan made, if it could get good security for it. He was forwarding and promoting the business of the company. It was the business of the company to make loans upon the security of stock,—whether its own stock or other stock,—and he was promoting the interest of the company in encouraging parties to buy stock. The question then comes to be, whether the representations which he thus makes, or is said to have made, are to be held as made by the manager in furtherance of the interests of the company—as representing the company, so that his representations are to be regarded as the representations of the company fraudulently made? If the company was not in a flourishing condition—if he did not believe the company to be in a flourishing condition, and nevertheless intended to lend Mr. Drew money belonging to the company upon the security of the stock of a company which he believed not to be in a sound condition—that would be very strange conduct on the part of the manager, and not forwarding the interests of the company. Mr. Barlow is here exhibited in a complex character, and unless you can find evidence that he had authority from the directors to make representations which you are satisfied were false and fraudulent—unless you can find evidence that he had authority to do that—evidence derived from some source or other in the case, I do not see how you can bring the matter home to the company;—of course all this arises only upon the assumption that you are of opinion that Barlow did actually say those things which Mr. Drew alleges, but which Mr. Barlow denies. Now, that is all I have to say on the defenders' first issue.

We come next to another part of the case, which stands in a different position, and the issue in reference to which is of a different kind. The issue here is,—"Whether, in the purchase of the said shares, the pursuers acted as the brokers of the defenders?" &c. This has nothing to do with fraudulent representations. We are out of that category altogether in this part of the case. It is not alleged, and it is not necessary for the defender's case to prove fraudulent representations. But the defender says, I employed the brokers to buy stock for me, and I was induced to do so by these brokers making misrepresentations as to the affairs of the company whose stock I wanted to purchase. The broker who does that violates his duty to his employer. He is not entitled so to act. He is guilty of a violation of duty to his employer if he does so, and he would be responsible to his employer if he led him into transactions by such misrepresentations. Then the question here comes to be twofold; in the first place, were the company brokers in this transaction? and, secondly, did they in their capacity of brokers in this transaction, make misrepresentations as to the condition of the company? The report made to the directors was not a report with reference to this transaction of purchase of stock. We are now here in reference to the acts and conduct of the brokers in regard to a particular purchase in October. But Mr. Drew tells you that all that was in the report was reiterated to him in October, when he went to Mr. Barlow as the manager of that company of brokers, in reference to the purchase of stock through them, and that by the reiteration of those statements which were not true—those misrepresentations—Mr. Barlow, in violation of his duty as a broker—being then acting in the capacity of Mr. Drew's broker—that he, in violation of his duty as Mr. Drew's broker on that occasion, made those statements to him, and led him to make that purchase. The first question is, was the company then acting as Mr. Drew's broker? and on that we have had a good deal of contention [10] and controversy about the import of certain accounts which were exhibited to accountants, and which, I think, was a contention of words and of forms of book-keeping, more than anything else; because I think the real nature of this matter of brokerage is pretty evident from the evidence and from the accounts. It seems to have amounted to this at that date,—I mean in October;—what it was at the previous period I do not inquire; but at the date of October it was this, that in all transactions in which the purchase of stock was facilitated by this company by their advancing money to enable the parties to make the purchase, the broker who got his transaction carried through by reason of such facility, allowed to this company one-half the brokerage, and they pocketed it, and they called it throughout their accounts the profits of the brokerage part of their business. They have in their contract a power to

anxious, and was continually trying to find out what was my opinion as to the depreciation of the shares, by the willingness of the company to make purchases. I cannot say what reply I made to his inquiries as to the cause of depreciation, further than this, that I did not offer any opinion whether he should purchase or not, and never gave any direct encouragement to do so. I cannot recollect the number of shares they purchased after any such conversation." Now, gentlemen, that statement is certainly not confirmatory of Mr. Drew's, but the opposite. Barlow says that he did not give any such assurance as to the condition of the company, did not state any such opinion, did not give any advice to purchase, did not hold out any inducement or encouragement to purchase. As to the statement, "I am sure I never gave to any person any undue encouragement to purchase shares. I have endeavoured to evade purchasing with the funds of the company, pleading generally as my excuse that we were too poor to part with the money;" and as to the Lord Advocate's observation upon evasive answers, I say nothing, because this is not stated to have occurred with Mr. Drew. But there is here a conflict between Mr. Drew and Mr. Barlow as to what passed at their interview. There is one witness on one side, and there is another on the other. Their statements are certainly anything but confirmatory of each other in regard to the matter; and if you cannot make out between them what is the true state of the matter, then you cannot hold that the alleged misrepresentations were made. In such a state of dubiety, you cannot hold that fraudulent misrepresentations were made. You must have evidence satisfactory to your own minds upon that point—that is, as to the conversation with Barlow. If you are satisfied that these representations which Mr. Drew has spoken to were made, and that they were fraudulently made, then you will have to consider what the effect of such statements by the manager would be. Now, in regard to the manager, the general propositions which I state to you are these, that the representations by the manager in the course of discharging his duty as manager, are representations by the company; and, further, that representations by him made by the direction or authority of the directors, in reference to the affairs of the company, are representations of the company. Whether he had directions or authority from the directors of the company, is a separate question. I am now stating what are those representations by the manager which would be held to be representations of the company. But, further, I have to state to you, on the other side, that representations by an individual director, not at the time acting in his official character, are not representations by the company, and that representations by the manager not in the course of the discharge of his duty as manager, and not made under the instructions or by the direction of the directors, are not representations of the company. As, for instance, a private opinion expressed by the manager to a friend who consults him as to the affairs of the company, in regard to purchases not from the company, is not a representation of the company. On the other hand, again, if in the course of doing that which the company authorised to be done, and entrusted to the manager to do—if, in the course of doing that, he follows out the matter by making statements in reference to the company, and so induces a party to come into the transaction with the company—statements which he has a general authority to make—general statements as to the condition of the company—or if he induces parties to go into transactions which necessarily imply the solvency of the company, being employed by the directors to make such transactions, that is then transacting for the directors and for the company, and the company are holding themselves out through him as in that condition which he represents them to be in. This brings the circumstances and facts of this case into a position which requires your careful attention. Mr. Barlow was not employed by the company to make sales of their stock in this case. He was not selling. Mr. Drew came to **[9]** consult him as to the condition of the company, and as to what was the reason that the stock had fallen. I do not know that Mr. Barlow was, in his capacity of manager of the company, entitled to give private advice on that matter. If Mr. Drew came to consult him as to whether he ought to buy or sell, I think the manager is not, for anything we see in this contract, or anything I know of the management of banks, entitled to make the company responsible for advice so privately given to a friend. I think it is not the province of the manager to give such advice. I think it would be wrong in him to do so. But so it is that there was no selling of stock here by the company; but then Mr. Barlow was in this transaction acting to a certain extent,

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act as brokers and many other things, and perhaps they did so in some cases; but the question is whether in this transaction they stood in the position of brokers? I think that what I have described is the result of all the accounts we saw. Buchanan and Kerr pocketed L.2, 10s., and the National Exchange Company pocketed L.2, 10s.; and as to the contention in regard to the way in which the brokers' accounts were made up, the difference just depends upon this, whether you are to read them as the settlement of two accounts at once by the company, or whether you are to read them as a short-hand way of giving one-half to the National Exchange Company, and retaining the other half to themselves. The result, however, is the same either way. It is a benefit that the National Exchange Company were to get from that kind of transaction. They had profit from other transactions of a similar kind, on a similar understanding between them and the brokers. It was not an understanding between them and a particular broker acting for them, but it was the understanding on the Stock Exchange with all the brokers; and it seems, from the evidence which we have heard, that the arrangement was coveted by all parties. Now, in this particular transaction, who were the parties that stood to Mr. Drew in the relation of his brokers, bound to him by the duty of brokers, transacting for him as brokers, talking to him as brokers, and writing to him as brokers? Was it Buchanan and Kerr, or was it the National Exchange Company, or was it a company consisting of Buchanan and Kerr and the National Exchange Company—a joint adventure? Mr. Drew himself says upon this point, "Knowing that the company acted as brokers, I asked him (Barlow) who was in their employment? viz., who was their broker? (meaning that he (Drew) would go to that person.) He (Barlow) said it would be better for me to employ some person of my own; he said he would get one-half commission on the transaction, whoever he was." Now that just amounted to this: Select your own person, look for the man in whom you have most confidence; select a man for yourself; we are not going into the market; select your own broker. Mr. Barlow, when examined, says that the company did not act as brokers in the buying and selling of stocks; they got a commission, but he says they did not act as brokers. Now the argument presented to you, is not that Mr. Drew gave his order to the National Exchange Company—gave them authority as to the rate at which he was to purchase, or that he consulted them as brokers. If he did, they declined to give advice, because they said at once, consult your own brokers. It is not that he gave authority to them to make purchases for him, or restrained them in any way, or wrote to them, saying, I have changed my mind. Nothing of the kind. Buchanan and Kerr tell you that they allowed the National Exchange Company a share, which, in this case, was one-half of the commission, which in other circumstances might be different, but which, in the circumstances at that time in Glasgow, was one-half—that they allowed that to any company who made advances for the purchase of stock, and that they had no other connection with the National Exchange Company in any way. But I am asked to tell you that that puts the National Exchange Company in the capacity of brokers, and that there were due from them, to Mr. Drew, all the obligations that are due by a broker to his employer. I do not know any authority for that. A passage was read from Lord St. Leonards' opinion, in regard to these accounts, in which his Lordship states the account one way; he might equally have stated it the other way, and it would have produced the same result, which is, that there was one-half the brokerage got. But his Lordship does not say, upon the evidence now before us, that the National Ex-**[11]**-change Company were brokers in that transaction. He had not before him then either the evidence of Mr. Drew, or the evidence of Mr. Barlow. All that he had was a record containing certain statements and certain documents from which the actual case could not be well inferred. But what he says is this, "The brokers were employed by this company, who were themselves brokers and bankers. The brokers, therefore, in the common market, charged them one-half commission,—that is, they divided the commission with the bankers who employed them."[1] At that time the evidence had not been led. Lord St. Leonards, whose opinion is always entitled to the greatest respect, was going on the statement in the record, and the productions before him, and he assumed that the company had employed a particular broker for Mr. Drew. I see no evidence that they did so. On the contrary, it appears, from Mr. Drew's own

[1] M'Queen, vol. xi. p. 141.

evidence, that the company said, go and employ your own broker; and it appears, from Mr. Barlow's evidence, that the company in this transaction, and in similar transactions, did not go into the market or employ anybody as broker. Lord St. Leonards does not even say, that when a broker gives a proportion of his commission to a party who sends him custom, that party is himself to be regarded as the broker, or is liable to the person whom he recommends to the broker. He does not say that, but he deals with a case quite different from that, and still more different from the one now before us. I do not see any evidence that at the time, and in the matter in question, the company were acting with Mr. Drew, or that he was conversing and talking with them as his brokers. On the contrary, it was after the whole conversation was over, in regard to the value of the shares, that, as he says, knowing the company acted as brokers, he asked Barlow the question about a broker, and Barlow answered,—No; employ your own broker. I do not see that this is a case of the company acting as brokers, in the view of the evidence which presents itself to my mind, and I cannot draw any such legal inference from the facts which are here presented to us. If the company had a copartnership with any person, and he was merely the representative, in one part of Glasgow, of the company sitting in another part of Glasgow, and they were participating in the profits, that would be a different matter. The question, then, which is put in this issue, is that which I have read to you. There is there again the element of inducement which you have to consider, as to whether that was the motive cause for Mr. Drew making the purchase, even if you were satisfied upon the evidence otherwise.

Now, Gentlemen, the points that you have to decide are, in the first place, whether the company, in their report of September 1847, or through Barlow acting for them, made false and fraudulent representations as to the credit and solvency of the company, false representations and fraudulent representations, and did induce the defenders to purchase the shares of the National Exchange Company, or any part of them? I forgot to notice a piece of evidence in this case, taken from the action which had been brought formerly by the Exchange Company against its own directors, to compel them to account for their misconduct, and to get quit of which they paid a sum of money. It never came to a judicial termination, because, as I understand from the evidence which we have had, it was compromised, and therefore it is very difficult for us to know what would have been the result of that action, if it had gone to trial. But it is said that some statements were made by Mr. Gourlay in that action, imputing to the directors mismanagement. It is not a question of mismanagement that is before us just now. It is a question of false and fraudulent representation. I need not turn up the evidence, but I think I am not wrong in saying, that Mr. Gourlay, who, in that former action, was the leading party moving against the directors, stated to us, in evidence, that in all the investigations which he made at that time into these matters, he saw nothing indicating fraud on the part of the directors—"not the least," I think was what he said, in the strongest terms. He himself swears, and that is better than any statement made for him by his advisers in another cause—he himself, in evidence, tells you that he saw nothing fraudulent about it; and it is plain he does not believe that there was any such thing. In these circumstances I do not attach much importance to expressions collected out of the pleadings in another case. I attach more importance to the evidence of Mr. Gourlay here as a witness, than to what was said for him, when he acted hostile to the directors in a former [12] case. You have now to say, first, whether there was here false representations; and, second, whether these were fraudulent representations. If they were fraudulent, then thirdly, was it through the representations so made, that the defenders were induced to make the purchase in question? If you are satisfied that they were false, and that they were fraudulent, and that it was these things which induced the defenders to make the purchase, then your verdict must be for the defenders. If you are not satisfied on these three points, then your verdict must be against the defenders. On the second issue, if you find, on the evidence, that the pursuers did really act as brokers in that transaction, in making the purchase—if you find that in the evidence, of course they are responsible for the statements that they made in that capacity; and if, in violation of their duty as brokers, they made such statements, then the verdict must be for the defenders. If, on the other hand, it appears to you that they were not the brokers, but that certain other parties were the brokers, and not the pursuers, then any representations made by the pursuers would not be in the capacity of brokers, and, therefore, it would be impossible

to affirm that, in violation of their duty as brokers, they misrepresented. You will consider the case in reference to both these matters. If you are satisfied that the defenders have made out either of these two latter issues, then, upon the structure of this case, which is to be considered as a complex case, I think the verdict on the first issue, in regard to the part of it which puts the question of resting-owing, must be a verdict for the defenders also.

The Jury returned a verdict for the pursuers on all the issues.

No. 4. **XXIII. Dunlop 15.** 15 Nov. 1860. 1st Div.—Lord Neaves.

THOMAS DUNLOP DOUGLAS (ALLAN BOGLE'S Executor), Pursuer and Real Raiser.

JOHN BLAKE (ALLAN GEORGE BOGLE'S Trustee), Claimant.—*Lord-Adv. Moncreiff —Pattison.*

JAMES GRAHAM TURNER and Others (Mrs. JANET BOGLE, afterwards GRAHAM'S, Trustees), Claimants.—*Sol.-Gen. Maitland—Dundas.*

Prescription—Sexennial—Statute 12 *Geo. III., cap.* 72—*Writ—Construction.*—In security for a loan of L.1000 the borrower granted a promissory-note, and an assignation of all interest in his father's succession. In a question between his assignee and executor, *held* (*aff.* judgment of Lord Neaves), on a consideration of the whole deed, that the security did not apply to the promissory-note, but to the debt, and therefore that the sexennial prescription did not affect the right of the creditors.

In a multiplepoinding, a claim was lodged by the assignees of Allan George Bogle for L.1000, with interest from 1837. This claim was founded on the following assignation, dated 28th December 1837:—"Know all men by these presents, that I, Allan George Bogle, now banker in Florence, youngest son of the deceased Allan Bogle, Esquire, merchant in Glasgow, by Mrs. Janet Hunter, his wife, considering that I having lately commenced business as a banker in Florence, it became necessary for me to have the command of a sum of money for that purpose, amounting to L.1000 sterling, and which sum has been advanced and lent to me in equal proportions by Thomas Dunlop Douglas and James Bogle, Esquires, merchants in Glasgow, George Bogle, Esquire, of Calderbank, and James Hunter, Esquire, of Hafton, on condition of my granting the bill or promissory-note and assignation in security in their favour hereinafter mentioned, and of which sum of L.1000 I hereby acknowledge the receipt; and farther, considering that by a bill or promissory-note of this date, I have, in consideration of the foresaid advance of L.1000, promised, twelve months after date, to pay to the said Thomas Dunlop Douglas, James Bogle, George Bogle, and James Hunter, the foresaid sum of L.1000; and for security of the payment of said promissory-note when due, interest and expenses, I hereby assign, convey, and make over to the said Thomas Dunlop Douglas, James Bogle, George Bogle, and James Hunter, and the survivors or survivor of them, in trust, for themselves and the executors of the predeceaser or predeceasers, and to the onerous assignees of the said assignees or their foresaids,—in the first place, all right and interest belonging or competent to me in the succession to the said deceased Allan Bogle, my father, in whatever manner the same may be constituted, whether under and by virtue of the contract of marriage between the said Allan Bogle and Janet Hunter, my father and **[16]** mother, or under and by virtue of the last will and testament of the said Allan Bogle, my father, or, in general, as one of the executors or legatees of my said father: In the second place, all right and interest belonging or competent to me in the sum of L.3000, bequeathed by the deceased Rosina Morrison or Hunter, my grandmother, widow of James Hunter, Esquire, merchant in Greenock, to the said Janet Hunter, my mother, in liferent, and her children equally amongst them in fee, with full power to my said assignees and their foresaids, to demand, uplift, and receive the whole sums of money hereby assigned, and apply the same in payment of the said sum of L.1000, interest and consequents, and to grant receipts and discharges for the said sums, which will be as

valid to the receiver or receivers as if granted by myself: But declaring always, as it is hereby specially provided and declared, that the present assignation is granted in security only to my said assignees for their relief from the payment of the said bill or promissory-note for L.1000, interest thereon, and expenses to be incurred in the premises; and that when they or their foresaids are fully relieved thereof by payment or otherwise, they shall be bound and obliged, as by acceptance hereof they bind and oblige themselves and their foresaids, at my expense, to discharge me of said sum of L.1000, interest and expenses; and also to retrocess or repone me or my foresaids in the full right of the whole premises hereby assigned. And if, when the said bill becomes due, I shall not have the means, or it may be inconvenient for me to retire the same, I oblige myself, in such event, to renew the same for such a period as shall be required by my said assignees; which assignation," &c.

The promissory-note referred to was granted at Florence of even date with the security. There were two renewals in favour of the same parties, dated "Florence, 24th January" 1839 and 1840 respectively.

There was no question that the property assigned embraced A. G. Bogle's right in the fund *in medio;* but a claim was also lodged by John Blake as A. G. Bogle's executor, and he pleaded, *inter alia;*—(8.) The promissory-note, in security of which the assignation founded on by the claimant Thomas Dunlop Douglas for himself and others bears to have been granted, having been discharged, and the subsequent promissory-notes granted in lieu thereof being extinguished by prescription, and there being no evidence of the subsistence of the debt therein mentioned, his claim as a creditor of Allan George Bogle cannot be sustained.

On 14th June 1859 the Lord Ordinary pronounced the following interlocutor:—"Finds, that on 28th December 1837, the said Allan George Bogle received in loan from the said claimant and other parties a sum of L.1000, for which he granted the promissory-note, No. 24 of process, and for which he also granted the assignation, No. 22 of process, assigning to them in security all right and interest belonging or competent to him in the succession of the deceased Allan Bogle, his father: Finds that the said assignation was, on 19th January 1838, duly intimated to the executors or executor of the said deceased Allan Bogle, by whom the fund or claim assigned was held or was due: Finds that the said promissory-note was afterwards renewed successively by the notes Nos. 25 and 26 of process, and that in or about the year 1843, the said Allan George Bogle died: Finds that the said assignation in security subsisted for the loan or advance for which the said several notes were granted: And finds that, in the circumstances of the case, the lapse of six years from the time when the last or any other of said notes fell due, does not afford a ground for pleading prescription against the claim now made by the said Thomas Dunlop Douglas, and others, to be ranked upon the fund *in medio*, so far as regards the said Allan George Bogle's share therein as assigned by the said assignation for payment of the said debt of L.1000 and interest, and to that extent and effect repels the [17] 8th plea in law for the claimant, John Blake; but, *quoad ultra*, appoints the case to be enrolled, reserving the question of expenses."[1]

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[1] "NOTE.—The main question here raised, and now decided, relates to the effect of the statute which established the sexennial prescription or limitation of bills or notes.

"In this case it appears that in the year 1837, Allan George Bogle, then a banker in Florence, borrowed a sum of L.1000 from Thomas Dunlop Douglas, and others, for which he granted his promissory-note, and also an assignation in security of all right and interest belonging or competent to him in the succession of Allan Bogle, his father, whether by marriage-contract, will, or otherwise.

"The assignation was duly intimated in 1838, to the surviving executor of Mr. Allan Bogle; but in consequence of the rights of Mr. Bogle's widow in the principal part of the funds constituting the succession, nothing became available from that source until January 1854, when Mrs. Bogle died.

"The original promissory-note for L.1000 was twice renewed by Allan George Bogle, the last renewal being in 1840; and that gentleman died in the year 1843.

"By the Act of Parliament 12 Geo. III., cap. 72, afterwards made perpetual, it is enacted, 'That no bill of exchange, or inland bill, or promissory-note, executed after the said 15th day of May 1772, shall be in force, or effectual to produce any diligence

[18] John Blake (Allan George Bogle's trustee) reclaimed, and prayed the Court

or action, in that part of Great Britain called Scotland, unless such diligence shall be raised and executed, or action commenced thereon, within the space of six years from and after the terms at which the sums in the said bills or notes become eligible.'

"The terms of this enactment go clearly to exclude any diligence or action which may be raised upon any bill or note after the lapse of six years from the term of payment; and if, in the present case, it should be considered that the claimant, Mr. Douglas, is using diligence or raising action upon any of the notes held by him, the statute would apply, and it would be necessary for him to prove his debt by writ or oath in the statutory manner. But the Lord Ordinary considers that these proceedings are not of the kind struck at by the statute, and consequently that the statute does not apply.

"It seems clear, upon the principles of the case of Don *v.* Lipman, 2 Sh. & M'L. 682, that the enactment of the statute goes only to a limitation of the remedy upon bills or notes, and does not affect the right of parties in them. This, it is needless to observe, is an important distinction. If it had been declared, that after six years such bills or notes were to be null and void, this would have been a different matter, and it would seem that in that case the claim now made, would be untenable in the same way as if the bill or note had been paid. But the statute does not annul the debt, it only excludes diligence or action upon the document; and this leaves room for the question which here arises as to the true nature of the claim now made, which does not proceed directly upon the bill, but upon the assignation in security which was granted for it.

"The assignation here granted contains an explicit acknowledgment of the debt. It assigns a certain fund for its payment, and the assignation thus made was intimated to the holder of the fund. In this way, it would seem, the assignation or conveyance of the fund was completed. The assignee was put in possession, and became the owner of the fund, or the creditor of the holder of it, in place of the cedent. The assignee thus became *in titulo* to uplift the fund, and no prescription has run applicable to his right, when viewed as a conveyance. In the claim which the assignee now makes, he is not truly using diligence or raising action on the bill. He is seeking to obtain actual recovery of a fund to which he has a vested right under his assignation. The assignation empowers him 'to demand, uplift, and receive the whole sums of money hereby assigned, and apply the same in payment of the said sum of L.1000, interest and consequents.' He is now seeking, therefore, to recover under the assignation which is not prescribed; and it is only after he has recovered the fund that he will come to apply or retain it in payment of his debt. This, it is thought, is not an example of diligence or action raised upon a bill, but of possession of a fund sought to be obtained under a conveyance, which will afterwards become available for payment of the debt by retention, without the necessity of any action or diligence upon the bill. A proof that this is not a question of action or diligence upon the bill may be found in the fact, that if ordinary action had been resorted to, it would have been directed against Mr. Allan Bogle's executors, without its being necessary to call or ask any decree against Allan George Bogle, the cedent.

"The question how far a document of debt, which, from the lapse of time, could not be directly sued on, can be indirectly recovered by retention or by the operation of a security, does not seem to have been the subject of much discussion in the courts of law of this country. But the view above taken seems to the Lord Ordinary a natural deduction from the doctrine that the short prescriptions generally, and the sexennial prescriptions of bill in particular, are mere limitations affecting the remedy and not the right. It seems to follow from that doctrine, that where the creditor does not require to resort to the remedy struck at by the limitation, his right will be as good as if no limitation had run.

"It is true that compensation is not allowed upon a prescribed debt; but the reason of that rule is obvious. Compensation does not operate *ipso jure*, but requires to be pleaded; and the act of pleading it is nothing else than a short-hand way of making a claim by a counter-action. A prescribed debt or document, therefore, can no more be a ground of pleading compensation than it can be a ground for a counter-action.

"Wherever, on the other hand, a case resolves into a statement of accounts, there it will not be competent to state prescription against individual items used as articles

to sustain his eighth plea in law, and to repel the claim for Thomas [19] Dunlop Douglas for himself and others, as assignees of the late Allan George Bogle.[1]

The respondents were not called on.

LORD PRESIDENT.—I go along with the views of the Lord Ordinary. This assignation is not to be read in the limited way contended for. There is more in it than the mere security for the bill and promissory-note. In the first place, it contains an acknowledgment of a loan, and, in consideration of that loan, two things are to be done. This assignation is to be granted, and this promissory-note is to be granted; and

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of discharge in the accounting—Hall *v.* Arnott, 16 Shaw, 263; see also Boyes' Trustees *v.* Gray, 7 Shaw, 815. Upon the principles of these decisions, a party who has got possession of funds, and is required to account for them, may discharge himself, by founding on debts now prescribed, to the payment of which the funds in his hands were applicable.

"There can be no doubt, therefore, that if the claimant in this case had got possession of Allan George Bogle's share of his father's estate before the bill was prescribed, and were now called upon to account for his intromissions, he could do so by taking credit for the sum in the bill. There seems, however, no substantial difference between that case and the present. The assignee did not get manual possession of this fund, but he completed his right to it, and terminated the right of the cedent; and the accident that payment was not sooner made, seems not materially to alter the case. Indeed, from the position and rights of the parties, the assignation was necessarily subject to this quality, that payment was likely to be postponed for some time during Mr. Bogle's life. And the fact that in such circumstances payment could not be got, ought not to operate against the assignee.

"It has been held that the existence of a writer's hypothec does not stop or elide prescription. Whether this view is consistent with correct legal principle has been doubted, and reference has been made to the law of England as being different—Bell's Prin. sec. 630. But further, a writer's hypothec or other general lien may, and commonly does, arise incidentally, without any reference to a special debt, and without implying that a debt is due. The debt, therefore, in such a case, requires to be constituted, and as the statute of limitations excludes any action, there cannot, after the six years, be any constitution of the debt, and consequently there is nothing to which the hypothec or lien can attach.

"It would be quite different if there was a special impignoration for a definite and acknowledged debt which required no constitution, and it is thought, that, in that case, prescription would not apply, if the creditor was willing to confine himself to his security as his only source of payment. This seems to have been the view taken by Lord Braxfield in the case of M'Adam *v.* Fogo (Hailes, 875), which found that a writer's possession of his client's papers does not interrupt the triennial prescription of his account. Lord Braxfield said, 'when a pledge is once constituted, the negative prescription will not run, because then there is possession; but as to the case of a writer having retention, that does not necessarily suppose that anything is due to him. It is not an impignoration on a ground of debt; the account must be constituted.'

"The distinction here indicated, seems to support the claim in the present case, where this fund was specially impignorated for the debt in question, of which the assignation contains an explicit acknowledgment. The creditor, by not raising an action or diligence within the six years, may have lost some ulterior remedies, but there seems no ground for saying that he has lost his hold of this fund which was thus made over to him for his payment.

"The Lord Ordinary has no doubt that the renewal of the bills does not supersede the security, if it be otherwise available.

"No judgment, however, has been pronounced sustaining the claim, as Mr. Blake does not admit that the debt is due, and there may be room for inquiry on that subject. Looking, however, to the terms of the assignation, and to the creditor's possession of the bills, it is thought that the *onus* of proving payment or discharge will lie on Mr. Blake, and that the claimant's case is complete, if not disproved."

[1] Allan *v.* Brander, 8th May 1839, *ante*, vol. i. p. 678; M'Innes *v.* Brander, 24th January 1844, *ante*, vol. vi. p. 512.

I cannot arrive at the conclusion that, if the promissory-note was prescribed, but yet that the debt had not been paid, and it was in the power of the party to establish the debt by the writ or oath of the debtor, that in that case he was to be obliged to discharge the debt, in virtue of that clause in the assignation; that when the events arise which that assignation contemplated, that then he was bound to discharge the debt. The state of matters which the assignation contemplated was the extinction of the debt. That is the true reading of the deed.

LORD IVORY.—It is impossible to read this assignation, and the other relative documents, without being satisfied that the intention of the parties substantially was, that the assignation was to be an acknowledgment of and security for the debt. It was not merely to be a security for the promissory-note. If it had, it would not have subsisted to the effect of being a security for the renewals of the bill, which, however, admittedly it is. The admission, therefore, that the assignation would have subsisted till the present day as a security, if there had been renewals of the bill, shows that it was for the debt, and not for the mere document, that it subsisted. That is the fair and sound reading of the assignation in point of law. It is also the common-sense reading of it. Suppose the bill had been on a wrong stamp, what then? Would the holder of the assignation have lost his security? for if the security applied to the individual document, then a new bill on a correct stamp would have been a different document from that to which the security was originally applicable; and, consistently with that view, the holder of the assignation would not be in a position to demand a new bill on a correct stamp. If a new bill were found necessary, a new assignation which should apply to it would also be necessary. In short, taking the grounds stated by your Lordship, and looking to the whole circumstances of the case, I am quite satisfied that the Lord Ordinary has come to a right conclusion.

LORD CURRIEHILL.—I entirely concur in the remarks of your Lordship and of Lord Ivory. The fair construction of this assignation is, that it is a security for the debt—the loan that is thereby acknowledged to have been made. Without doing violence to the intention of the parties, there is no room for a distinction between the debt and the promissory-note. The only additional remark which I have to make is with reference to that alleged distinction, viz., that the condition of the loan was, that there should always be an existing promissory-note for the debt, and that the assignation was to cover the debt in such note. In the first place, a promissory-note was to be granted for the debt. That condition was bind- **[20]** -ing on the granter of this assignation. It is admitted that, if there had been any fatal flaw in the promissory-note that was originally granted, the debtor might have been compelled to grant a valid promissory-note. And, in the second place, there is the farther obligation to renew that promissory-note. That obligation is a continuing one. The obligation to grant renewals does not fall under the sexennial prescription. It is valid and effectual at the moment; and, were it necessary, I do not see how the debtor could resist a call upon him to grant such a renewal. And as it is incumbent on the debtor to grant such a security now, his position is no better than it would have been if he had performed that obligation on these special clauses of the deed, as well as in the more general and broad ground stated by your Lordships. I agree in thinking that the interlocutor of the Lord Ordinary should be adhered to.

LORD DEAS.—I agree that the interlocutor repelling the eighth plea ought to be adhered to. The leading ground on which the Lord Ordinary arrives at that conclusion is, that the statute of 12th George III. only affects the remedy, and does not annul the bill, or the rights of parties connected with the bill. If it were necessary to go into that question, it might require very great attention and consideration. I think it is not in the least necessary to go into it; and whatever opinion I might have upon it, on full argument, I give no opinion upon it here, nor do I understand any of your Lordships to proceed upon it, either one way or other. I go simply upon this, that the assignation itself, apart from the bill altogether, is sufficient evidence of the loan, requiring to be met by some evidence of payment or extinction on the other side. There is here no allegation of payment, and no evidence of extinction.

It cannot be doubted that an assignation which acknowledges the advance of a sum of money in loan, and then proceeds to convey a certain subject in security of that loan, is sufficient evidence of a debt, although there may not be, in the body of the assignation, any express obligation of repayment. I do not think that can be doubted.

It follows that, if nothing had been said, in this assignation, about the bill, the assignation would clearly have been, in the first instance, sufficient evidence of the debt, subject to the long prescription of forty years.

That only leaves the question, whether what is said about the bill in this assignation alters the state of the question we are now dealing with? The argument to that effect turns entirely upon whether the assignation is to be read as a security for the bill, or a security for the debt contained in the bill?

I think, with your Lordships, that the fair reading of the assignation is, that it is a security for the debt, and not a security for a particular document of debt. It sets out by acknowledging the loan. It states that it had become necessary for the granter of the assignation to have the command of a sum of money, amounting to one thousand pounds sterling—"which sum has been advanced and lent to me" by Thomas Dunlop Douglas, and others named, "on condition of my granting the bill or promissory-note and assignation in security in their favour hereinafter mentioned; and of which sum of one thousand pounds I hereby acknowledge the receipt."

When you stop here, can it be doubted that there is a sufficient acknowledgment of debt—a sufficient document to constitute evidence of a debt, although the bill had never been granted at all? There is first the acknowledgment of the advance, and then an obligation to grant a bill for that advance. The bill itself was really to be a security for the loan; but the loan existed and was acknowledged independent of the bill. If the assignation had stopped here, there could have been no room for doubt at all that there was a sufficient constitution of the debt.

Now, I cannot read the rest of the assignation as altering what would have been the state of matters had it stopped here; for although, after stating that a bill had been granted, it sometimes speaks of the assignation as granted in security of the bill, it, at other times, speaks of it as granted in security of the debt—shewing plainly that the two modes of expression were used as synonymous, and that the true meaning was, that the assignation was granted in security of the debt represented by the bill. For instance, at one place the words occur, "and for security of the payment of said promissory-note when due." But then come the words, "with full power to my said assignees," &c., "to receive the whole sums of money hereby assigned, and apply the same in payment of the said sum of one thousand [21] pounds, interest and consequents." Then we come to this passage, but declaring, &c., "that the present assignation is granted in security only, to my said assignees for their relief from the payment of the said bill or promissory-note for L.1000, interest thereon, and expenses to be incurred in the premises." It would be difficult to read "expenses" here as limited to expenses on the bill; and the deed immediately goes on—"and that when they or their foresaids are fully relieved thereof by payment or otherwise, they shall be bound and obliged, &c., to discharge me of said sum of one thousand pounds, interest, and expenses; and also to retrocess and repone me or my foresaids in the full right of the whole premises hereby assigned." Payment of the L.1000, interest, and expenses, is here made the condition of retrocession. Then comes an obligation to renew the bill, if not retired, "for such a period as shall be required by my said assignees." In short, it is quite plain, that although the phraseology varies, it is the debt and not the bill for which the security is truly granted. This becomes clearer, if possible, when it is admitted, as it has been, that the security extends to renewals of the bill; for this necessarily imports a departure from the strict reading of the deed, which would confine the security to a security for the bill mentioned, and for nothing else. Suppose a personal bond had been substituted for the bill, or that no bill had ever been granted at all, or that the bill actually granted had been on a wrong stamp, is it possible to say that the security would not have been good as for the debt? Suppose, again, that the bill had become prescribed, but that the debt was proved by the oath of the debtor, would the security not have been good for the debt so proved? All this goes to shew that the security was really not for that particular bill, but for the debt which is acknowledged in the assignation. Therefore I agree that, upon the face of the assignation itself, there is sufficient to sustain the interlocutor; and, consequently, it is unnecessary to go into the more subtle question as to the nullity of the bill, which does not arise here, and which it is important to keep in view that we do not decide.

The Court pronounced the following interlocutor:—"Adhere to the interlocutor of the Lord Ordinary reclaimed against, and refuse the desire of the said reclaiming note: Find the said reclaimers liable to Thomas Dunlop Douglas, for himself and others, in expenses incurred by him since the date of the Lord Ordinary's interlocutor reclaimed against; allow an account thereof to be given in; and remit to the Auditor of Court to tax the same, and to report: Appoint the Auditor's report to be made to the Lord Ordinary, and remit to the Lord Ordinary to decern for the taxed amount."

No. 5. **XXIII. Dunlop 21.** 16 Nov. 1860. 2nd Div.—Lord Ardmillan.

JAMES EDMOND (DINGWALL'S Trustee), Pursuer.—*Patton—D. M. Smith.*

JOHN BLAIKIE and ALEXANDER ANDERSON (DINGWALL'S Trustees), Defenders.—*Young—Mackenzie.*

Trust—Administration—Powers and Liabilities of Trustees.—Trustees infeft under a private trust for the management of an estate having been superseded,—*Held* (*aff.* judgment of Lord Ordinary), 1. That where the cost of drainage operations, undertaken with consent of the truster, exceeded the amount contemplated, the trustees were entitled, in accounting, to credit for the additional expenditure. 2. That it was not beyond the discretion of the trustees to discharge arrears of rent, such discharge being one of the conditions on which the tenant accepted a new lease, which was not challenged. 3. That the trustees were not bound to denude until their acts and intromissions were approved of, or to accept a discharge under reservation of their right to credit for any part of the expenditure.

Alexander Dingwall of Rannieston having become embarrassed, granted a trust-disposition in 1847, whereby he conveyed to John Blaikie and Alexander Anderson, advocates in Aberdeen, his whole estate, heritable and moveable, with full powers for management, particularly to let the lands to tenants, to borrow money, to "compound, transact, and agree anent all [22] doubtful claims and demands, either at my instance against others, or at the instance of third parties" against the truster; to refer such claims to arbitration, and to subscribe and deliver releases, acquittances, assignations, and other deeds, &c., for the purposes, 1*st*, of paying the expenses of executing the trust, and a reasonable gratification to the trustees for their trouble; 2*d*, for division of the free proceeds of the estate among the truster's creditors; and 3*d*, for payment of any residue to the truster, or his heirs or assignees.

On 22d October 1855 Mr. Dingwall executed another trust-disposition for the same purposes in favour of James Edmond, advocate in Aberdeen, who raised this action against Blaikie and Anderson, concluding for declarator, that the conveyance in their favour was in trust only, and had been revoked by the trust-deed granted to the pursuer; that they should be decerned to denude of the trust-estate, and account to the pursuer for their intromissions therewith. The pursuer averred, that the accounts given up by the defenders shewed a balance as due to them amounting to L.104, 11s. 9d., of which they claimed payment before denuding; and he objected to their accounts on the following grounds:—

(1.) That having authorised the defenders, by an agreement entered into subsequently to the execution of the trust-deed in their favour, to borrow from Government, and expend on one of the farms which formed part of the trust-estate, a sum of L.1000, the defenders charged, and took credit for having expended in such drainage, the sum of L.1109, 4s., being an excess of L.109, 4s.; that this surplus expenditure was not authorised by the agreement; and that the trust-deed contained no power or authority to make the same.

(2.) A deduction of the sum of L.100 was allowed to Watt, tenant of the farm of Mains of Rannieston, from arrears of rent owing by him, on granting a renewal of his lease in 1854. It was stated that the new lease to Watt was granted after the pursuer had been infeft as trustee, and without, by advertisement or otherwise, taking

means to obtain the full value of the farm. Other objections were stated, but none of them were insisted in, in the Inner-House. It was stated—"(Cond. 7.) The defenders declined to correct the errors pointed out in their accounts, or to refer the same to the determination of an arbiter, or to hold these objections as reserved, taking their discharge subject to the reservation. The pursuer offered payment of the balance claimed by them, subject to the reservation of objections to the accounts, and consequent repayment. The defenders have also retained possession of the trust-property, and continued to intromit therewith, and they still retain it, and refuse to denude, although, as above stated, they are actually debtors to the trust. They will not even permit the pursuer to pay the burdens affecting the property, in so far as they have influence to get the creditors to refuse to receive payment."

The defenders' answer to the statement above quoted was in these terms:—"Admitted that the defenders claimed payment of the balance due to them in 1856, and before this action was raised, and that they also claimed to be validly and effectually discharged of the trust, and that the pursuer having challenged their acts, and refused to pay this balance, and to grant a valid discharge of the defenders, they continued their possession of the trust-estate. Admitted that they still continue possession of the same, because the pursuer still challenges their acts, and refuses to grant them a discharge. Admitted that they refused to refer the said claim to arbitration. *Quoad ultra* denied, and reference made to the defenders' statement."

The defenders besides averred (Cond. 4) that the trust-deed in their favour contained a declaration that they "should be bound to hold count and reckoning with him and his foresaids for his intromissions, but that the account of their intromissions to be made up by them from time to time, when **[23]** signed by them, should be held finally and conclusively to fix and ascertain the balance between the parties, and should not be open to any exception or objection whatever at the instance of him or his foresaids." With regard to the charges objected to by the pursuer, they averred that in January 1854, with the consent of the truster, they had borrowed from the Drainage Commissioners the sum of L.1250, to be expended on the drainage of two farms on the estate—L.1000 being to be expended on Watt's farm of Mains of Rannieston, and L.250 on the lands of Mill of Rannieston, held by another tenant. Watt was owing certain arrears of rent; and on condition of being discharged of the arrears to the amount of L.100, he got a new lease, by which he undertook to pay 6½ per cent on the sum expended on drainage—an arrangement which the trustees considered favourable for the truster. The cost of the drainage executed on Mains of Rannieston was found to exceed by L.109, 0s. 4d., the sum advanced by the Drainage Commissioners. This balance had been paid by the defenders; and on that sum also Watt had agreed to pay interest at the rate of 6½ per cent during the currency of his lease. The expenditure was for an improvement, not only of great benefit to the estate, but was an expenditure the truster was entitled to charge against succeeding heirs of entail.

On 5th July 1859 the Lord Ordinary pronounced this interlocutor:—"Finds, 1st, That the clause in the trust-deed of Mr. Dingwall in favour of the defenders, dated 25th March 1847, quoted in the fourth article of the defenders' statement of facts, does not afford protection to the defenders against the pursuer's demand for accounting: Finds, 2d, That the defenders, as trustees, are entitled to take credit in accounting for the sum of L.109, expended in drainage of the estate, beyond the sum obtained for that purpose from Government, with concurrence of Mr. Dingwall: Finds, 3d, That the defenders, as trustees, are also entitled to take credit in accounting for the sum of L.100, allowed by them as an abatement of rent to a tenant, not disputed to have been in arrear: Finds, 4th, That no other objections to the accounts of the defenders, as trustees, have been insisted in, and, on the other hand, it is not averred by the defenders that they are now in advance for the trust-estate: Finds, 5th, That, under these circumstances, there are now no grounds for resisting the conclusions for denuding of the trust, the defenders being discharged of their intromissions: Therefore, decerns against the defenders, conform to the conclusion for denuding in the libel, and appoints a draft or drafts of the necessary deed or deeds for denuding and conveyance, with the relative discharge and exoneration, to be lodged in process, that the same may be adjusted and executed at the sight of Mr. John Kennedy, junior,

W.S.; and remits to Mr. Kennedy, accordingly, to see the same adjusted and executed: Finds no expenses due to either party."[1]

[24] The pursuer reclaimed, and prayed the Court to recal the second and third findings of the Lord Ordinary, and the finding as to expenses.

The defenders reclaimed, and craved that they should be found entitled to expenses.

The pursuer argued in support of his reclaiming note;—The truster, as an heir of entail, had merely a liferent interest in the estate, and, under the trust-deed, the defenders were not entitled to borrow or expend any sums on the estate, except such as could be made a burden on succeeding heirs. The agreement with the truster, under which the defenders were authorised to obtain money for the drainage, expressly limited, the amount to be expended in so far as regarded the farm of Rannieston, to L.1000, and the defenders exceeded their mandate in allowing any further sum to be expended, which would fall to be paid by the truster, without any relief against the estate: The defenders were not entitled so to exceed their powers, and to subject him, against his will and authority, under any such liability. With regard to the abatement of rent to the tenant, it was argued;—The rent was a liquidated liability on the part of the tenant, which the defenders could and should have recovered by the exercise of their right of hypothec, and was not a doubtful claim of such a nature as the defenders were authorised under the trust-deed to compromise; their making such abatement involved a sacrifice of the interests of the truster for the benefit of the future heirs of entail, and was not an ordinary or justifiable act of management.

LORD JUSTICE-CLERK.—The interlocutor of the Lord Ordinary, so far as brought under review, disposes of three points. It disposes, first, of the question as to the L.100 taken credit for by the trustees, in their accounting, as an abatement granted by them to the tenant Watt; secondly, of the question as to the L.109, which is said to have been expended in draining the estate, in excess of the sum borrowed from the Drainage Commissioners; and thirdly, it disposes of the question of expenses.

As to the first point, I never had any difficulty at all. These trustees were infeft and in possession of the estate under the trust-deed when the former lease to Watt expired at Martinmas 1854, and by the powers of the trust-deed they were entitled to grant new leases, and to exercise their discretion as to the terms of them. They had also power under the trust-deed to compound and transact all manner of claims and debts. In exercise of these powers, they, in June 1854, enter into an arrangement with Watt in anticipation of the expiry of the lease at Martinmas 1854. Some insinuations have been made as to the inexpediency of this arrangement. It is said the trustees should have put the farm into the market, and so raised a competition. That might or might not have been expedient. It sometimes is expedient to do so, and sometimes is not; and these trustees had a large discretion in that as in every other matter of management; and in absence of any charge of abuse of power, I am bound to hold that they exercised their discretion well in the way in which they leased these lands.

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[1] NOTE.—"The defenders did not, at the bar, plead that their liability to account was discharged or relieved by the terms of the clause in the trust-deed above mentioned, and the objections of the pursuer were limited to those now disposed of. As, however, the clause was specially set forth on the record, a finding in regard to it has been pronounced.

"The trust partook largely of a factorial character. The deed conferred extensive powers and wide discretion on the defenders, as trustees. It is not alleged that they acted otherwise than in good faith, or that, in the expenditure of the particular sums complained of, there was recklessness or disregard of duty as trustees. In these circumstances, and no proof or inquiry in regard to the expenditure having been craved by the pursuer, the Lord Ordinary has repelled the objections, which are thus left on an averment of want of power.

"The procedure for denuding and transference of the trust, with relative discharge of the defenders, as the denuding trustees, has been placed in the hands of a neutral man of business, at whose sight the matter will, it is hoped, be satisfactorily adjusted."

As to the nature of the bargain they made, it appears that the land was in need of drainage, and that the trustees made arrangements to obtain money from the Inclosure Commissioners; and Watt undertook, that, in addition to his former rent, he should pay 6½ per cent on L.1000 to be expended in draining the lands—that was, an addition to his former rent of L.65 a year. And, as the money was to be expended not for the benefit of the tenant only, but for the permanent benefit of the estate, that arrangement was so far a beneficial management of the estate.

Then they agreed that the tenant was to be forgiven L.100 of arrears. That was part of the consideration for which the tenant agreed to pay the L.65 a-year. I think that to grant that abatement was perfectly within the power of the trustees, and we have nothing but a question of power before us. The Lord Ordinary has disposed of the question as a question of power, and so viewing it, I cannot see that these trustees had not power to grant this abatement in consideration of the additional rent.

As to the L.109, that seemed at first sight attended with more difficulty. The drainage operations were going on throughout the years 1854 and 1855; and it is [25] plain from the drainage accounts, that the drainage had been going on on a concerted plan; and it could not indeed be otherwise, because otherwise there would be no chance of obtaining the approval of the Government inspector. He would never approve of lending money for the drainage of one field one year, and of another another year, and so on; and, therefore, we may safely assume that the plan carried out was the plan concerted and intended when the operations began.

Down to the time when the new lease was executed the L.1000 had not been expended; that is perfectly plain, and it is a material fact in this case. On the 20th December 1855, as appears from the drainage accounts, there was still a balance of the L.1000 to be spent on Watt's lands in drainage. But that balance, it turns out, is insufficient to finish the plan of drainage. The question is, whether the trustees, who found, at the conclusion of these operations, that the balance of the money borrowed was insufficient, were not, as they were unquestionably bound to pay the full sum expended, justified in taking credit for that expenditure in their trust-accounts?

The party making these operations was the proprietor of the estate as represented by his trustees. They were carried on under the superintendence of the tenant, but the party making them for his own benefit was the proprietor. He takes L.1000 of Government money, and then embarks in a scheme of drainage; and it turns out, when the operations are completed, that the money expended is in excess of the money borrowed. But is it not incidental to the kind of undertaking in which he embarked, to be exposed to such accidents? A man who borrows L.1000 for drainage and finds that he has expended L.109 more, has no great ground for astonishment or complaint; and therefore, as in a question with the truster and his trustees, I cannot think, on the one hand, that his position is one of hardship, or on the other, that the trustees have been guilty of such excess of power—for that is the question—as to make them personally liable. Such an excess of expenditure might be incurred, in spite of the utmost care by the trustees, in the management of operations of this kind. I am therefore for adhering to the Lord Ordinary's interlocutor as regards the L.109.

As to the reclaiming note for the defenders, I confess I wish the Lord Ordinary had explained the grounds on which he finds no expenses due. So far as I can understand, there have been only two litigated points—those which we have now disposed of. Other questions are raised in the record, but they have not been insisted in. These proceedings, then, have been instituted to try whether the trustees are entitled to credit for the L.100 and the L.109, and we find that they are entitled to take credit for both. I think, therefore, the defenders are entitled to expenses. But it is said, on the other side, that the defenders forced the pursuer to bring them into Court; that they would not settle out of Court; and it is further said, that the pursuer offered a reference, and that the defenders would not agree to it. Not much is to be made of what is said as to the pursuer's offer of making payment of the balance, because the serious question was, whether the actings of the trustees were to be adopted by Edmond, or challenged, and that was the matter about which they desired to be satisfied. They declined to denude until it was settled whether their actings were to be given effect to or challenged; and Edmond never undertakes to adopt their actings, and never undertakes that the whole of them will not be challenged.

Then as to the offer of a reference, the defenders' admission as to that must be read

with reference to the averment contained in the seventh article of the pursuer's condescendence, and the explanation in answer. They admit that they refused to refer their claim to credit for the various charges objected to, or to denude, until they should be validly and effectually freed from challenge. And I must say that I think the defenders were well entitled to refuse that, because they were never told the extent to which their actings were to be challenged, nor was any explanation given them of the grounds of challenge. Whether I look to the result of the action, or to the circumstances under which it was brought into Court, I am for giving expenses to the defenders.

LORD COWAN.—The two questions which have been discussed,—whether, in the first place, these trustees acted within their powers in granting to the tenant the abatement of L.100, and whether they are entitled to take credit for the L.109, expended in drainage,—might have given rise to important questions as to the [26] powers of trustees under a trust-deed such as the present, had these questions arisen purely. According to my recollection, both questions have been the subjects of consideration and decision by the Court.

As to the power of the defenders to grant discharge of the arrears, that depends on the special circumstances of the case, and we are not called on to consider it as a general question. The new lease stands unchallenged, and it is not to be challenged. The trustees are exonerated, and the new lease is to be held as having been competently granted by the trustees in the exercise of their powers of management of this estate. But the discharge of the L.100 of arrears was the express condition on which the tenant agreed to the other conditions of the new lease. That is specially stipulated in the memorandum which is referred to in the lease of November 1855, and therefore that matter is out of the case.

No doubt, the other question as to the expenditure of money on drainage raises a very different question. I am not sure that expenditure of that kind is within the powers of trustees, and it would be a nice question whether trustees are entitled so to expend trust-funds without the consent of the proprietor. I am not aware of any case in which a large expenditure of money on drainage has been allowed. But this case is entirely special. This L.109 was not expended except in reference to a system of drainage carried on with the consent of the proprietor. It so happened that in carrying out that system, there was, beyond the L.1250 which was borrowed, this sum of L.109 expended. That is a special case. There was no improvement made by the trustees, other than such as fell within the system agreed to by the proprietor. I think the specialties of the case exclude consideration of the general question; and I think the trustees were entitled to pay that additional sum, the expenditure having been beneficial, and the trustees having obtained an obligation from the tenant to pay 6½ per cent on the L.109. Therefore, I concur in the finding of the Lord Ordinary, repelling the objection to the trustees' accounts on that head. If these objections be repelled, in what has the pursuer been successful? I do not see any grounds for refusing expenses to these defenders.

LORD BENHOLME.—It very often happens, when a party has put himself under trust to individuals in whom, at the time, he has full confidence, that he takes an unfavourable view of their management, and in consequence, executes a subsequent trust in favour of others; and many litigations have had their origin in collisions between the first and second set of trustees. A proprietor certainly is fully entitled to alter his mind, to challenge the operations of his trustees, and to execute a revocation and recal of the trust-deed. At the same time, if he takes that course, he must expect that the parties in whom he formerly confided, and who have acted upon that confidence, shall demand full legal protection from the consequences of the exercise of the powers he confided to them. Up to the moment of recal, what is duly done by them, or begun so that it must be continued, they are entitled to maintain; and if they are asked to denude, they are entitled to decline to do so till they are freed from responsibility,—to say, we must not only have our accounts balanced and settled, but we must be kept safe as to more important than mere pecuniary responsibilities; as to the responsibility, for instance, arising from granting a lease, the validity of which the truster does not admit, but threatens to impeach.

On the other hand, from the moment the recal of the trust is intimated to them, they are no longer entitled to exercise all their ample powers of management and dis-

cretion under the trust. They then hold the estate merely in security of their own indemnity. It occurred to me, in reference to the drainage money mentioned in this discussion, that if it could be shown that the extra expenditure had been authorised by the defenders after the recal of the trust had been intimated to them, they could not defend themselves as to such acts of authority on the grounds of their powers under the trust-deed. But as it now appears that the extra expenditure arises from this, that works begun and in execution turn out in the end to be a little more expensive than was originally supposed, I look upon this extra expenditure as arising from an act of authority by the trustees previous to the recal. The time at which the payment comes to be made, or even at which the work is completed, is not important. The question is, what was validly undertaken by the trustees? though what was undertaken may have been partly done subsequent [27] to the time when the recal was intimated. I am fully satisfied that, in this case, the authority of the trustees was not interposed in reference to the extra expense, subsequent to the time when the trust was recalled; and on that ground I quite agree with your Lordships.

As to the L.100 of abatement, the granting of that was a condition of the lease, and you cannot take one part of that transaction without the other.

LORD WOOD was absent.

The Court adhered to the interlocutor of the Lord Ordinary, except as to expenses, the defenders being found entitled to expenses.

No. 6. **XXIII. Dunlop 27.** 16 Nov. 1860. 2nd Div.—Lord Mackenzie.

The NATIONAL EXCHANGE COMPANY of GLASGOW, Pursuers.—*Gordon*—*A. Moncrieff.*

PETER DREW and MATTHEW DICK, Defenders and Reclaimers.—*Fraser*—*Scott.*

Process—Reclaiming Note—Competency—Closing Record—Statute 13th and 14th Vict. c. 36, section 5—Act of Sederunt, 11th July 1828, section 77.—Held that, in an action in dependence before the passing of the Act 13th and 14th Vict., c. 36, but in which the procedure had been in the form provided by that Act, it was competent for the Lord Ordinary to close the record by interlocutor without a minute signed by counsel, and that a reclaiming note against an interlocutor doing so was incompetent without the record being appended.

Process—Reclaiming Note—Competency—Decree in Absence—Act of Sederunt, 11th July 1828, section 72.—Held that an interlocutor which set forth that a party appeared at the calling of the cause in the debate roll, and declined to proceed, and decerned against him in terms of the conclusions of the libel, was competently reclaimed against as a decree in absence, without appending the record to the reclaiming note.

This action was raised in 1849, at the instance of the National Exchange Company, in order to recover calls on shares in the company. Parties were ordered to lodge revised papers, and in 1850 the pursuer got a diligence against havers for the recovery of writs. In 1855 the process was wakened in the form prescribed by the Court of Session Act of 1850 (13th and 14th Vict. c. 36), the report of the diligence was allowed to be received and seen, and the process again fell asleep. It was again wakened in May 1860, and parties were ordered to adjust their revised papers. After repeated prorogations, the defenders having failed to lodge their paper, the Lord Ordinary, on 13th July, pronounced this interlocutor:—"Declares the record closed on the adjusted revised condescendence and revised answers, and appoints parties to debate." Thereafter, on 20th July, the Lord Ordinary pronounced this interlocutor:—"In respect the case has been called in the course of the debate roll, and the defender declines to proceed with the debate, upon the ground that he intends to reclaim against the interlocutor closing the record, and the pursuer having in consequence moved for decree, decerns against the defender, conform to the conclusions of the libel: Finds the defender liable in expenses, and remits," &c.

The defenders reclaimed against these interlocutors, and prayed the Court "to remit to the Lord Ordinary with instructions to open up the record, to allow the defenders to adjust their revised answers within a certain short space, and thereafter to proceed with the cause in common form; or otherwise to recal the said interlocutor of 20th July 1860, to appoint an issue to be lodged and adjusted for the trial of the cause, or to sustain the defences and assoilzie the defenders; or to do otherwise in the premises," &c.

The pursuers having objected to the competency of the reclaiming note, in respect the record was not appended,

It was argued for the reclaimers;—This cause having been in dependence [28] before the passing of the Act of 13th and 14th Vict., c. 36, its provisions were not applicable. Prior to that Act, the only interlocutor that could have been pronounced would have been to decern against the defenders in default. For the first time power was given to the Lord Ordinary to close the record without its authentication by the signature of counsel, and the interlocutor closing the record was made subject to review in the Inner-House; but there was no provision that the record should be appended to the reclaiming note. The interlocutor of 20th July being an interlocutor or decree pronounced in respect of failure to implement an order, a reclaiming note against it did not require the record to be appended.[1]

To which it was answered;—This reclaiming note was to be dealt with as falling under the provisions of either the 72d or the 77th sections of the Act of Sederunt of 11th July 1828. If it was to be held as a reclaiming note against an interlocutor closing the record, it required the record to be appended under the 77th section. Again, it was incompetent under the provisions of the 72d section—1st, because, looking to the terms of the prayer, it was not a proper reponing note—which alone, under that section, was competent—without having the record appended; and 2d, it was not against an interlocutor pronounced in absence, for the interlocutor expressly bore that the defenders' counsel appeared when the cause was called in the debate roll.

Lord Justice-Clerk.—This is a reclaiming note against two judgments of the Lord Ordinary, and the prayer is, "to recal or alter the said interlocutors; to remit to the Lord Ordinary, with instructions to open up the record" and allow the defenders to adjust their revised answers; or otherwise, to recal the interlocutor of 20th July 1860 decerning against the defenders, in respect the defenders declined to proceed with the debate. Now, looking to the prayer, this is a proper reclaiming note, and not a note to be reponed in the form specified in section 72d of the Act of Sederunt. These two things are distinct; and the question is, is this reclaiming note competent without having the record appended? That must be considered separately with reference to each interlocutor.

With reference to the interlocutor of 13th July, by which the Lord Ordinary declared the record to be closed, it was argued that that was an incompetent proceeding, in respect the action was raised prior to the passing of the Act of 1850; and that it was necessary that the minute closing the record should be authenticated by the signature of counsel, as under the old form of process. But, looking to the history of this case, the Court cannot listen to such an argument, the case having, of consent, been all along dealt with, as if it came under the provisions of the Act of 1850. Taking it, therefore, that the record was well closed by the Lord Ordinary's interlocutor of 13th July, that interlocuter cannot be brought under review, except under the provisions of the 77th section of the Act of Sederunt, 11th July 1828, which provides that reclaiming notes, except against decrees in absence, or on failure to comply with orders, shall not be received unless the record is appended. As to the first interlocutor, therefore, the note is incompetent, the record not having been appended.

As to the second interlocutor, the difficulty was, that the proper remedy has not

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[1] Wilson *v.* Stark, 17th February 1844, *ante*, vol. vi. p. 692; Binney *v.* Binney, 16th November 1848, *ante*, vol. xi. p. 89; Milne *v.* Scott, 7th July 1858, *ante*, vol. xx. p. 1224; Young *v.* Mackenzie, 19th July 1859, *ante*, vol. xxi. p. 1358.

been sought by this reclaiming note. It is said that the decree was pronounced in respect of the defenders' failure to comply with an order to appear and debate, and that, under the 72d section of the Act of Sederunt, a party wishing to be reponed against such an interlocutor may, before extract, apply to the Inner-House by a short note, setting forth the interlocutor or decree, and craving to be reponed. But here the reclaimer does not ask in direct terms to be reponed, and this note is not a proper reponing note. I do not, however, wish to deal so strictly with this note as to throw it out as incompetent on that ground, but I am inclined to sustain it in so far as it seeks redress against the interlocutor of 20th July, upon payment of such expenses as are reasonable.

LORD COWAN.—The argument that, because the record in this case had been [29] closed by the Lord Ordinary in terms of the Act 13th and 14th Vict., cap. 36, without authentication by the counsel for the parties, the whole subsequent proceedings must therefore be held null, would have been of great practical importance, had there been any force in it. I think it has none whatever. It is true that the cause was brought into Court before the statute. The process had been allowed to fall asleep, and after the passing of the Act was wakened in the manner therein directed, and the whole subsequent proceedings have been under that Act. Parties have been going on all along on the presumption that the statute applied. It is only now that the objection is taken. Such being the case, the parties cannot, I apprehend, now go back, nor be listened to in objecting to the proceedings, even had they been informal. The informality, if it exists, has been obviated *rebus ipsis et factis*. But I go further. I am of opinion that under the 5th section of the Act of 13th and 14th Victoria, the Lord Ordinary had power to close the record, though the process was in existence prior to the passing of the statute. The enactment provides, "that it shall not be necessary, in order to the closing of a record in any process before the Court of Session, that the record shall be authenticated by counsel as adjusted or closed." This enactment came into operation on 1st November 1850, and after that date it was not necessary in closing a record that counsel should consent. I do not find anything in the statute which confines that statutory provision to processes brought into Court after 1850. I read the statute quite otherwise; and therefore as to this objection I hold it to be quite unfounded.

That leaves for consideration, the alleged incompetency of the note in respect of the record not being appended. To dispose of this objection, it is necessary to consider the 72d and 75th sections of the Act of Sederunt; and the question is, under which of these two sections does this case fall?

As regards the first interlocutor, that of 13th July, the case, in my opinion, clearly falls under the 77th section. It is a reclaiming note against an interlocutor closing the record, not an interlocutor of the kind dealt with in section 72. It is not an interlocutor pronounced on default. The record is closed by the Lord Ordinary, and the statute provides that it shall be competent to bring that interlocutor under review. I cannot doubt that the reclaiming note bringing such an interlocutor under review must be framed in accordance with the 77th section. It is a judgment *in foro*, and in order that we may consider the merits of the judgment, it is necessary that the record be appended. On that ground, I am of opinion that this is an incompetent reclaiming note against that first interlocutor.

Then, as regards the second interlocutor, the case is quite different. It certainly does not appear from any of the cases, that the question has arisen for discussion, whether a party who has appeared before the Lord Ordinary, and intimated that he declined to proceed with the debate, can be viewed as in default, and entitled to be reponed upon that footing. In the cases that have occurred, no appearance was made at the calling of the debate roll; and the Lord Ordinary thereupon pronounced judgment on default. That was the position of the party in the leading case of Wilson, in 1848, when the Court were divided seven to six, and it was authoritatively ruled that a reclaiming note in such cases may be dealt with as if presented against an interlocutor pronounced as on default.

There may be very cogent reasons for holding that failure to implement an order to debate should not have been so viewed. A party may disappear as often as the case appears in the debate roll, and then apply to be reponed. But the rule has been fixed, and the remedy for that abuse lies in the Lord Ordinary's hands, who can follow

the course adopted by Lord Cockburn in the case of Horner, when there were repeated refusals to comply with an order to sist a mandatory.

This being the state of the decisions, it seems to me that it would be going on a narrow ground to distinguish this case, in which the counsel merely made appearance at the bar, and intimated that he declined to debate, from those in which no appearance was made. At the same time, I have great difficulty in viewing this note as a reponing note to any effect, having regard to the terms of the prayer; but as your Lordship thinks it may be so treated, I do not press this difficulty in form.

LORD BENHOLME concurred. LORD WOOD was absent.

The Court pronounced this interlocutor:—"Find the reclaiming note incompetent, and refuse the same in so far as it seeks to bring under **[30]** review the interlocutor of 13th July last: Remit to the Lord Ordinary to repone the defenders against the decree of 20th July last, on payment of such expenses as to his Lordship may seem reasonable: Find the pursuers entitled to the expenses of this discussion, and remit," &c.

No. 7. **XXIII. Dunlop 30.** 17 Nov. 1860. 1st Div.—Sheriff-Court of Banffshire.

WILLIAM FIFE and Others (ALEXANDER REID'S Executors), Pursuers and Respondents.—*Mure—Anderson.*

CHARLES INNES, Defender and Advocator.—*Young—J. C. Smith.*

Act 1579, *c.* 83—*Prescription—Writ—Extrinsic and Intrinsic—Proof—Parole.*—In 1854 an action was brought for the balance of an account for furnishings, the last item being dated in 1844. To meet the plea of prescription the pursuer produced a letter written by the defender in 1848, containing the following passage, *inter alia*:—"The number of gallons is correct; but I am charged about 1s. 6d. per gallon more than the agreed price." *Held* (1), That the defender's writ proved the subsistence of the debt, the qualification not being intrinsic of the admission; (2), That proof as to the price of the furnishings was not limited to writ or oath; and, (3), After a proof *prout de jure*, that the defender was not entitled to the deduction from the price claimed by him.

In 1854 the trustees of the late Alexander Reid, distiller, Easter Elchies, who died in 1847, brought an action in the Sheriff-Court of Banff against Charles Innes, vintner, for payment of L.145, 9s. 2½d. sterling, "being the amount of an account commencing on the 20th day of October 1840 years, and ending on the 6th day of January 1844 years, for goods sold to the defender by the said deceased Alexander Reid, senior, but under deduction of the sum of L.110, 12s. 1½d., being the amount of cash paid by the defender to the said Alexander Reid, senior, Esq., at different times, commencing on the 11th day of January 1841, and ending on the 20th day of December 1844," &c.

The items of the account consisted almost entirely of supplies of whisky.

The defender pleaded, *inter alia*, prescription. The point chiefly argued was, whether or not that plea was obviated by writ of the defender.

Three letters by the defender to the pursuers' agent were produced:—(1.) "28th March 1848. Dear Sir,—I received yours about my account due the late Mr. Reid. The account is not correct. I want a statement of the whole transactions between him and me. There is also a contra account; but in the meantime I am quite unable to pay, as I have not been able to settle the last of my dividends; but, with a little time, I hope to be able to arrange matters satisfactory. But, in the meantime, to put any expenses on me, it would make bad worse, so I hope you will allow a little time till I get to a little business again." (2.) "September 30, 1848. Dear Sir,—I had a letter sometime ago from you about the leat Mr. Read's account, which is not corect. I am charged for about 35 pounds, and I can prove I am not due twenty. The number of gallons is corect; but I am charged about 1s. 6d. per gallon more than the agreed prise, and lekways I am charged a long time back with this 1s. 6d. on the gallon. I can show a ballance between Mr. Read and I, and his own signature to it, which the overcharge on the whisky for such a length of time makes the difference

between us; and lekways I have ane account aganst Mr. Read and the Doctor, I think upwards of 8 L. pounds; and I have also a letter from Mr. Read's own hand axcepting of my offer of composition, whatever it wase, which was adressed to Mr. Fleming, and is now in my posison. So I think there will not be a great dale to do if once we had a ballance; and then I must have a short time to pay. . . . . I have a few of my divedends to settle yet, which I will do; but I must have a little time to do it. . . . I have had your letters from Mr. Fliming about your account; but I hope you will give me a little time to pay it, and I will pay [31] you what is a fair thing onstly, and without very little troubell." (3.) "Aprile 19, 1853.—I received a notise from you, dated 15 inst., requesting a settlement of a debt due by me to the late Mr. Read's trustees, which I consider is settled and more. I paid Mr. Alexander Read so much, and I have a accunt in my books stands aganst Doctor Stephen, which will cover my debt and more. I hold a letter from the leat Mr. Reid, saying he is to axept of my composiso whatever it would be; it was addressed to my man of busnis in Keith."

On 4th June 1856 the Sheriff-substitute (Gordon) decerned against the defender, in terms of the conclusions of the libel.

On 31st March 1858 the Sheriff-depute (Bell), on appeal, "recals and reverses the interlocutors appealed against: Finds that the Act 1579, c. 83, applies to the debt sued for: Finds that the pursuers have no action, unless they either prove by writ or by oath of the defender: Finds the constitution and subsistence of the debt proved by the defender's writs produced; and, with these findings, remits to the Sheriff-substitute to proceed and determine the exact amount resting-owing, and, for that purpose, to receive all competent evidence."

A proof *prout de jure* was then allowed. Its import was, that it was the practice of the trade to allow a discount of 1s. 6d. per gallon from the invoice price when paid within three months, which had not been done. The Sheriff-substitute, on 7th September 1858, found "that the defender had failed to prove any overcharges in the account libelled on, and therefore of new decerns in terms of the libel."

The defender advocated direct to the First Division. He pleaded that proof *prout de jure* was incompetent, and the case of Dowdy established that the writs must be taken with their qualifications. If a letter admitted the debt, but qualified it by stating that there was a counter claim, which extinguished that debt, that was no proof of the existence of the debt. It was a qualification which must be taken as part of the admission. The question here was not the same as what is extrinsic and intrinsic in a reference to oath.[1]

Pleaded for the pursuer;—The question is not whether the exact sum sued for is established, but whether there are admissions under the hand of the defender that the debt is subsisting; and, if so, then proof or inquiry will be allowed as to the amount of that debt.[2]

Lord President.—I have no doubt that, in this case, the statute 1579, c. 83, applies to the debt sued for. Then the question arises, whether the writs that have been produced are sufficient to establish the constitution and resting-owing of the debt. I think that the letter of 30th September 1848 is the letter of chief importance here. It is impossible to read this letter otherwise than as importing that there were made to this party such furnishings as are charged in this account; that the account is incorrectly stated—is excessive—is liable to correction—but that still there would be a balance which he would have to pay, and for which he asks time. I may mention that the subsequent part of the letter, "I hope you will give me a little time for your sum," applies to an account due to Mr. Simpson himself, to whom the letter is addressed, and not to the account of Alexander Reid. That is clear; and on looking through the other parts of the case, the defender says he has certain objections to this account; and it is said that they are stated in such a way that they become intrinsic qualities of the

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[1] Stevenson *v.* Kyle, 5th Feb. 1850, *ante*, vol. xii. 673; Graham *v.* Dowdy, 8th December 1859, *ante*, vol. xxii. p. 181; Macgregor *v.* Macgregor, 27th June 1860, *ante*, vol. xxii. p. 1264. Smith *v.* Falconer, 17th Feb. 1831, 9 S. 474; Ritchie *v.* Little, 15th January 1836, 14 S. 216; Napier *v.* Smith, 14th December 1838, *ante*, vol. i. p. 245; Turnbull, 12th May 1830, 8 S. 737.

[2] Milne *v.* Donaldson, 10th June 1852, *ante*, vol. xiv. p. 849.

admission of the debt; and that the admission cannot be taken, without giving effect to the qualification. There is no necessity in this case for going into any discussion of the doctrine as to qualifications—the effect to be given to the qualifications in a written statement—either in judicial proceedings [32] or other documents. The case referred to of Dowdy *v.* Graham has no bearing whatever on this matter. It was not a case of prescription at all. It was a case in which the Court held that the qualifications contained in the writ were such as could not be discharged on a consideration of the import of the writ; that is all. Some of the Court (of whom I was one) stated that they read the writing as a denial; and those of the Judges, who went more into detail, specially stated that they did not hold the case as necessarily regulating questions of prescription, or cases that might arise on the import of oaths. Therefore I do not think that that case can be brought to bear upon this case at all. The question of extrinsic and intrinsic arises always on the particular writing,—what is the true import of the statement introduced into it? Is it that which amounts to a qualification, whether as to the alleged admission, or as to something relative to the subject-matter of the admission, which may require to be made the subject of separate investigation. I think it is possible, and not uncommon, that there may be a writ which contains an admission of the constitution, and of the resting-owing of the debt, and yet which may also contain a statement which may go to qualify the admission. And I think that, if the statement or alleged qualification is not clear—is ambiguously expressed, as it is in the present case, we cannot take it as necessarily of the meaning which the defender proposes to attach to it. It must be cleared up. His qualification must be made as clear as the admission, as if the qualification was not there. What is pleaded as a qualification and deduction cannot be taken on the face of the document without sifting of it. And although I have difficulty in referring to this record as indicating anything—it is a sort of legal curiosity—I read it as meaning that, in the course of dealings between the parties, a certain discount was allowed. If that is the meaning of this alleged qualification, investigation is clearly necessary. If that is not the meaning of it, there is no definite meaning at all; and, therefore, I think that every effect, in point of law, is given to it, when it is sent to proof, as was done by the Sheriff. On proof it turns out that the deduction was only allowed on accounts paid within a certain time, which the defender had allowed to elapse. I am, therefore, quite clear that judgment must go in favour of the pursuers.

Lord Ivory.—I am satisfied that there never was any dispute as to the articles furnished, or the amount. The number of gallons is admitted to be correct. There is an opportunity of speaking to the other items of the account, and no objection is insinuated as regards them.

The difference between the parties now, existed all along. There was no special agreement between them riding over all this account, or any individual items of it. There was a series of furnishings made in the ordinary course of dealing, and it is not alleged that there was any distinct or express agreement by which the whisky was to be given at a particular rate, or on which, in particular circumstances, a deduction was to be made. The deduction which makes now the difference between the parties is, as your Lordship has explained, a sort of trade deduction as regards the settlement of the account,—not as regards the amount of the account, or the price charged in it; but a deduction if prompt payment was made. That being the only difference between the parties, shows, in the first place, that whilst it remained unsettled, there was an admitted account of furnishings,—that the account remained unsettled, and that the thing to be adjusted was, whether any deduction was to be made at all. If it had not been a fair deduction claimed of 1s. 6d. per gallon, the number of gallons being admitted, the price must also be admitted, because there is no objection to them, except that from the price as made there should be a deduction of 1s. 6d. per gallon. That being so, we see distinctly from the correspondence that this dispute existed at an early date. In the way that the parties have dealt with it, I think that it remained a matter for investigation. It has been made matter of investigation by the Sheriff, and it has been proved that in regard to trade deduction, it was usual to give such deduction between distiller and innkeeper, provided payment was made within a particular date, otherwise the right to have such deduction fell to the ground. The result of the proof is to negative that, in the circumstances of the present case, there was any ground for a claim of deduction at all. That disposes of the only point of difference between the parties, and

that being removed, and no deduction allowed, the amount from which it was claimed is established.

LORD CURRIEHILL.—I concur. I never had any difficulty except upon the [33] point, whether or not the second letter did not import a statement that the price of the whisky had been stipulated to be 1s. 6d. lower than the price at which it was invoiced? Had there been such a statement, I should have read it in favour of the defender, and would have held it to be an essential part of his admission. But when I consider the question, what was the agreed on price? I cannot find the answer in the letters. The defender says he is to get a deduction of *about* 1s. 6d. per gallon. How can I tell whether it is to be more or less? Making the calculation from the number of gallons in the account, and the total prices, I see that the whisky must have been charged at three different rates. Does the defender mean that he is to get a deduction from each of these rates? Then he says the deduction is to be made on all whisky supplied *so far back*. How far back? The accounts extend over a period of two years, and there are no data for ascertaining. It is therefore impossible for me to ascertain from the letters what the defender calls the agreed on price. Now, when the amount of remuneration, prices, wages, fees, &c., cannot be found from the terms of an oath or of letters, it is settled law that we must go into proof. There are several cases to that effect, and this comes under the same category, as we are not in the case of a party who expressly states that it was a portion of the original bargain that the price was to be a certain sum. I concur entirely with what has already been said, and think it unnecessary to add more.

LORD DEAS.—I think it right to state specifically the grounds of my opinion, not because there is any difficulty in the case, but in order to prevent any bearing it may have on other cases from being misunderstood.

The action is for the balance of certain accounts, to which the statute introducing the triennial prescription is undoubtedly applicable. The pursuer alleges that he has proved the debt by the letters founded on. To test this, let us see, in the first place, how the matter would stand, putting aside all allusion to the deduction claimed of 1s. 6d. per gallon on the spirits furnished. Taking the letters so, the result, I think, is the same whether the letters be read separately or together. I shall assume that the defender is entitled to have them read together, so as to give him the benefit of any explanations which one letter may afford of another. But, taking the case upon the fair import of the whole letters, the result, as I have said, is the same as if the letters are taken separately. The first letter (28th March 1848) states three objections to the demand:—1st, That "the account is not correct,"—that means, in details; 2d, That it does not contain the whole transactions,—that is, that it does not go far enough back into the dealings of the parties; 3d, That the defender has a contra-account. But, although effect were given to all these objections, this letter plainly implies that there would still be a balance due; for the defender goes on to say that he is, in the meantime, unable to pay, and to put expenses upon him would make bad worse, and asks for time to enable him to arrange everything satisfactorily. The second letter (of date 30th September 1848) implies the same thing. It bears that "the number of gallons is correct," but complains of the overcharge, which, the defender there says, "makes the difference between us,"—sets forth that he can show a balance against Mr. Reid under his own hand, and a letter from him agreeing to accept a composition; also that the defender has a contra-account of upwards of L.8, for which Reid is liable; and adds, "So, I think, there will not be a great deal to do, if once we had a balance; and then I must have a short time to pay." The allegation here made of a composition contract, I should hold to be extrinsic, if it were necessary to go into that question. There cannot be a doubt that, in writings of this kind, there may be qualifications which are extrinsic. The case of Graham *v.* Dowdy, 8th December 1859, is not an authority to the contrary. The observations there made must be taken as pointing to such cases as we were then deciding. It was just because some of these observations might have been understood in a broader sense than I thought they could be meant, that I guarded my opinion as I did. Here, even assuming that there had been a composition contract, the letter of 30th September plainly imports, that after giving effect so such contract there would be a balance due which the defender required time to pay. The third and last letter (19th April 1853) takes broader ground so far. The defender there says he considers the debt to be "settled and

more." But he immediately proceeds to explain how this comes about:—"I paid Mr. Alexander Reid so much, and I have an account **[34]** in my books stands against Doctor Stephen, which will cover my debt and more. I hold a letter from the leat Mr. Reid saying he is to axept of my composisn whatever it would be; it was addressed to my man of busnis in Keith." The alleged extinction of a debt by a contra-account against a third party, for whom the creditor is said to be liable, is plainly extrinsic, and must be supported by evidence. So it would be, in my opinion, as regards the composition contract, even if the defender had meant (which I think he did not), that the composition contract left nothing whatever due. Therefore, apart from what is said about the overcharge of 1s. 6d. per gallon, I should have no difficulty in holding that these letters admit a debt to be due, and leave only the inquiry to be followed out in the usual way, what the amount of that debt is.

Now, as regards this alleged overcharge, had the letter distinctly stated that the original bargain was for whisky at a given price, and that the price actually charged was 1s. 6d. per gallon more than the price so agreed upon, I do not say that I should have held such a qualification (referable as it would have been to the original bargain) to be extrinsic. But the language of the sentence relied on is, to say the least of it, equivocal; and I agree with your Lordship in the chair, that the prejudicial question arises, What it means? To get at this, I am not prepared to say that we might not, were it necessary, look at the record where, in answering the pursuer's explanatory statement (Art. 2) about this 1s. 6d., the defender says, "it is the understood practice of the trade that innkeepers, like the defender, get a reduction of prices of whisky in every case;" thus putting the 1s. 6d. as a discount depending on the practice of trade, which would require to be inquired into and ascertained. You cannot take judicial statements without their qualifications to the effect of eliding prescription. But it does not follow that you cannot look at them as explanatory of what an ambiguous letter means. But, without going into this, I am satisfied, on the face of the letters themselves, taken in connection with the proof of practice (which to this effect is quite competent), that the defender did not mean to say, in his letter of 30th September 1848, that the bargain was for whisky at a price named; and that he had been charged 1s. 6d. per gallon more than that price. I think he meant that he had not been allowed a discount of 1s. 6d. per gallon, which he ought to have got from the invoice price. In gathering his meaning, we must keep in view that he is evidently an illiterate person, whose grammar is as defective as his orthography. For instance, in the same letter, referring to a different debt due to the agent he was addressing, he says, "I hope you will give me a little time to pay it, and I will pay you what is a fair thing onstly and without very little troubell,"—meaning, I presume, the reverse,—that he would pay *with* very little trouble. We must pause, therefore, before we think we have got his precise meaning, when he says, "I am charged about 1s. 6d. per gallon more than the agreed price, and leckways I am charged a long time back with this 1s. 6d. on the gallon; which overcharge on the whisky, for such a length of time, makes the difference between us." Why was the overcharge "*about*" 1s. 6d. a gallon, and not a precise sum, if it was an excess upon a price specified and agreed on? And how had it gone on for a long time back (referring apparently to accounts already paid), if it was not a discount which he referred to? In short, I think there is no doubt that this was his meaning; and, if so, there is no intrinsic qualification in this passage of the letter, and no ground for deciding otherwise than we would have done had the allegation of an overcharge not been made in the letters at all.

The Court pronounced the following interlocutor:—"The Lords, on report of Lord Kinloch, Ordinary, and having heard counsel for the parties, and having considered the record, proof adduced, and whole process, Advocate the cause, and, so far as not in accordance with the present judgment, recal the interlocutor submitted to review: Find, in terms of the statute 1579, c. 83, that the debt libelled not having been pursued for within three years, the pursuers can 'have no action except he either prove by writ or by oath of his party:' But find that, in the whole substance of the grounds of action, there has been adduced sufficient writ of the defender to **[35]** satisfy the statutory requirements: More particularly, Find it established, in point of fact, by the defender's writ, 1st, That the furnishings contained in the account were duly made by the pursuers to the defender; 2d, That said account was never settled between the

parties, and remains at the present moment unsatisfied, and as regards more especially the prices charged for those items of the account, which consist of furnishings of whisky, has all along been matter of dispute; 3d, That this, which the defender admits to have been and to be the sole difference between the parties, turns simply on the question, whether, by the course and practice of trade as between distiller and retail dealer, the defender was entitled to a discount or deduction of one shilling and sixpence on the price of each gallon of whisky disbursed, and that, except as regards this special ground of difference, the amount of the account is unchallenged, and so equally established by the writ of the defender as the fact of the furnishings: Find that, in this way, nothing remains but to ascertain whether, as regards the discount or deduction of one shilling and sixpence per gallon in dispute between the parties, the course and practice of trade was or was not as has been alleged by the defender: Find, in point of law, that this is not a matter as to which probation exclusively by the defender's writ or oath falls within the requirements of the statute, but, on the contrary, that it is open and competent to be investigated between the parties by proof *prout de jure*, and that this has accordingly been done by the supplementary parole proof led by the pursuers, which satisfactorily establishes, in point of fact, that the defender was, in the circumstances of this case, entitled to no such discount or deduction as he claims: Therefore, on the whole matter, repel the defences, and decern in terms of the libel: Find the defender liable to the pursuers in expenses, both in this Court and the inferior court: Decern against the defender for payment to the pursuer in the sum of L.17, 16s. 9d. of expenses, modified in the inferior court; and appoint an account of the pursuers' expenses incurred in this Court to be given in, and remit to the Auditor," &c.

[Cf. *Haldane* v. *Speirs*, 10 M. 562.]

No. 9. **XXIII. Dunlop 36.** 20 Nov. 1860. 2nd Div.—Lord Ardmillan.

J. and R. YOUNG and COMPANY, Pursuers.—*Young*—*A. Moncrieff.*

GEORGE GRAHAM, Defender.—*Macfarlane*—*W. M. Thomson.*

Process—Issues—Agent and Principal.—Issues adjusted to try whether a shipowner was owing to brokers the usual commission for having, on the shipowners' employment, procured a charter which he declined.

Process—Record—Pleas in Law.—Observed, that general pleas will not be held sufficient compliance with the provisions of the Act requiring parties to append pleas in law to a condescendence.

J. and R. Young and Company, shipbrokers in Glasgow, the pursuers of this action, averred that they were employed by the defender George Graham, the owner of the ship "Halifax Packet," to procure a freight or charter for his vessel from Troon in Ayrshire to Buenos Ayres, or to Monte Video. After they had made some unsuccessful endeavours to procure a charter at the rate specified by Graham, he came to Glasgow, when they introduced him to Messrs. Ferguson, Rennie, and Company, who made an offer to charter the vessel, and through the pursuers' intervention and brokerage, an agreement was concluded, and a charter party extended and given to the defender that he might sign it. This he did not do. He afterwards employed Messrs. Cree, Skinner, and Company, shipbrokers, to procure a freight for the vessel, and they arranged an agreement with the same firm of Ferguson, Rennie, and Company, to charter the vessel, as the pursuers averred, at rates nearly identical with those arranged by them, but, as averred by the defender, at 6d. per ton more if the ship went to Monte Video. He subscribed a new charter party. The pursuers concluded for L.39, 7s. 10d., as the commission due them in respect of the employment of the defender, and services rendered under that employment. The pursuers pleaded;—"In the circumstances above set forth, the pursuers are entitled to decree in terms of the conclusions of the libel, with expenses."

Parties having failed to adjust an issue, the Lord Ordinary reported the case by interlocutor dated 10th July 1860.[1]

After hearing parties, on 17th November,—

LORD JUSTICE-CLERK.—In this case I observe that there is no plea in law appended to the pursuers' condescendence. A plea in law ought to be a distinct legal proposition, applicable to the facts of the case, which this is not. It must be understood by the profession that the Court will not sustain a loose and unmeaning statement like this as a plea. We will allow the pursuers to lodge a plea in law before we adjust this issue.

The pursuers accordingly lodged the following plea in law:—"The pursuers having been employed by the defender as shipbrokers to procure a charter of the defender's vessel, and having, in respect of said employment, performed the acts and rendered the services set forth in the condescendence, are entitled to decree in terms of the conclusions of the libel, with expenses."

The Court adjusted the following issue for trial of the case:—"It being admitted that the defender is owner of the ship or vessel called the 'Halifax Packet,'—Whether, in or about the month of August 1858, the defender **[37]** employed the pursuers as shipbrokers to effect a charter of the ship the 'Halifax Packet;' and whether for their services under said employment the defender is indebted and resting-owing to the pursuers the sum of L.39, 7s. 10d., or part thereof, with interest?"

No. 11. **XXIII. Dunlop 38.** 20 Nov. 1860. 2nd Div.—Lord Mackenzie.

CHRISTINA M'LAREN or SHARP, Reclaimer.—*Scott.*

JEAN M'DOUGALL or M'CALL, Respondent.—*J. Burnet.*

Process—Reclaiming Note—Competency—Judicial Factor—Appointment—Statute 20 *and* 21 *Vict. c.* 56, *sections* 4, 5, 6.—*Held* competent for a party served with a petition for the appointment of a *curator bonis*, to reclaim to the Court against an interlocutor making an appointment pronounced in absence. But the note should not be in the form of a note to be reponed, but of a reclaiming note as against an interlocutor on the merits, praying to have the appointment recalled.

On 4th September 1860 a petition at the instance of Mrs. M'Dougall or M'Call, for the appointment of a *curator bonis* to William M'Laren, alleged to be imbecile, was presented to the Lord Ordinary on the bills. The petition prayed for an order for intimation in common form, for service on William M'Laren, and on Christina M'Laren or Sharp, and an order to lodge answers, if so advised, within six days; and thereafter, on resuming consideration of the petition, with or without answers, to appoint a *curator bonis*.

On 5th September the Lord Ordinary pronounced an interlocutor ordering intimation and service, in terms of the prayer of the petition; and no answers having been lodged, the party suggested by the petitioner was appointed *curator bonis* by interlocutor dated 20th September.

Against the latter interlocutor a reclaiming note for Mrs. M'Laren or Sharp, with consent of her husband, was boxed along with answers to the petition. The prayer of the reclaiming note was "to recal, or remit to the Junior Lord Ordinary officiating in the Outer-House to recal, the prefixed interlocutor of 20th September 1860, and

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[1] "NOTE.—The Lord Ordinary is inclined to think that neither of the issues proposed is so framed as to be really suitable for trial of the questions here raised.

"The defender's issue will not meet the case. The pursuers' issue as expressed, does not quite meet it. Something should be introduced relative to the act of the defender in putting the matter into the hands of others than the pursuers, who did actually effect the chartering of the vessel. If that act was wrongful, the pursuers will succeed. If that act was justifiable, the pursuers will not recover the brokerage."

repone or remit to his Lordship to repone the petitioners thereagainst, and receive the answers for the reclaimers, and thereafter to proceed with the cause in ordinary form; or to do otherwise," &c.

When the reclaiming note was called in the roll of single bills, it was objected to its competency;—The petition was presented to the Lord Ordinary under the provisions of the statute 20 and 21 Vict. c. 56. It provided by section 6 for a review of a judgment of the Lord Ordinary on the merits by reclaiming note, but the interlocutor reclaimed against was pronounced in absence. The whole intent of the statute was to provide for the safety of the property of pupils and persons labouring under mental incapacity, by a speedy form of process, which object would be defeated, and the estate would be left unprotected, if parties who were served with notice of such petitions were allowed to lie bye until a judgment was pronounced by the Lord Ordinary, and by reclaiming prevent the judgment becoming final.

LORD JUSTICE-CLERK.—This reclaiming note is rather an unexampled proceeding, and, therefore, when it was presented in the single bills, I thought it right to call attention to it. I am not satisfied that this note is precisely in the shape it should be, to come within the words of the Act; but I do not think there are sufficient grounds for dismissing it as incompetent. The class of proceedings with which we are here dealing differs materially from the class of actions brought before us in the exercise of our ordinary jurisdiction. In this class of cases the appeal is to the equitable jurisdiction of the Court, and it is neither necessary nor usual in such cases that there should be two parties before the Court as contradictors. [39] There is nothing more common than to find applications of this kind unopposed, because all parties interested are frequently satisfied that the application is well-founded, and that the appointment craved ought to be made.

Besides, in this class of cases, there was before the passing of the Act of 20 & 21 Vict., no review at all. All such applications were presented at once to the Inner-House, and, therefore, there could be nothing of the nature of a reclaiming note. But when this jurisdiction was for the first time vested in the Lord Ordinary on the bills, it seemed proper to the Legislature that provisions should be made, under which persons interested, who might be dissatisfied with the interlocutor of the Lord Ordinary, might bring his judgment under review in the Inner-House. The sixth section of the Act gives right to any party having lawful interest, to reclaim to the Court against any interlocutor of the Lord Ordinary disposing of the petition on its merits. These are general words, and keeping in view the nature of these proceedings, which are commonly disposed of in absence, I think the intention of the Legislature was, that any party with lawful interest to reclaim, may reclaim, whether he appears before the Lord Ordinary or not, for there is nothing in the Act to limit the right of reclaiming to such parties as make appearance before the Lord Ordinary. I think, therefore, that it is impossible to construe the Act so as to compel us to reject this reclaiming note, upon the ground that the reclaimer did not make appearance before the Lord Ordinary, or is coming here to be reponed against a decree in absence.

But then there is a difficulty arising from the way in which the prayer of this note is expressed. It is plain that the party has had in view the case of a note to be reponed against a decree in absence, and proceeds upon a supposed analogy between this case and the cases provided for in the 72d section of the Act of Sederunt, 1828, with which, however, it has nothing to do. The proper prayer of a reclaiming note against a decree such as this, would be, not to recal the interlocutor, and send the case back to the Lord Ordinary, but to recal the appointment. But some apology is to be made for this reclaimer, who, feeling that she is placed in an unfavourable position by not having appeared before the Lord Ordinary, submits that, in place of recalling the Lord Ordinary's interlocutor, and hearing her here, it may be consistent with the spirit of the Act, that the matter should be sent back to the Lord Ordinary for reconsideration, and that she should there make appearance and be heard in support of her answers; and therefore, although I do not quite approve of the form of the prayer of this reclaiming note, still I think it competent, and I would suggest to your Lordships that we may recal this appointment, and remit to the Lord Ordinary to hear the parties on the petition and answers, and do further as shall be just. But, in the meantime, as we are to deal with this as a reclaiming note, it will go to the summar roll.

LORD COWAN.—It is not to be doubted that it is competent to bring under review an appointment of a curator made by the Lord Ordinary under the Pupils Protection Act; and that this may be done by a party having interest, even although no appearance has been made before the Lord Ordinary. His interlocutor is declared, in express terms, to be open to review by reclaiming note; and I think it would be a serious matter to restrict that remedy against a nomination, which is considered by those having interest to be objectionable, to parties who have made appearance before the Lord Ordinary. The answer to the argument that this course might cause undue delay, and that in the meantime the estate would be unprotected, is, that it is competent to make an interim nomination.

In this case the prayer of the reclaiming note is not to be strictly construed; but I think the reclaimer must satisfy the Court that there has been some good cause for delay, and for her non-appearance before the Lord Ordinary. I see, on looking at the prayer of the petition, that there is an application for warrant of intimation to her *nominatim*. The petition was served on her, and answers ordered, but, notwithstanding, she makes no appearance, and comes here after the lapse of the long vacation.

LORD BENHOLME.—I think there is a material distinction between a reponing note in the proper sense, and that now before us. In general, the object of a reponing note is to obtain redress against an interlocutor pronounced simply in absence, or in default, without any reference to the merits of the cause. I do not think that is the present case; because here there was a competent petition before **[40]** the Lord Ordinary, accompanied by such amount of evidence as warranted the granting the prayer of the petition, if unopposed. In that state of matters, there being no opposition, the Lord Ordinary pronounced judgment—a judgment which, I think, must be considered a decree on the merits, and falling under the provisions of the statute relative to such decrees. So viewing it, the competency of this note appears to me to be clear; which is all we have at present to determine. How we are to dispose of it hereafter, is for farther consideration. We may either deal with the matter ourselves, or remit the case back to the Lord Ordinary. As Lord Cowan has observed, I think we are entitled to put it upon the reclaimer to state why she did not make appearance before. At present I only express an opinion upon the competency of this reclaiming note, which is the only point on which I am satisfied, and the only point I am at present for deciding.

When the case was called this day in the summar roll, it was stated, for the reclaimers, that their non-appearance before the Lord Ordinary arose from a misapprehension on the part of their agent, who was out of town when the petition was presented, and who from a communing with the petitioner's agent, understood that notice would have been sent him of the reply to some communications sent to the petitioner's country agents before an interlocutor was applied for. The reclaimer's agent got no further notice, and the interlocutor reclaimed against was pronounced without his knowledge.

LORD JUSTICE-CLERK.—I believe your Lordships are of opinion that this reclaiming note is competent under the 6th section of the Act of Parliament 20 & 21 Vict., which provides that it shall not be competent to bring under review of the Court any interlocutor of the Lord Ordinary on petitions of this kind, pronounced with a view to inquiry and investigation merely, and which does not finally dispose of the merits of the application, "but any judgment pronounced by the Lord Ordinary on the merits, unless where the same shall have been pronounced in terms of instructions by the Court on report as hereinbefore mentioned, may be reclaimed against by any party having lawful interest to reclaim to the Court, provided a reclaiming note shall be boxed within eight days," &c.

This interlocutor was pronounced by the Lord Ordinary on 20th September 1860, and it appoints a *curator bonis* to William M'Laren. It was pronounced in absence, and at first it appeared doubtful whether the ordinary regulations as to reclaiming applied to this case. But the terms of the 6th section of the Act seem so general, that it may be fairly read, and I think it ought to be read, as giving the right to reclaim to any party having interest, whether present or absent when the interlocutor was

pronounced; and therefore we deal with this as a reclaiming note in terms of the 6th section of the Act.

It seemed to your Lordships that some explanation should be given to account for the non-appearance of the reclaimer in the Bill-Chamber, and the explanation which we have heard is, I think, on the whole, sufficient and satisfactory, and therefore I propose that we should grant the remedy sought. But I think it ought to be understood that a party who absents himself in the Bill-Chamber when such appointments are made, is not entitled to come here with a reclaiming note, and get the appointment recalled merely on the ground that he was absent when the interlocutor was pronounced. On the other hand, it has been contended that if a reclaiming note of this kind is allowed, the effect would be that no appointment during vacation could receive effect, and proceedings may be hung up, to the detriment, it may be, of the rights of parties, if any party should choose to put in a reclaiming note. That, I think, is a mistake; because, under the statute, when an appointment is made in absence, the reclaiming note must be presented within eight days after the date of the interlocutor, and, when that is done, it is then quite open to the petitioner to apply for an interim appointment, in respect of the permanent appointment being brought under review by a reclaiming note. I therefore do not see any difficulty. On the whole matter, I am inclined to recal the appointment, and to remit to the Lord Ordinary to receive the answers, under such conditions as to expenses as his Lordship may think just.

Lords Cowan and Benholme concurred.

Lord Wood was absent.

[41] The Court recalled the appointment, and remitted the case to the Lord Ordinary.

No. 12. **XXIII. Dunlop 41.** 22 Nov. 1860. 2nd Div.—Lord Kinloch.

Andrew Graham and Others, Pursuers.—*Gifford.*

The Rev. David Marshall and Others, Defenders.—*Clark.*

Trust—Expenses in Litigations as to Trusts.—The beneficiaries under a marriage-contract having succeeded in a reduction of a trust-deed as granted by the predeceaser of the spouses to defeat the pursuers' rights under the marriage-contract,—*held* that the trustees who had unsuccessfully litigated were not entitled to deduct their expenses from the trust-funds.

By antenuptial contract of marriage, executed in 1842, between Andrew Graham and his wife, to which Mrs. Graham's parents, Mr. and Mrs. Scott, were parties, Mr. and Mrs. Scott conveyed a piece of ground, and houses thereon, to Mr. and Mrs. Graham in conjunct fee and liferent, and for Mr. Graham's liferent allenarly, and to the children of the intended marriage in fee; whom failing, to Mrs. Scott or Marshall, and the Rev. David Marshall, her husband, in liferent, and their children in fee. Mr. Graham renounced his *jus mariti* and right of administration over the whole estate, heritable and moveable, of his wife, and made certain provisions for her and the children of the marriage; in consideration of which Mrs. Graham conveyed to her husband, in the event of his surviving her, for his liferent use, and to her children in fee, or in case she should have no children, or they should die before majority and without issue, then to the said Mr. and Mrs. Marshall and their children, all and sundry lands and heritages, debts, and sums of money, and in general, the whole means and estate, heritable and moveable, that should belong to her at the time of her decease, reserving power to herself and Mr. Graham, with mutual consent, to divide the property among their children, and to the survivor of her and Mr. Graham right to divide, in as far as related to the estate and effects belonging to such survivor.

Both prior to and during the subsistence of her marriage, Mrs. Graham became possessed of various subjects, and also of certain policies of insurance, and had besides money in bank. In 1843 she executed a trust-assignation in favour of the Rev. David Marshall and others, whereby she conveyed to them four policies of insurance for the aggregate amount of L.1300, for the following purposes, *inter alia*:—That the trustees might

invest the proceeds that might be recovered, and pay the annual income therefrom to or for Mrs. Graham's behoof; that they might at any time pay to her the whole or such part of the capital as they should think proper; and on her death, that they should expend the free income on the maintenance of her children, and divide the principal among the children on the marriage or majority of the youngest.

Mrs. Graham died in January 1858. She was survived by her husband and by two children.

In July 1858 this action was raised by Mr. Graham and his children Andrew and Mary, and by him as tutor-at-law to his son, and as administrator-at-law to his daughter, against the trustees under the trust-assignation executed by Mrs. Graham, and under another deed of the nature of a trust-settlement, executed by her in 1857, but which, not being maintained by the trustees named in it, it is unnecessary to notice, concluding for reduction thereof, and for declarator that she had no right to alter or affect in any way the rights of the pursuers under her contract of marriage, that their rights were fixed thereby, and that in case of the defenders having obtained possession of any of the effects conveyed to them, that they should be decerned to denude in favour of the pursuers, that the pursuers might **[42]** enjoy the same for their respective rights and interests, in terms of the provisions of the contract of marriage.

The trustees under the trust-assignation of 1845 gave in defences. They pleaded; —That the policies of assurance, both by the terms of the original assignations under which they were acquired by Mrs. Graham, and by the terms of her marriage-contract, were excluded from the *jus mariti* of her husband; she was entitled to deal with them as she thought proper, and to assign them by the trust-assignation of 1845,—more especially as the purposes of the trust thereby constituted were in accordance with the destination of the assignation under which they were acquired by her, and were not prejudicial, but, on the contrary, beneficial to the interests of her children, the minor pursuers. As the said policies were validly and irredeemably transferred and delivered by Mrs. Graham during her lifetime to the defenders as trustees, and as therefore the said policies, or the proceeds thereof, did not belong to Mrs. Graham at the time of her death, they did not fall under her contract of marriage, and the action of reduction, so far as directed against the trust-assignation, was groundless.

On 19th January 1860 the Lord Ordinary pronounced an interlocutor finding "that the trust-assignation of January 1845, executed by the deceased Mrs. Graham, was a subsisting contravention of the antenuptial contract of marriage, and that the sums realised from the said policies in the hands of the trustees, or invested by them, with interest, fall under the disposition in the said antenuptial contract to the said pursuer in liferent, and to the other two pursuers in fee, but subject always to the terms and provisions of the said antenuptial contract: And therefore, in reference to the said trust-assignation, reduces, decerns, and declares, in terms of the reductive and declaratory conclusions of the summons; and with regard to the other conclusions, so far as the said trust-assignation is concerned, appoints the cause to be enrolled: Further, with reference to the trust-disposition and settlement executed by the said Mrs. Katherine Scott or Graham, on the 29th day of August 1857, which neither the trustees therein named nor any other party concerned has appeared to defend, reduces, decerns, and declares in absence, conform to the conclusions of the libel."[1]

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[1] "NOTE.—By the antenuptial contract between the pursuer Mr. Graham and his deceased wife, the latter conveyed, under certain conditions and provisions, all the property which should belong to her at her death, to her surviving husband in liferent, and to the children of the marriage in fee.

"By the trust-assignation of 31st January 1845, Mrs. Graham assigned certain policies of insurance to trustees specially named by her, in terms which, in the event of her death, set aside her husband's liferent, and materially qualified her children's fee. There can be no doubt that, assuming the property conveyed to fall under the marriage-contract, the trust-assignation is a subsisting contravention of that contract.

"The trust-assignation was maintained by the defenders to be valid, on the ground that the property comprehended in it, having been conveyed away by Mrs. Graham during her lifetime, did not fall under the description of property belonging to her at her death, and that therefore the provisions of the marriage-contract did not apply to it.

[43] On 14th July 1860 the Lord Ordinary pronounced this interlocutor:—"Finds that the defenders, the trustees of Mrs. Katherine Scott or Graham, are bound to account for the trust-funds without any deduction of expenses in this action; and, under this qualification, finds no expenses due to either party, and decerns."

The Rev. Mr. Marshall, and the other trustees who had appeared as defenders, reclaimed, and prayed the Court to alter the judgment of the Lord Ordinary, so far as to find that they were entitled to deduct from the trust-funds the expense incurred in this action.

LORD JUSTICE-CLERK.—I think this question important, because it seems to me clear, that the contention of these trustees is an entire perversion of the ordinary rule, that trustees are entitled to be relieved from expenses incurred in defending the trust-estate or the trust-deed. That that is a sound rule no one can doubt. But this case does not come under that rule at all. I do not think it necessary to inquire whether the deed of 1845, executed by Mrs. Graham during her lifetime, was a deed which, during her lifetime, might possibly have received effect. She might have been entitled to give away her estate during her lifetime, either for a consideration or gratuitously. But the Lord Ordinary has found that this trust-deed is a subsisting contravention of the antenuptial contract of marriage, and it is challenged as a standing contravention of the marriage-contract by the creditors under that contract, so that the question has been between the creditors under the antenuptial contract and parties seeking to defeat the rights of these creditors, and I confess I cannot see why, in a litigation between two such opposing parties, the ordinary rule of giving the successful party his expenses should have been departed from. But that question is not now before us, because we have no reclaiming note by the defenders. That the unsuccessful parties are called trustees does not affect my mind at all, because I must consider not only their position, but also that of the other parties who say that a wrong has been done them by the trust-assignation. That wrong has been successfully resisted, and it is proposed now that these creditors should, out of their own pockets, pay the expenses of the parties who have attempted to deprive them of what has been found to be their right. The trustees say that they are trustees for other parties, and could not safely admit the demands of these creditors. That statement might be true without affecting my opinion; and all that one could say is, that they had placed themselves in an unfortunate position by accepting the trust. But, after all, what does that statement

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"The Lord Ordinary cannot adopt this view. The trust-assignation of 1845 was a deed in favour of parties who held as Mrs. Graham's own trustees and mandatories, bound to apply the interest for her behoof, and to dispose of the principal as she should appoint. It is true that the deed contains a clause purporting to give the trustees a veto on Mrs. Graham's instructions. But this being a restriction which she voluntarily imposed on herself, it was only binding on her so long as she chose to submit to it; and the Lord Ordinary perceives nothing to have prevented her from at any time recalling the clause, or, in truth, the deed altogether. Besides, the veto was only operative during Mrs. Graham's lifetime, and did not apply 'in the event of there being any part of the trust-estate existing at my decease.' In this latter case, there was a disposal of it absolutely directed, and this in a way at variance with the provisions of the marriage-contract. The property remained entire at the time of Mrs. Graham's death; and the question simply comes to be, whether it is to be disposed of according to the direction of the trust-assignation, or according to the provisions of the marriage-contract. The Lord Ordinary entertains no doubt that it is just property belonging to Mrs. Graham at the time of her death, to which as such the onerous obligation of the marriage-contract attaches.

"It is unnecessary to consider how matters would have stood had the trustees, under Mrs. Graham's directions, alienated the property to a third party during her lifetime. Nothing of the kind occurred. The property remained at Mrs. Graham's death held for her by her mandatories, and completely within her power. It was just as to property so situated that the marriage-contract effectually tied her up from defeating its disposition by any *mortis causa* settlement. Whether the property was vested directly in herself, or in trustees who held for her behoof, and subject to her order and disposal, makes no difference in result."

amount to? It is said that they are representing the interests of those pursuers who, being minors, cannot act for themselves. But these parties are represented by their administrator-at-law. If they are not effectually represented by him, because he has an adverse interest, then, I take leave to say that these defenders have not a good judgment yet, because it is a decree in a cause with parties who are not adequately [44] protected. If the father has an adverse interest, a tutor *ad litem* should have been appointed, and the trustees would still not be safe in implementing the Lord Ordinary's interlocutor without a curator *ad litem* being appointed. But one may dismiss that view from consideration, because it is clear that the interests of the pursuers are all adverse to the contention of the trustees, and all their interests are injuriously affected by the operation of the assignation. Then it is said that the trustees represent the interests of other parties, some of whom are of age, and some of them minors. But when trustees do not see that they are in safety to defend an action, it is quite competent and not unusual that they should appeal to these parties, and say, "Do you wish us to defend this action, because, if you do, you must furnish us with funds." And nothing could be fairer than that the trustees should have so addressed Mr. Marshall and his wife, who adequately represent all these parties; and if they declined to assist the trustees, then the trustees were quite entitled to allow decree in absence to go out, and I cannot see that any after liability could attach to them. On the whole matter I think there are no grounds why these trustees should receive payment of their expenses out of the funds of parties against whom they have endeavoured to perpetrate a wrong, and with whom, for that purpose, they have litigated unsuccessfully.

LORD COWAN and LORD BENHOLME concurred.

LORD WOOD was absent.

The Court pronounced this interlocutor:—"Refuse the desire of the reclaiming note, and adhere to the interlocutor reclaimed against; Find the reclaimers liable in the expenses incurred since the date of the Lord Ordinary's interlocutor, and remit," &c.

No. 18. **XXIII. Dunlop 69.** 24 Nov. 1860. 2nd Div.—Lord Kinloch.

UNITED MUTUAL MINING and GENERAL LIFE ASSURANCE SOCIETY and Others, Pursuers.—*Young—M'Laren.*

JOHN MURRAY, Defender.—*Sol.-Gen. Maitland—Webster.*

Process—Cautioner—Relevancy—Fraud—Issues.—Averments by a defender (a cautioner), sued on a written obligation, which *held* not to amount to fraud, nor to entitle him to issues in support of a defence which the principal obligant could not have stated.

Process—Issue—Resting-Owing.—Observations (per Lord Justice-Clerk) on issues of "resting-owing."

The pursuers, an English Mutual Insurance Company and their officers and a mandatory, raised this action on a bond, by which Mr. James Murray, as principal, and John Murray (the defender) and John Frankeiss, as cautioners, became bound to pay to the society a yearly annuity of L.56, 10s.

On the institution of the society, James Murray was employed to canvass for business; and he undertook to procure insurances to the amount of L.40,000. Instead of paying him a commission, it was agreed that the society should grant him a policy of insurance on his own life, with a receipt indorsed on it for the whole premiums —the annual premiums being equal to the commission he would be entitled to on the insurances he was expected to procure. In order to secure the company, it was agreed that the bond of annuity now sued on should be granted, by which he became bound to pay [70] an annuity equal to the annual premium on his policy. It was stipulated that he might purchase up the bond of annuity by delivering up the policy, when the society would be bound to grant him a new policy for L.2000, at an annual premium of L.56, 10s.; and also that, on the specified amount of insurances being obtained, the bond of annuity should be cancelled.

It was held by the Court, on 13th June 1860, that the bond, which was not probative, had been validated *rei interventu;* and the case was remitted to the Lord Ordinary. It now came before the Inner-House on the adjustment of issues.—(See *ante*, vol. xxii. p. 1185.)

James Murray became bankrupt soon after the policy was granted. He had deposited it in the hands of London bankers as a security for money borrowed. John Frankeiss also became bankrupt.

James Murray failed to obtain business for the society, and, in consequence, payment of the annuity was demanded. It was paid up to August 1856; and the payments for the years 1852, 1855, and 1856, the pursuers alleged, were made by John Murray, whom they now sued as the only solvent party to the bond, and the only one within the jurisdiction of the Court.

In defence it was averred, that James Murray's failure to procure business for the Insurance Office arose from no want of exertion on his part, but from the insecure, fictitious, and fraudulent basis on which the society was founded, and carried on their business; that he did procure a certain amount of insurances, but the society was possessed of no capital. By the terms of the deed of constitution of the society, the directors and members incurred no personal liability, and the funds and property of the society only was liable for its obligations. It never was possessed of funds to meet its obligations; and, after struggling for some time, it was dissolved in 1857. The defender pleaded, *inter alia;*—6. No party acting fraudulently in entering into a contract was entitled to enforce the stipulations or obligations in his favour, obtained under such circumstances. (7.) Misrepresentation or concealment from the cautioner of any material fact discharged him from his engagement. (8.) As the pursuers had no funds to satisfy the obligations undertaken by them in the policy issued in favour of James Murray, they were not entitled to demand payment of the sum concluded for, which formed the counter consideration for the sum insured by that policy. (9.) The association being dissolved, the pursuers are not in a situation to fulfil the undertaking, to grant a new policy on having the existing one surrendered and given up; and not being in a position enabling them to fulfil their own engagements, they were not entitled to insist for fulfilment of any counter stipulations or undertakings.

The Lord Ordinary having ordered issues, the following was *pro forma* lodged by the pursuers, who, however, contended that they were not bound to take any issue:—"Whether the defender is indebted and resting-owing to the pursuers in the sum of L.56, 10s., as a year's annuity, due on the 19th August 1857, under the bond or grant of annuity, No. 11 of process, with interest from said date?"

The defender proposed the following counter-issues:—"1. Whether the document, No. 11 of process, was entered into by the parties, upon the mutual understanding and agreement that the annuity therein mentioned should be payable only so long as James Murray, the first party thereto, should not have procured insurances on lives to the extent of L.40,000 or thereby, to be effected with the said United Mutual Mining and General Life Assurance Society; and whether the said society held out to the defender and to the public, that it was in a situation to undertake insurances on lives to the foresaid or other considerable extent; and whether the said society was not, at the date of the said document, and never was thereafter, in a situation to undertake, in good faith, insurances on lives to the extent of L.40,000, or to any considerable amount? 2. Whether the [71] said United Mutual Mining and General Life Assurance Society has ceased to exist as a company carrying on business, and is not in a situation to grant an effectual policy of insurance for L.2000 on the life of the said James Murray, at or under the annual premium of L.56, 10s., in conformity to the covenant or obligation to that effect contained in the said document No. 11 of process? 3. Whether the said James Murray procured for the pursuers insurances on lives to the amount of L.10,000, or any, and what part thereof?"

Parties having failed to adjust issues, the Lord Ordinary, by interlocutor dated 18th July 1860, reported the case.[1]

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[1] After a statement of the circumstances, the note proceeded:—"The pursuers now sue on the bond for the year's annuity, due on 19th August 1857. They have, *pro forma*, lodged an issue, putting the simple question of debt; but they suggested that an issue was unnecessary on their part, and that, if any inquiry was allowed in

LORD JUSTICE-CLERK.—My Lords, this case is reported on issues by the Lord Ordinary, and the first so-called issue is said to be proposed by the pursuer; but it has been explained that the pursuer does not insist on that issue, and the defender does not maintain that the pursuer is bound to take an issue. The pursuer could certainly never have taken this issue, for resting-owing is, in every case, [72] the inference from the grounds of action; it is the proper subject of the conclusions of the action; and what is to be put in issue is the ground of action, from which is derived the inference that forms the conclusion of the summons. Therefore, what is called an issue of resting-owing is not properly an issue at all, being extracted from the conclusions, instead of the condescendence and pleas in law, where only the grounds of action are found.

As to the issues proposed for the defender, it is not at first sight easy to apprehend what the defender's case is; but I am prepared to say that, in his statement of facts and pleas in law, there is no relevant ground of defence. The nature of the transaction, as set forth, is this:—A number of gentlemen constituted themselves into an insurance society, and, in order to set their scheme afloat, they desired to secure the services of gentlemen who had influence, to bring business to the office of the society; and accordingly they arranged with Mr. Murray that, within one year, he should procure them a certain amount of insurances, for which, in the ordinary course of business, he would be entitled to a considerable commission; but, instead of giving him a commission, they agreed to grant him a free policy for L.2000—that is, a policy for L.2000, having

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defence, the defender should stand pursuer of the issue. The Lord Ordinary concurred in this view. The case of the pursuers is established by the bond. Any case remaining for inquiry is the case of the defender; and it appears only reasonable that the defender should open his case, as pursuer of the issue, before the pursuers can be called on to reply to it.

"But the question has arisen, whether the defender can be allowed the issues proposed by him, or any other issues, under the present record. The Lord Ordinary has great doubts whether any issue can be allowed him.

"What he primarily proposes to put in issue is an alleged incapacity, both originally and now, on the part of the pursuers, to meet their alleged counter-obligations, for want of pecuniary means. The Lord Ordinary can remember no precedent for an issue like this; and on principle it appears objectionable. Where a party cannot say that he was induced to enter into the contract by fraudulent misrepresentations, or in essential error, he is presumed to know, and to be satisfied with, the condition of the other contracting party, and to take his risk of him. To allow him afterwards to suspend performance of his own liquid obligation, on an inquiry into the pecuniary capacity of the other party to fulfil his counter-prestations, would open the door to interminable litigation. The very nature of the inquiry is such as would, in most cases, admit of no definite or satisfactory result. Incapacity to fulfil is, generally speaking, only to be inferred from a demand, and failure when the time of fulfilment comes.

"If the defender averred (and this is, perhaps, what he really points at) that he was induced to enter into the contract by misrepresentations as to the character and means of the company with which he was contracting, he might conceivably get quit of his obligation on the ground of either fraud or error. But his proposed issues are, in any proper sense, neither on fraud nor error. And the plea on either ground could, perhaps, only be effectually stated in a formal reduction of the contract.

"With regard to the last issue, which proposes to ask, 'whether the said James Murray procured for the pursuers insurances on lives to the amount of L.10,000, or any and what part thereof?' it appears to the Lord Ordinary that the record affords no ground for it. It is apparently not disputed that the policy was to be granted or kept up free of premiums (in other words, the bond of annuity to be cancelled) in the event of James Murray procuring, within twelve months, insurances to the extent of L.40,000. But it does not appear even to be averred that a partial reduction of the premium was to follow on a partial acquisition of business. The proposed issue is pointless as regards the case on record.

"It will deserve consideration, either now or at the trial, if such be granted, whether the written bond of annuity libelled can be qualified or affected in our courts by any alleged agreement not constituted by writ."

indorsed on it a receipt for the whole amount of premiums payable on it. The policy was delivered to Mr. Murray, and formed a piece of property which he was entitled to sell and assign, or pledge. It was a policy of insurance, on which all the premiums had been paid up, which is always a subject of value in the market; and, in return for that, Mr. Murray granted a bond of annuity for L.56, 10s., which is equivalent to the annual premium which would have been payable on the policy; and, so far as the instruments before us go, that is all we know as to the understanding between the parties. But there are admissions by the pursuers, and beyond these admissions we cannot go in determining the nature of these transactions, because we cannot allow the written instruments to be qualified by parole evidence. The pursuers admit that it was agreed that the bond of annuity was to be cancelled, and the policy to become Mr. Murray's free property, if he procured for the society insurances to the amount of L.40,000 within twelve months. It is admitted, on the other hand, that he did not procure these insurances; and his averment and explanation of that matter is, that during the first twelve months of its existence the company was not in sufficient credit and position to enable him to procure insurances to that amount. But of that contingency he took the risk. He took the risk of being unable to induce his friends to insure with the company, and of the possible want of success and reputation of this infant concern during the year in which it was formed; and whether it would have sufficient success and reputation, was a matter as to which there was the greatest possible doubt. It is stated that the society started with no capital; but, from the very nature of its constitution as a mutual insurance society, it could not have any capital. The capital of such a society arises from payment of premiums, and, therefore, it never can have any capital till it obtains business. It is, therefore, out of the question to say that, because it had no capital, it had no credit, which again it could not be expected to have, because, by the constitution of the society, no member was individually responsible; and it would have been a fraudulent misrepresentation had it been pretended that it had either capital or credit in any proper sense of these terms. Then the duty of the partners, and of Mr. Murray, not only as a partner, which he was as a policy holder, but also as a party under an express obligation to procure insurances, was to do all in his power to foster the infancy of this company, and to promote its reputation; and he says that he failed, and that the company—that is, the partners of the society other than himself—equally failed in procuring such support as would launch the vessel in complete and perfect condition.

But that is not such a statement as will amount to an averment of fraud, on the part of the other policy holders, any more than on his own part. He is one of the policy holders, and any fraud which was committed by these policy holders would be such as he, as a policy holder, was participant in. The averments of the defender, therefore, come to nothing at all; they seem to be made in forgetfulness of the nature of this institution, and of the transaction in which Mr. Murray was engaged. Had this been a proprietary office, and the company fraudulently represented to Murray that they had a large capital, and so induced him to enter into the transaction, that would have been a different case. Although, if it were averred that the contract [73] had been induced by such false representations, I should think that could not be made the ground of defence without a reduction. But here the matter is very different, and the whole averments of the defender amount to no more than that this was a scheme for setting up a mutual insurance society, of which Mr. Murray is a member, and just as much involved in the prosperity and credit, and fair dealing of the society, as any one else. And the arrangement which he made with his co-partners was, that his policy was to be free, but that he was to be under an obligation to pay an annuity to the company equal to the amount of the premium, unless within twelve months he procured insurances to the amount of L.40,000, and if he did not, the policy and the bond were both to remain uncancelled. It has turned out that this Mutual Insurance Society has met with so little success that it has been obliged to give up business. But that is a contingency which must be held to have been in the view of parties, and when it occurs, the concern must be managed so as to give the whole partners a fair return from the assets of the society, so far as they will go, and according to a fair and equitable principle of distribution.

The cautioners cannot, it appears to me, stand in a better position than the principal, and I cannot see on what equitable grounds they can be relieved. If the

principal obligant be bound to pay the annuity, there is no room for liberating the cautioners on any ground of law I am acquainted with.

LORD COWAN.—After the statement of your Lordship, I have very little to add.

I do not at all concur with the Lord Ordinary in his doubt whether the defender may not be entitled to an issue. I have no hesitation in agreeing with your Lordship in thinking he is not. This is an action for payment of an annuity for the year 1856 and 1857, under a bond which, though not a probative writ, has been validated *rei interventu*. It is as good a ground of obligation and debt as though it had been executed in terms of the Act 1681, and there is no condition in the bond which is said to entitle the defender to resist payment.

With regard to the second issue as proposed,—It is quite true that, in other circumstances, the clause in the bond entitling the defender, on surrendering the policy, to have a new policy, and to have the bond of annuity cancelled, might have given rise to a defence which, as the case stands, cannot be stated. It is impossible to recognise the right of the defender to insist in any plea founded on that stipulation, when he is admittedly not in a position to deliver up the existing policy.

There is no room for holding any difference to obtain between the position of the defender and that of the principal debtor under this bond of annuity. I see no ground for holding that the cautioner is entitled to any issue, in the circumstances of this case, which would have been refused to the principal. They are in the same situation. As the principal would not, so neither can the defender, the cautioner, be allowed an issue under which he is to be permitted to prove by parole what may entitle him to get quit of an obligation constituted by writ. Had fraud been pleaded, the matter would have been different; but that is not the nature of the defender's averments; and if fraud had been averred, the proper remedy would have been a reduction.

LORD BENHOLME concurred.

LORD WOOD was absent.

The Court pronounced this interlocutor:—"Find that the pursuers are not bound to take any issue: Disallow the issues proposed for the defender: Find that the averments of the defender afford no ground for allowing any issue: Find the pursuers entitled to expenses since the date of the interlocutor of 13th June last, and remit, &c.; and remit to the Lord Ordinary to proceed farther in the cause, with power to decern for the expenses now found due, reserving all other questions of expenses."

No. 19. **XXIII. Dunlop 74.** 30 Nov. 1860. 2nd Div.—Lord Jerviswoode.

The ABERDEEN TOWN and COUNTY BANK, Pursuers, Nominal Raisers. ISABELLA CLARK, Claimant.—*Macfarlane—Fraser—J. Hunter.*

ALEXANDER FAIRWEATHER and Others (JAMES CLARK'S Trustees), Claimants.—*Young—Gifford.*

Proof—Parole Evidence—Written Contract.—Where it was proved that parties had signed an improbative agreement for a contract of copartnery which had been acted on, *held* (1) that parole evidence was inadmissible to prove the terms of the document, it not having been proved to have been either lost or destroyed; (2) that it was incompetent to ask one of the partners what was the extent of her interest.

See *ante*, vol. xxii., p. 44.

In this multiplepoinding, in which the fund *in medio* consisted of the sum realised by the executors of the late James Clark, in payment of the debts due to, and the sale of the stock in trade, of the firm of James Clark and Co., hosiers in Aberdeen, Miss Clark, James Clark's sister, claimed repayment of advances she alleged she had made to the firm; and on the ground that she was a partner in the company, she also claimed one-half the produce of the stock-in-trade. The case (which had been tried before Lord Jerviswoode and a jury on 7th July 1860) now came before the Court on a bill of exceptions to rulings by his Lordship.

The issues were as follows—Miss Clark standing as pursuer, and her brother's trustees as defenders:—"1. Whether, from the month of November 1848, until the month of July 1857, the pursuer, Miss Clark, and her brother, the deceased James Clark, carried on business in the sale of woollen manufactures in Aberdeen, as copartners, with equal shares? 2. Whether, on or about 1st January 1849, the pursuer, Miss Clark, advanced and paid to the said copartnery, out of her own funds, the sum of L.159; and whether the said sum, or any part thereof, with interest from the date of payment, is resting-owing to the pursuer by the said copartnery?"

At the trial there was tendered in evidence for Miss Clark minutes of the trustees for the creditors of Clark and Macdonald, another firm of which James Clark was a partner; and on that firm being sequestrated, the trustees took possession of Mr. Clark's stock in his shop in Aberdeen. The minutes proved the trustees' resolution to sell James Clark's stock, and their acceptance of an offer for it by Miss Clark. There were also produced a number of accounts, receipts, bank cheques, letters, invoices, &c., showing that the business was afterwards carried on under the firm of James Clark and Company.

Miss Clark being adduced as a witness, deponed that she had received some money from her mother on her death-bed, and also saved some. "After insolvency of Clark and Macdonald we were reduced to straits; and, after consultation, my brother and I agreed that I should offer for stock in Broad Street. Made offer 4th November 1848. The firm of James Clark and Co., mentioned in offer, were my brother and myself. Duncan and Best were trustees for Clark and Macdonald. This offer by me was accepted." "Contract of copartnery between me and brother written out by Mr. Duncan. I signed it, and brother signed it also. I signed in December 1848. My brother and two others (witnesses) signed at the same time. My brother put contract into his desk in the shop. I may have seen it occasionally, and I read it about a year and a-half before brother's death. About that time, some documents in house were burnt, and papers brought up from shop also. I put the contract, and other papers which were not burnt, into a box in the house. A servant took others away to burn. I never saw contract again."

[75] The following question was then put to Miss Clark by her counsel—"What were the terms of the contract as to the interest of the partners in the concern?"

This question having been objected to, Miss Clark's counsel put in the report of a commission and diligence against havers obtained by Miss Clark, to recover a contract of copartnery between her and James Clark, and any scroll or copy thereof. Under the diligence four persons were examined:—1. John Duncan, advocate in Aberdeen, deponed,—"In one or other of the years eighteen hundred and forty-eight or eighteen hundred and forty-nine, I, at the request of James Clark, merchant in Aberdeen, made out a minute of agreement in draft as for a partnership between Clark and his sister, the pursuer. That draft was a clean copy, and could have been signed, and would have served as a principal. I gave that draft or clean copy to Clark, who took it away with him, as if to submit it to his sister. I have never seen that paper since. I do not know where that paper may now be, if it be not in the repositories of Clark." 2. Miss Clark deponed,—"I have not in my custody or possession anything which is now called for. All that I know is, that in the year in which occurred the bankruptcy of Clark and Macdonald, and in which I bought the stock of James Clark, and in the December of that year, my brother, James Clark, put into my hands a writing, which was a contract of copartnery as between him and me. I read that document and approved of it, and signed it, and returned it to my brother, who put it into his desk in the shop. At about twelve months before the death of my brother, his desk was required for the use of Adam Smith, then my brother's shopman, or rather shopman to Clark and Company, and Smith and I took out of that desk the papers contained in it. These papers were carried out of the shop to my brother's house, and submitted to him, and he looked over some of them in my presence; and, as he looked at the papers, he burned some of them, and I assisted him. At that time, I saw among the papers which had been taken out of the desk, the contract of copartnery which I have mentioned. I laid that contract with my own hands into the box in my brother's house, wherein he kept his papers; and then left the house and went back to the shop; and I have not seen that writing since, and I do not know where it now may be. On the day of my brother's funeral, the defender, David Mitchell, read my

brother's settlement in my brother's house; and the box containing my brother's papers was before him, and open. I saw Mr. Mitchell take some papers out of that box and roll them up, and take them away with him; but I do not know what these papers so taken away consisted of. Mr. Mitchell's clerk wrote out at the time what I took to be a list of the papers so taken away, but I was confused at the time, and cannot now say what papers were mentioned in that list. I remember that the list stated so many bundles of papers, and that the contract was not named in that list. I signed the minute containing the list at the time it was made." 3. Adam Smith, formerly shopman to Clark and Company, deponed,—"I have not in my custody or possession anything now called for. I do not know where any such contract or agreement, or any scroll or copy thereof, may now be; nor can I give any account of any one such writing." 4. David Mitchell, advocate in Aberdeen, mentioned in Miss Clark's deposition, deponed that he had not in his custody, and never had any of the documents called for, nor did he know where they were.

The question objected to was then repeated. The objection was sustained, and an exception taken.

John Duncan, advocate in Aberdeen, was the next witness adduced. He was one of the trustees for the creditors of Clark and Macdonald. He recollected of Miss Clark's offer to buy James Clark's stock, which the trustees agreed to. "I was instructed to prepare minute of agreement between [76] Miss Clark and her brother. I drafted in my own hand such a document. Mr. Clark got the draft from me. He never came back to me with it. I understood it had been executed, but it never came back to me. When I parted with it, there was no testing clause filled up. I never filled it up. I do not know whether it was filled up or not. The agreement was written in heads distinctly, and might have served as a principal." In cross.—"I don't think there was any part of a testing clause in the draft,—just heads of a memorandum of agreement. I understood it was signed, but it did not come back to me."

Miss Clark was then recalled, and the question previously objected to having been repeated, and an objection again sustained, Miss Clark's counsel again tendered an exception.

Miss Clark was then interrogated by her counsel,—"What was your interest or share in the copartnery between you and your brother?" This question having been objected to was also disallowed, and the ruling was also excepted to.

Miss Clark's counsel stated that, subject to the above exceptions, she did not at present insist further under the first issue, and withdrew the second issue.

The jury, as directed by the presiding Judge, returned a verdict for the defenders.

It was argued in support of the exceptions;—There was no doubt that by the documents produced the existence of a copartnery had been proved; the question to be determined under this exception was, whether the amount of the respective shares of the copartners could be proved by parole? The pursuer of the issue was doing so when met by the technical objection that the terms of the contract having been embodied in a written deed, parole evidence of the terms of the contract was inadmissible. That objection was founded on the principle, that where parties have agreed on a binding deed as evidence of their bargain, the deed itself was the only admissible evidence of the terms of their contract. But, in this case, the rule did not apply. 1st, The parties had never executed an effectual deed; they had merely signed a memorandum of agreement, which could never be set up as a good deed without *rei interventus;* it had none of the requisites of a binding deed by the law of Scotland; it was not holograph, and did not set forth the names either of the writer or of the witnesses; the tenor of such an imperfect deed could not be proved. But the pursuer was not without a remedy. This deed, though imperfect, had been made effectual by being acted on, and the tenor of it, as well as the actings of the parties, could be proved by parole, not as the contract itself, but as an item of evidence as to what the contract was. 2d, On the authority of Lord Stair, an action of proving of the tenor was unnecessary. "When writ hath been adhibited, and without the party's fault hath been lost or destroyed, in such cases witnesses cannot be rejected, either to prove the fact, where the writ is only for probation, or to prove the tenor of the writ, that it may remain for probation, or to prove the tenor where the proving of the fact will not suffice, in respect the writ is a necessary solemnity." (Inst. iv. c. 32,

sect. 2.) The exception stated by Stair was particularly to be noticed, where the case was that of a contract of copartnery, to prove which writ was not necessary. 3d, Moreover, here Miss Clark, though put in the position of pursuer of this issue, was in reality standing on the defence of her rights.[1] She did not seek to set up the contract as an effectual deed to every effect, and she merely sought to prove what would have been proved by the production of a document which, it had been made out, had disappeared while in the custody of James Clark, and to his advantage.[2] There [77] were many cases in which the tenor of a document had been allowed to be proved incidentally as part of the evidence, though not as a written constitution of an obligation.[3] The rule that secondary evidence was admissible where it was proved that better evidence was not attainable, had been admitted with reference to almost every kind of document, and there was no sound principle for excluding from the rule a document such as the draft of a contract of copartnery. There was nothing in the record which could exclude the existence of a written contract of copartnery, and it was not necessary to set the draft contract forth on the record, it not being the ground of Miss Clark's claim. It might be that proof of such a contract was objectionable on the ground of surprise; but though that was a ground for a new trial, it was not a ground for an exception.

LORD JUSTICE-CLERK.—Two issues were appointed for the trial of this cause, but at the trial one of these (the second) was withdrawn from the jury, and the other alone remained to be disposed of. Under the first issue the pursuer undertook to prove two substantial matters of fact—in the first place, that she and her brother, the deceased James Clark, carried on business, as partners, in the sale of woollen manufactures; and, in the second place, that their shares in the concern were equal. Now, in the course of the pursuer's case, the first witness that was examined was the pursuer herself; and in the course of her examination by her own counsel, after explaining the manner in which she had purchased the bankrupt stock of the former firm of Clark and Macdonald, by means of funds belonging to herself, she makes this statement in answer to the questions of her counsel,—"The contract of copartnery between me and my brother written out by Mr. Duncan. I signed it, and brother signed it also. I signed in December 1848. My brother and two others, witnesses, signed at the same time. My brother put contract into his desk in the shop. I may have seen it occasionally, and I read it about a year and a half before brother's death. About that time some documents in house were burnt, and papers brought up from shop also. I put the contract, and other papers which were not burnt, into a box in the house. A servant took others away to burn. I never saw contract again." Now, by means of this examination, the pursuer proved that there was a written contract of copartnery between herself and her brother. A question is then proposed and objected to, but it is unnecessary to notice it in the meantime, because there was some further evidence given before a deliverance by the presiding Judge was taken upon its competency. The object of the question, however, it must be borne in mind, was to prove the terms of that written contract, the existence of which had been made matter of evidence by the pursuer. I think it not immaterial to observe, that the existence of the written contract was not brought out by the defender, but, on the contrary, was made part of the pursuer's case. Her counsel next proceeded to put in certain depositions of havers, with a view to the question he was about to put, which depositions were put in for the purpose, as I understand, of proving that an attempt had been made, in the course of the process, to recover the written contract, without success. And it is only necessary to advert very shortly to the terms of these depositions. They were not evidence to go to the jury of anything whatever; but they are evidence to the presiding Judge and to the Court now, and it is competent to the presiding Judge and to the Court now, to read the

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[1] Moderator of Synod of Merse *v.* Scott, 21st Feb. 1753, M., p. 15,823.

[2] Seton *v.* Paterson, 17th June 1766, *v.* Br. Sup. p. 924; Fisher *v.* Smith, 23d Nov. 1771, M. p. 9366; Ross *v.* Fisher, 28th Feb. 1833, xi. Sh. & D. p. 467; Dickson on Evidence, p. 651; Tait on Evidence, pp. 213, 214.

[3] Paris *v.* Smith, 5th March 1823, iii. Murray, p. 335; Mitchell *v.* Berwick, 4th Feb. 1845, *ante*, vol. vii. p. 428; Millar *v.* Fraser, 25th Oct. 1825, iv. Murray, p. 114.

depositions, for the purpose of seeing what means were taken to recover the contract, which was not then before the Court or the jury, and which neither party was in a condition to produce.

The first haver examined was Mr. Duncan, a man of business in Aberdeen, who seems to have acted for both the brother and sister in the matter of this copartnery. He is asked to produce the contract, and he says that he has it not. But he says that, in 1848 or 1849, at the request of James Clark, he made out a minute of agreement in draft, as for a partnership between Clark and his sister, [78] the pursuer, and that draft was a clean copy which could have been signed, and would have served as a principal. "I gave that draft or clean copy (he says) to Clark, who took it away with him, as if to submit it to his sister." Now, your Lordships will observe that nothing is proved by this except the existence of that which, according to the evidence of the pursuer, was subsequently made the contract, by being signed as a principal, and the fact that it was given by Duncan to Clark. But, as we have the contract further accounted for afterwards in the evidence of the pursuer herself, it does not appear to me that Mr. Duncan's deposition is of any use, except to show that he has it not in his possession. Then it is unnecessary to say much about what the pursuer herself says, when examined as a haver, because, of course, in so far as that was material, she had an opportunity of repeating it on her examination as a witness at the trial, and should have done so if it was intended to be made use of. But it is only fair to observe, that she does say, at the end of her deposition as a haver, that a Mr. David Mitchell took charge of her brother's affairs and his papers at the time of his death, and she says that the box containing her brother's papers was before him, and he read the settlement at the meeting of the friends after the funeral; that she saw him "take some papers out of that box, and roll them up, and take them away with him; but I do not know what these papers so taken away consisted of. Mr. Mitchell's clerk wrote out at the time what I took to be a list of the papers so taken away; but I was confused at the time, and cannot now say what papers were mentioned in that list. I remember that the list stated so many bundles of papers, and that the contract was not named in that list. I signed the minute containing the list at the time it was made." The deposition of Adam Smith I pass over altogether as having no bearing upon this matter, as far as I can see. I do not see why he should have been supposed to have this contract in his possession, or why he was examined as a haver at all. But there remains the deposition of Mr. David Mitchell, who is one of the defenders, being, as I understand, one of the trustees of James Clark; and, when he is asked to produce the contract, or any minute of agreement, or scroll thereof, he says, "I have not in my custody or possession anything now called for. I never saw any one such document, and can give no account of its existence, or of where it may now be."

In that state of the evidence, the question proposed to be put by the pursuer's counsel was this, "What were the terms of the contract as to the interest of the partners in the concern?" Now it must be quite obvious that this is a proposal to prove the contents or tenor of a written instrument by parole; and that is objected to, and the Lord Ordinary rejects this evidence, and refuses to allow the question to be put. Certain objections were stated by the defenders, and recorded in this bill of exceptions, which I find it quite unnecessary to dispose of. I do not care whether they are well or ill-founded, because it appears to me that the true question for consideration is, whether the Lord Ordinary did right or wrong in rejecting the evidence. And I am humbly of opinion that he did right, and could do nothing but what he did, and I shall state to your Lordships the ground of that opinion in a very few words. I think it is not proved by the evidence which I have run over, that that contract is not in existence and accessible. I think there is nothing like satisfactory evidence to prove, that it is either non-existent or inaccessible. All that the pursuer says, on the matter is (and this is the important thing), that the last time she saw the contract, she put it into a box with other papers in the house—that is to say, in the house in which she and her brother lived, and which, as I understand, was in connection with the shop which they also jointly occupied. Now, that certainly does not put the contract out of the possession of the pursuer. It was just as much in her possession as in the possession of her brother. Then what more do we hear about it? We never hear anything about it after that. We do hear, indeed, that Mr. Mitchell, as acting for the trustees of James Clark, took possession of his papers on the occasion of his death.

We hear of a box which contained his papers being taken possession of by Mr. Mitchell, of a bundle of papers being taken away, and of a list of these papers being made; and does not all that suggest at once to the mind of anybody who is examining into the existence or non-existence of this written instrument, means of tracing it? What has become of the box? what has become of the bundle of papers? what has become of the list? Not one of all these things is examined into or accounted for in the slightest degree. All that is done is to ask Mr. Mitchell [79] as a haver, Have you got the contract? Oh! no, I never saw such a thing in my life, he says; and there the inquiry stops. Now, it appears to me that it is the duty of a party who is going to avail himself of the extraordinary privilege of substituting parole for written evidence,—of proving by parole the terms of a written contract between the two parties whose interests are involved in this issue,—to prove, by the best evidence which he can procure, that the contract is not in existence, and cannot be had; and I think that duty is not discharged, nor anything like discharged, by the loose proceeding which was here adopted. And, therefore, as I said before, I have no doubt whatever that the presiding Judge did quite right in refusing to admit this evidence, because it was parole, to prove the contents of a written instrument, the destruction of which was not proved, and the impossibility of obtaining and producing which was not instructed. So much for the first exception.

But then the counsel for the pursuer endeavoured to make his case better for the admission of such parole and secondary evidence; and it was quite right and proper that he should endeavour to do so. Nothing is more legitimate than that. He examines the pursuer further, and she says, "After contract was signed, it was put into the desk in the shop. Nothing was added to it after it was signed. There were some alterations made on it before it was signed." She is then asked in cross, a question to which she answers,—"We carried on business under that contract till my brother's death." Then Mr. Duncan is examined as a witness; and he says that Clark got the draft of the contract, and never came back to him with it. "I understood it had been executed, but it never came back to me. When I parted with it, there was no testing-clause filled up. I never filled it up. I do not know whether it was filled up or not. The agreement was written in heads distinctly, and might have served as a principal." He is cross-examined, and says, "I do not think there was any part of a testing-clause in the draft; just heads of a memorandum of agreement. I understood it was signed, but it did not come back to me."

Now, in that state of the evidence, the counsel for the pursuer again proposed to put the same question as he had done before—that is to say, he proposed to ask the pursuer as a witness what were the terms of the contract as to the interest of the partners in the concern? The alteration which had taken place, in the meantime, between the position of the case when the question was first put, and its position when the question was now again proposed, seems to me to be simply this, that it had been in the interval proved—I do not say that it is very clearly proved, but I shall take it as proved—that the testing-clause of that contract had never been filled up; or, in other words, that there was no testing-clause. It was written by the hand of Mr. John Duncan; and therefore it could not be, in any sense, a holograph writing of either of the parties; and so being written by Mr. Duncan, and not tested, it must be taken to be an improbative instrument as far as the evidence goes. But then it had also been brought out in evidence before this question was repeated, that, under that contract, the brother and sister carried on business. And so there was *rei interventus* on the contract, which made it a binding instrument between the parties; and, as it was a binding instrument between the parties, it was the only thing that could either regulate or prove the shares of the pursuers in the concern; and thus it appears to me that the case remained in effect exactly where it was before, notwithstanding of this additional evidence. There was still proved to be in existence a written contract of copartnery between the brother and sister, and an effectual written contract of copartnery, no doubt made effectual *rei interventu*, and not because the instrument was probative itself, but not for that reason a bit the less an effectual written contract of copartnery. And the rule, that you cannot prove the contents of a written instrument by parole, is just as clearly applicable, according to all the authorities, to an instrument that is validated *rei interventu*, as to an instrument that is originally probative. Therefore it appears to me, that, when this question was again repeated,

the presiding Judge was right in rejecting the evidence, upon the very same ground that he was when he rejected it in the first instance.

But that question having been rejected again, the counsel for the pursuer then proceeds to put his question a third time; and there certainly is very considerable ingenuity in the terms of this third question. He says to the witness, "What was your interest or share in the copartnery between you and your brother?" [80] Now, that in itself is not apparently an incompetent question to put to a witness. And if we had never heard anything about the written contract—if there had been no previous evidence in the case—and nothing before the Judge and the jury but the issue which was to be tried, viz., whether they carried on business in the sale of woollen manufactures as copartners, with equal shares, there would have been nothing on the face of the question to render it incompetent or objectionable. But unfortunately that which goes before had established, that there was a written contract of copartnery between the brother and sister, under which they had acted, and which written contract of copartnery, therefore, was, so long as it existed, the only competent evidence of what the shares of the partners were. And the objection to this question, therefore, came to be, not that it was in itself an objectionable question, but that it was an objectionable question because the shares of each of the partners were regulated by the written contract, which was therefore the only competent evidence of what the shares were. And, therefore, I think the third question, though it stands in a somewhat different position from the others, is liable to an equally fatal objection, and that the presiding Judge did quite right in rejecting that evidence also. On these grounds I am for disallowing the exceptions.

LORD COWAN.—The only question before us regards the correctness of the ruling by the presiding Judge, in holding inadmissible the questions set out in the bill of exceptions. I understand that ruling to have proceeded on the footing, that the object and effect of the questions were to make out the contents of a written contract, not sufficiently shown by the evidence to be lost or inaccessible. I take that to be the ground on which your Lordship's opinion proceeded; and, as you have so fully stated the views upon which we came to be at one on that matter in consultation, I think it would be an unnecessary waste of the time of the Court were I again to go over those grounds of judgment. But I must add, that the opinion which I have formed, and I believe which your Lordship has formed also, depends in no respect upon this, that, had evidence been otherwise competent to the effect sought on the part of the pursuer, an action of proving of the tenor would have been necessary, and that a decree of proving of the tenor not being produced, was an obstacle to leading such evidence. It does not appear to me that any such proving of the tenor was necessary. But, then, I cannot look to the questions here put—and I am speaking of the whole three questions—in any other light than as an attempt to rear up by parole the contents of a written document not sufficiently established to be lost or to be inaccessible.

LORD BENHOLME concurred.

LORD WOOD was absent.

The Court disallowed the exceptions, and found the defenders entitled to the expense of discussing the bill.

No. 21. **XXIII. Dunlop 85.** 30 Nov. 1860. 2nd Div.—Lord Kinloch.

PETER BRUCE, Suspender.—*Fraser—Mair.*

THOMAS LINTON and ALEXANDER M'DOUGALL, Respondents.—*Young—Gifford.*

Jurisdiction—Police-Court—Adjournment—Conviction—Suspension—Stats. 9 Geo. IV., c. 58; 16 & 17 Vict., c. 67.—In a prosecution under a statute conferring on magistrates power to grant warrant to apprehend a party complained on, and "adjourn the hearing of such complaint to a subsequent day to be by them at that time appointed," a magistrate, after the hearing had commenced, adjourned four times,—on

the occasion of the first adjournment granting warrant to commit the party to prison till he found caution to attend all future diets of Court. Caution to that effect was found. *Held* (1.) that the warrant of imprisonment and demand of caution were illegal, but did not vitiate the subsequent conviction; and (2.) (*alt.* judgment of Lord Kinloch) that it was within the discretion of the magistrate to adjourn the case for such periods as he might consider necessary; and that the exercise of that power not having been such as, in the circumstances, to amount to oppression, it was not a ground for suspending the conviction.

[86] Peter Bruce, designed as formerly tavern-keeper, now coffee-house and lodging-house keeper, and presently prisoner in the prison of Edinburgh, brought this suspension of a warrant of imprisonment granted by the Judge in the Police-court of Edinburgh, whereby, in default of payment of a penalty for a contravention of the Act 16 & 17 Vict. c. 67, by selling or bartering spirits without a license, the suspender was sentenced to imprisonment. The conviction was obtained in the following circumstances:—On 22d August 1859, Mr. Linton, the superintendent of police for the city of Edinburgh, and public prosecutor in the Police-court of the city, presented a complaint in the form prescribed by the Act 16 & 17 Vict. c. 67, being that provided by the previous Act 9 Geo. IV. c. 58, against the suspender, addressed to "The Honourable the Judge of the Police-court, Edinburgh;" and, on the same day, obtained a warrant to apprehend the suspender, and to cite witnesses and havers. On the morning of the 23d August, he was apprehended by two police-officers or constables, and locked up in one of the cells of the police-office. He was afterwards, on the same day, taken to the Police-court, where he was charged on the complaint. The complainer had no witnesses in attendance, and the case was adjourned till next day; and a warrant granted to commit the suspender to the cells of the police-office until he should find caution to the amount of L.20 to attend next day, and at all future diets of Court. The suspender found caution, and was liberated. On the 24th August the suspender appeared, and having denied the charge, witnesses were examined by the respondent to prove his guilt of the particular offence charged, and also that he had been twice previously convicted of similar offences, viz., on 17th July 1857 and 10th June 1858. The suspender craved an adjournment, in order that he might have an opportunity of examining witnesses in his defence. His request was granted, and the case was adjourned till the following day. On 25th August the case was again called. The suspender then adduced witnesses to prove, that prior to the convictions libelled on, he had been twice convicted of the same offence; and the suspender on that evidence raised the plea, that he having been convicted of a third offence on 17th July 1857, and as the Act gave power to try and convict for three offences only, he could not a second time be charged or convicted of a third offence. The case was then adjourned till 8th September. On that day the case was again continued till 29th September. On 29th September the Judge found the charge proved, and therefore convicted the suspender as for a third offence, and found him liable in the sum of L.30 of penalty, and adjudged him to pay one-half to Linton, the prosecutor, and the remainder to Alexander M'Dougall, treasurer of the Royal Infirmary of Edinburgh, for behoof of that institution; and, in default of immediate payment, granted warrant for the suspender's imprisonment for four calendar months. On this warrant the suspender was imprisoned, and remained in prison until liberated by the Lord Ordinary on the Bills, on finding caution to the amount of L.20 to return to jail to fulfil the remainder of the sentence. This suspension called both Mr. Linton and Mr. M'Dougall as respondents.

The suspender averred that the conviction was illegal for the following reasons:—The complaint was addressed to the judge of the Police-court of Edinburgh. The Act of 9 Geo. IV. c. 58 only specifying the Sheriff, Justice of Peace, and Burgh Courts, the complaint should have set forth the statute, if any, conferring jurisdiction on the judge of the Police-court to entertain the complaint. The respondent did not libel the Act 9 Geo. IV. c. 58, by which penalties were imposed for selling spirits without a certificate, and by which prosecutions for such penalties were authorised, the statute 16 & 17 Vict. c. 67 being a mere amendment on that Act, and did not in itself impose penalties for selling spirits without a certificate, or contain any provision authorising prosecution for such penalties. **[87]** The complaint was irrelevant, in respect it did

not set forth whether the suspender had been guilty of selling or of bartering spirits, the party to whom the spirits were sold or bartered, and the kind of spirits. The warrant granted on the complaint did not specify the time when or place where the suspender was to be brought to answer to the complaint as required by the statute; it contained no warrant for serving a copy on the suspender, and no copy was served on him in terms of the statute. The detention of the suspender in the police cells after he was apprehended was oppressive, and it was also illegal to commit the suspender to the police cells till he found bail; there was no warrant in the statute for such procedure. The four adjournments of the case were also illegal, and without statutory warrant. The suspender's evidence tendered in his defence was illegally rejected. The sentence or conviction was false, *in essentialibus*, and therefore null, in respect it bore that the conviction was for a third offence, it being known to the prosecutor that it was the suspender's fifth offence, he having been four times previously convicted. The conviction was ambiguous and uncertain, in respect it did not set forth whether the suspender was convicted of bartering or of selling spirits. The Act did not empower the judge to pronounce at the same time, and combine in one record, a conviction and a warrant of imprisonment; according to the Act and the schedule, the conviction and warrant of imprisonment require to be separate. On these grounds, it was pleaded, that the whole proceedings were groundless, harsh, and oppressive.

It was averred for the respondent, with reference to the adjournments, which was the only ground of suspension dealt with by the Court—(cond. 8th)—the Judge, on 25th August, after hearing an argument by the suspender's agent, on his plea that there was no warrant in the statute for any conviction after a third, "adjourned the case, that he might have an opportunity of deliberately considering the point thus raised, the suspender in the meantime being left at perfect liberty."

On 20th March 1860 the Lord Ordinary pronounced this interlocutor:—"Finds that the diet of 29th September 1859, at which the judgment complained of was pronounced, was an illegal and incompetent adjournment from previous diets: Therefore, suspends the said judgment, conviction, sentence, and warrant of imprisonment, and proceedings following thereon, and decerns: Finds the suspender entitled to expenses: Allows an account," &c.[1]

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[1] "NOTE.—There is one ground of suspension which appeared to the Lord Ordinary sufficient to quash the conviction now in question. It is, therefore, unnecessary that he offer any opinion on the other pleas of the suspender.

"The case is one of penal charge. The suspender has been convicted of an offence, and sentenced to pay a fine of L.30, and, in default of payment, to imprisonment for four months. The Lord Ordinary can by no means assent to the doctrine, urged on him by the respondent, that the process is to be regarded as a mere civil action for debt. Though, in consequence of the crime being statutory, and the penalty in the first instance pecuniary, the jurisdiction of review belongs to the Civil Courts, the case is, in its essence, a criminal prosecution; and the law must afford to the accused the safeguards proper to such a case.

"The suspender was apprehended on 23d August 1859, under a complaint at the instance of the respondent. Beneath the Act 9 Geo. IV., cap. 58, the proceedings in such a case commenced by simple citation; but this probably was found at times ineffectual to secure the attendance of the accused; and the Act 16 & 17 Vict., cap. 67, authorised the proceedings to be originated by personal apprehension; and such was resorted to in the case of the suspender. It scarcely requires to be said, that there arose all the greater necessity for having the proceedings brought to a close as speedily as possible; for the Lord Ordinary does not doubt, that the power of apprehension implied a power of detention till the trial should be brought to an end.

"The suspender was carried before the Judge of the Police-court of Edinburgh, who, under the Edinburgh Municipality Extension Act, 1856, had unquestionable jurisdiction to try the case.

"By the 23rd section of the 9th Geo. IV. (by which statute the proceedings in the trial are regulated) it is enacted that, at the time and place at which the accused is brought before him, the magistrate shall 'inquire into the truth of the

[88] The respondents reclaimed, and argued;—The view expressed in the note of the Lord Ordinary was correct, that power to adjourn was conferred by [89] the statute. There was no doubt that the first was necessary, and the second, at the request of the

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allegations in the complaint;' but the following provision is subjoined:—'Provided always, that if such Sheriff, Bailie, or Justices shall see cause, it shall be lawful to adjourn the hearing of such complaint to a subsequent day, to be by them at that time appointed.'

"A question has been raised, whether, under this provision, there can competently be more than one adjournment. It is perhaps unnecessary, in the present case, absolutely to decide this question. The statute evidently contemplated that one adjournment might prove sufficient. It imports, at the very least, that unless for good cause, the trial should be then finished. It must at once be manifest, that nothing could be further from the policy of the statute, and its fairly presumable intendment, than a succession of adjournments, without cause or reason, at the mere caprice of the judge.

"The magistrate, in the present case, found it necessary to adjourn the case till next day, probably to enable the prosecutor to bring his witnesses, whom he could not be expected to have ready at whatever moment he might succeed in apprehending the accused. Such adjournment was clearly competent.

"But the judgment expressing the adjournment contains a farther order, of a greatly more doubtful character. The judgment runs thus:—'Edinburgh, 23d August 1859. —Continues the diet till to-morrow at ten o'clock forenoon; and grants warrant to officers of police for committing the said Peter Bruce to the cells of the Police-office of Edinburgh, therein to be detained until he finds sufficient caution acted in the books of court, under a penalty of L.20 sterling for his appearance at that and all future diets of Court.' This is not a simple order for detention till the adjourned diet. Neither is it an order for liberation on bail offered and accepted. It is substantially a warrant for incarceration for the indefinite period elapsing till bail be found. The bail is fixed at L.20, not a very light sum for a person in the suspender's position; and the bail is not for appearance at the adjourned diet of next day, but 'for his appearance at that and all future diets of court.'

"In the view of the Lord Ordinary this was an irregular order; and, either considered by itself, or in combination with the after adjournments, the circumstance of the warrant being granted comes, in the Lord Ordinary's opinion, to have an important bearing on the case.

"The suspender found bail under this order, and was liberated. But his doing so, under the compulsion of the warrant, cannot, as the Lord Ordinary conceives, exclude him from now maintaining its illegality.

"On the following day, the 24th, witnesses were examined in support of the complaint; and the record bears:—'Continues the diet till to-morrow at ten o'clock forenoon, for proof on the part of the said Peter Bruce.'

"Whatever may be the construction of the statute on the matter of adjournment, it would be difficult for the suspender to found any challenge of the conviction on this second adjournment, considered by itself. The object of the adjournment was to enable him to lead proof in exculpation; and, after taking advantage of the adjournment for this purpose, the Lord Ordinary could not permit the suspender to turn round and object to its competency.

"But the next day, being the 25th, the proof in exculpation was led: the proceedings in the case were terminated on both sides: and nothing remained but for the magistrate to pronounce judgment.

"This, it was to be expected, he would immediately have done; but, in place of judgment, the record contains nothing but a fresh adjournment for fourteen days, without the assignment of cause or reason of any sort:—'Edinburgh, 25th August 1859.—The judge continues the diet till the 8th day of September next, at ten o'clock forenoon.'

"This continuance of the diet inferred a compulsory prolongation of the endurance of the bail-bond, by which alone the suspender was protected all the while from detention in prison.

"On the 8th September, the record again bears nothing but another causeless

suspender, was unobjectionable. During the [90] adjournments, it was necessary that the judge should have power to detain; because, although the Act gave power to proceed in absence of the party complained on at the first diet, there was no such

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adjournment for three weeks:—'Edinburgh, 8th September 1859.—The judge continues the diet until the 29th day of September current, at ten o'clock forenoon.'

"On the 29th September the sentence is pronounced, and, perhaps in accordance with the previous irregularities, it bears on its face what is not strictly accurate, that all the proceedings in the case took place on that date:—'At Edinburgh, the 29th September 1859 years,—In presence of Thomas Russell, Esquire, Judge of the Police Court of Edinburgh, compeared Peter Bruce, and the complaint being read over to him, he denied the same, but it was proved against him by the oaths of Daniel Banks,' &c., 'And therefore the said judge convicts the said Peter Bruce,' &c.

"It appears to the Lord Ordinary that these proceedings of adjournment were incompetent and illegal; and the inference, as he thinks, follows, that the sentence being pronounced at an incompetent adjournment, is itself incompetent and invalid.

"It may, or may not be, that the statute gives the power of adjourning more than once. But, according to the view of the Lord Ordinary, neither the statute nor the common law, which speaks when the statute is silent, permits an adjournment without sufficient cause. An adjournment at the mere caprice of the judge appears to the Lord Ordinary clearly inadmissible. If one such adjournment be competent, two or any number are equally so; and thus, by a mere exercise of arbitrary will, the accused may, for any length of time, be kept with the charge hanging over him, untried, and, if innocent, unacquitted.

"The record of the proceedings assigns no reason for these last two adjournments; and this perhaps is sufficient to warrant their being held causeless. But, even during the discussion before him, the Lord Ordinary had no reason stated, which could bear a moment's examination. It is said in the 8th statement of the revised answers, that the magistrate 'adjourned the case that he might have the opportunity of deliberately considering the point raised.' The Lord Ordinary cannot accept this excuse. The magistrate who tries such a case should be able to decide it at once, and without the necessity of five weeks' prolonged meditation. The Queen's subjects must not remain under trial till the judge learn the law.

"It is said that the adjournment must be held to have been consented to by the suspender, and therefore cannot be now impeached. But this has no other meaning than that the suspender passively submitted to what he could not help. There is no consent interposed on the record; and it is not necessary to show a formal protest at the time to warrant the challenge of an illegal act.

"But the adjournments cannot be regarded by themselves merely. They must be viewed in connection with the fact, that the accused was all the while under a stringent bail-bond, framed so as to cover an indefinite number of adjournments, and yet capable of being forfeited by non-attendance at any one of them. This, in the view of the Lord Ordinary, renders the adjournments peculiarly objectionable. The accused was all the while under an irregular and unwarrantable detention. Indeed, the question must perhaps be treated as if he was in prison all the time, for the bail-bond was the substitute for detention in prison. The hardship was of course less. But, as to the competency of the adjournment, it makes no difference in principle whether the detention was actual or constructive merely.

"The chief argument for the respondent was, that such adjournments were immaterial, unless they amounted to oppression, which in this case, it was said, they could not do, as the man was not actually in prison. The Lord Ordinary is not satisfied that the question is thus convertible. Nor, if it were so, is he prepared to remove the proceedings from the legal category of oppression. Different minds may entertain different ideas of what constitutes oppression; for, in different minds there is a different extent of sensibility to the well-being of others. To keep an accused person, with the charge hanging over him, whilst the case is adjourned from week to week, it may be from month to month, at the mere caprice or for the personal convenience of the magistrate, the accused being all the time either in prison or under a bail-bond covering any amount of adjournment, appears to the Lord Ordinary to be simply oppression of the lieges, neither more nor less. The oppression might conceiv-

power as to the second diet. This provision for proceeding in absence was contrary to common law, and was to be strictly construed. If there was power to detain, there was also surely power to admit to bail, which was for the advantage of the suspender. The adjournment might be either for evidence, or any other purpose, by which the mind of the judge was to be informed. The question of the number and length of adjournments was a matter for the discretion of the Judge, and was to be considered as oppressive or not on a view of the whole circumstances; and a prominent one in considering the length of an adjournment was, that the party was at large on bail. The Court were to consider real circumstances, not imaginary ones, such as fancied hardship in being under bail to appear again. It was no doubt a hardship for a party to have such a complaint against him undisposed of; but that was a hardship which the ends of justice required many people to suffer. If there was power to adjourn to hear evidence, or for argument, there was power also to adjourn for avizandum. The suspender having set up a most impudent defence, the bailie may have thought a long time necessary for him to make up his mind upon the law, which was what had been improperly called "learning the law." But the same hardship was imposed in many cases in a more aggravated form. For example, in cases where prisoners remained in jail during the period that must intervene between a trial before the Circuit Court of Justiciary, and the consideration by the High Court of any points certified by the Judges on circuit. In such cases the law has also to be [91] determined by the Judges, or, as it was said by the Lord Ordinary, they have to "learn the law." The case of M'Loughlan *v.* Evans was not in point here.

To which it was answered;—As the case might go on in absence, there was no reason for any interim incarceration; and this was a civil offence. There was no power to incarcerate; and the cases of M'Loughlan *v.* Evans, and Hay *v.* Linton (II. Irvine's Justiciary Reports, p. 333) established that, where a party was not legally in custody, a conviction was bad. Neither was there power to adjourn, except once, "to hear and determine on the case." The statute was to be strictly construed; and if no farther power was given in the statute to adjourn except once, any further adjournments were illegal; such a power in Acts conferring statutory jurisdiction would be senseless, unless the provision was necessary. It was in vain to say that these repeated adjournments did not impose hardship on the suspender.

LORD JUSTICE-CLERK.—In this case of Linton *v.* Macdougal and Bruce, a number

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ably be greater; but the difference, in the Lord Ordinary's view, is merely one of degree.

"The Lord Ordinary has been aided in arriving at his conclusions by the analogy of the recent case of M'Loughlan *v.* Evans, decided by their Lordships of the Second Division on 18th February 1859, D. 21, 532. The case is different from the present in its details; but it involves principles which are of general application. The accused was, in that case, apprehended under a statute which made it lawful 'to arrest and detain every person so discovered, and to carry him or her before one or more Justice or Justices of the Peace for the county, shire, division, city, town, or place, wherein such person shall be so discovered.' The party was detained for forty-eight hours in a police cell, before being taken before a magistrate; the reason, offered to be proved, being, that the officer was all the time endeavouring in vain to get a Justice to take up the case. Their Lordships held not only that the detention was illegal, but that it was sufficient to vitiate the whole after procedure, the appearance before the Justice, ultimately brought about by such means, not being a legal appearance, on which proceedings could competently pass. It appears to the Lord Ordinary that the decision evolves a principle, not only unquestionably sound, but of the highest value towards the right administration of penal justice.

"If the conviction in the present case was sustained, it would, as the Lord Ordinary thinks, be simply to promulgate, to the whole magistracy of Scotland, paid and unpaid, a license to adjourn the proceedings, under a penal charge, as often as they arbitrarily chose. This, in the view of the Lord Ordinary, would be to authorise a trifling with the liberty of the subject, alien to the whole spirit of the law, and such as the Lord Ordinary cannot assume the responsibility of either excusing or sanctioning."

of objections to the conviction have been stated, which have not been disposed of by the Lord Ordinary. He proceeds on one ground, which, in his opinion, is sufficient to warrant him in quashing the conviction. In dealing with the question which his Lordship has determined, namely, the effect of the various adjournments made by the Bailie, I find it impossible to separate from that the consideration of the legality of the previous proceedings, and particularly the legality of an order to find bail for appearance at future diets of Court. The other grounds of suspension, whatever they may be, are not now before your Lordships in reviewing this interlocutor, and it is not necessary to consider them.

The complainer states that, on "the morning of the 23d of August 1859, he was apprehended by two police-officers or constables." We find, by reference to the proceedings, that the apprehension of the complainer on the 23d of August was in virtue of a warrant to that effect by the Judge of the Police-court, on presentation to him of a complaint at the instance of the respondent. The complaint was presented on the 22d August, and the warrant for apprehension was granted of the same date; and, from the statement in the 7th reason of suspension, it appears that the warrant was executed on the morning of the 23d, and the procedure would seem to have been regular, but for the averment that, instead of being taken to the Police-court, he was locked up in a cell in the police-office. But, in the present state of the record, that cannot be dealt with. It is neither admitted nor proved, and we must therefore assume that the warrant was duly executed, and that the complainer was brought competently and regularly before the Judge of the Police-court on the 23d August 1859. On that day the Judge in the Police-court issued this interlocutor and warrant:—"Continues the diet till to-morrow at ten o'clock forenoon, and grants warrant to officers of police for committing the said Peter Bruce to the cells of the Police-court of Edinburgh, therein to be detained till he find sufficient caution acted in the books of Court, under a penalty of twenty pounds sterling, for his appearance at that and all future diets of Court."

Now, it is admitted that the case was adjourned with the object of adducing witnesses for both parties, and that was in pursuance of the provision in the 23d section of the 9 Geo. IV., in which it is provided, that if the Sheriff or Bailie shall see cause, it shall be lawful to adjourn the hearing of such complaint to a subsequent day, to be by them at that time appointed. I think we are all agreed that that provision of the Act gives power to put off the case from the day on which it was intended to hear it, or, in other words, to adjourn the trial, and does not refer to the ordinary power of adjourning after a cause has begun, and when it is found impossible to finish it in one day, a power which is inherent in every court. Therefore, in so far as the interlocutor continues the diet till the next day at ten o'clock forenoon, it was in accordance with the provision of the statute. But it is contended further, that the warrant to incarcerate Peter Bruce till he found caution to attend all future diets of Court was illegal; and the question is thus raised, whether, under the two Acts of Parliament before your Lordships, a bailie in the Police-court has power to grant such a warrant.

[92] With a view to solve that question, it is necessary to recur to the provisions of the Act of the 9 Geo. IV., under which there was no power to interfere with the personal liberty of the defender in such cases till he was convicted. By that Act the party is brought into Court on citation, and he is under the same obligation to attend all the diets of Court as any other defender is when duly cited. But there is no authority to interfere with his personal liberty in any way during the dependence of the proceedings. The Act of 16 & 17 Vict., c. 67, grants jurisdiction to try the offences specified in the statute, by the 16th section, in these terms:—"Every offence committed against this Act shall be tried and determined, and all penalties incurred under the authority of this Act shall be recovered and applied in the manner, and before the Courts, and subject to the conditions provided in the said recited Act of 9th Geo. IV.;" so that the jurisdiction conferred is subject to the conditions and under the regulations of the previous Act of Parliament. The previous Act of Parliament would not have justified the apprehension of an accused person on a warrant to bring him before the Court, much less his imprisonment. But this section of the 16 & 17 Vict. goes on to provide—"But in case of any person complained against for bartering or selling spirits without having obtained a certificate, it shall be

lawful for the Sheriff, Bailie, or Justices, to or before whom such complaint shall have been made, instead of granting warrant to the officers of Court to summon the person complained against, to grant warrant for the apprehension of such person, and, after such apprehension, to inquire into the truth of the allegations in such complaint."

Now, this particular provision is made applicable only to one class of offences under the statute, viz., the case of persons complained against for bartering or selling spirits. It is an alteration, in a very important respect, of the provisions of the Act of Geo. IV. It gives the bailie authority to grant warrant to apprehend the party complained against. But when and for what? Upon a complaint being presented to him; that is the time; and for the purpose of apprehension coming in place of citation. Citation is still competent, but the bailie may substitute a warrant of apprehension for the citation, the object of both being the same, and where the one or the other has been duly executed, and the party is brought to the Court, the judge is to proceed under the complaint as if the party had appeared under a summons.

It appears to me that enactments of this kind affecting the liberty of the person, cannot be construed beyond what the very words of the enactment justify. And I have never been able to understand how it could be contended, that a warrant to apprehend and bring a party before a magistrate could be construed into a warrant for incarceration. The two things are entirely different. The apprehension of a party is taking him into custody by an officer of the Court; but the effect of that is to put his person into the hands of an officer of Court, who is charged with the custody of his person, and cannot lose sight of him, and is bound to bring him up before the judge. But a warrant to incarcerate is a warrant, not to put him in the custody of an officer of Court, but of a jailer—quite a different person in the eye of the law. It does not matter whether he has the name of jailer or not, he is one who gets the custody of the person, for the purpose of incarcerating him in a lawful prison. That is the difference between apprehension and incarceration. Detention may be something between the two, and we had a good example of that in the case of M'Loughlan *v.* Evans, where the statute authorised both apprehension and a limited amount of detention. But in this statute we have not even the word "detention" or "detain," but only apprehension; and I think that the power to grant the warrant for apprehension is given to the magistrate merely to insure that the party shall be in Court when the case commences. It was contended that if there is a power to apprehend and bring into Court, that implies that the party is not to leave Court while the case is proceeding. And that is true; it implies everything that is necessary to give effect to what the statute contemplates, and the statute contemplates that the party shall be present during the trial; and therefore, if the case is adjourned, it may be necessary and right that the bailie should have the power to apprehend the party again. But incarceration in the interval, from one day to another, is not to be found in the Act of Parliament, and is beyond the power of the magistrate in the Police-court. I am, therefore, bound to come to the conclusion, that this warrant to imprison the suspender till he found [93] caution to attend all future diets of Court was without authority, and was an unlawful warrant.

It appears that, in point of fact, this party found caution without difficulty, and therefore the warrant to incarcerate was not carried into execution. But if the party had been imprisoned, and had come here with a suspension, I should have had no difficulty in advising your Lordships to grant a remedy against that unlawful proceeding. But then the question comes to be, What is the effect of that unlawful warrant? because this is not a suspension of that warrant, but a suspension of a conviction for selling spirits without a certificate; and the important consideration is, whether the granting of this unlawful warrant interfered with the bailie's power to exercise the jurisdiction conferred by the statute. I think not; and, in this respect, the case contrasts with that of M'Loughlan *v.* Evans. In that case the Justice of Peace had power to try the offence in the manner he did, only in the event of the party being brought before him on immediate arrest; and the state of the fact was, that the Excise-officer lodged the offender in jail, for which there was no warrant, and after two days brought him before the magistrate; and for that reason we held that the Justice had no jurisdiction to try the defender in the way in which he did try him; because that was only applicable to immediate arrest, and, unless upon immediate arrest, the trial

required to proceed on information, and with leave of the Board of Excise. It was therefore a proceeding by immediate arrest or nothing; and as it was not a proceeding by immediate arrest, we held that that affected the jurisdiction, and vitiated the conviction.

But here we find this party was quite competently brought into Court, and therefore the bailie had jurisdiction, and this illegal warrant is quite separable from the rest of the proceedings, and does not affect the jurisdiction. It is said that under that warrant he was compelled to find caution to attend subsequent diets of Court, and therefore that his attendance was under an illegal compulsitor. It may be that he was thereby more readily induced to attend. But he was under a compulsitor to attend without caution. He was legally bound to attend all the diets of Court, the jurisdiction being undoubted, and the complaint regular. He says that the finding of caution left him no alternative but to attend the Court; the result of that argument logically is, that this unlawful warrant took away from him some right which he otherwise would have had; but I can discover no right of which he was deprived, except the right to run away from justice, and that is a right which we cannot recognise. And therefore, I do not think that this illegal warrant deprived him of any right which he had, or vitiated the subsequent procedure, or interferes with the validity of the conviction.

But it is said that the subsequent proceedings were in themselves irregular and illegal, and we are asked, in dealing with them, to consider them in connection with this illegal warrant. The adjournments have been four in number. The first, from the 23d to the 24th August, is plainly unobjectionable, and it is warranted by the provision of the statute which I have already referred to. But on the 24th, witnesses having been examined, another continuation takes place till the 25th, and this was in order to enable the defender to adduce a witness to prove a fact in connection with his defence. To that there is no practical objection, if the Court had power of adjournment at all beyond the power specified in the Act. On the 25th of August, the case was continued till the 8th September, and from that till the 29th; and on the 29th, the Bailie pronounced sentence, and granted warrant to officers of Court to imprison the suspender, if he did not pay the penalty imposed.

The adjournments particularly complained of are the two last, on the ground that, in the circumstances, it was entirely unjustifiable and illegal to adjourn for a period of five weeks after the trial and evidence were completed. If there were any room for saying, that a court of this kind has no power of adjournment, except what is given by the statute, I think that would be a very formidable ground of complaint. But, I think, that is altogether untenable; I think that every court must have, inherent in it, the power to adjourn when necessary. The most summary case may turn out to be a very long case, and it may be inconsistent with human strength and patience to finish it in one sitting; and if there were no power of adjournment, the case would fall. And even in such cases as, from their nature, **[94]** cannot be expected to extend over a day, some accident may occur which may render adjournment necessary; and if there be any case in which, at common law, from the nature of jurisdiction, a court has power to adjourn, the general rule follows of necessity, that a power to adjourn is a power inherent in every court, which must be exercised according to the discretion of the judge. It falls within the maxim, that, with jurisdiction, is given every power that is necessary to the full exercise of the jurisdiction. And if this power of adjournment be in the discretion of the judge, it is very difficult to see how the exercise of it can give rise to an objection of illegality. For, in the first place, there is no contravention of the Act of Parliament, because the power is a power at common law and not under the Act; and if it be a power at common law, I do not see how the objection of illegality can arise, unless the facts amount to legal oppression. Any magistrate may use his power in an oppressive manner, and if he does, your Lordships will give redress; but your Lordships will not interfere unless you are satisfied that what is done amounts to oppression.

What are the grounds in the present case for saying that the procedure amounted to oppression? The length of time was very much founded on, and undoubtedly it is rather startling. But for that delay there may have been reasons which did not require to be stated on record, and which the prosecutor was not bound to state on this record, because he may not have known them. We have had no return from the

Judge himself, and your Lordships have not thought fit to call on him to give any explanation. Therefore I shall say no more about the length of the time which was allowed to intervene between the trial and the conviction, except that such delays are very inexpedient, and quite inconsistent with the spirit of the Act, unless there is a good reason for them. But I cannot assume that they were made without good reason.

Then it is said that, considering the condition in which the defender was placed, lying as he was under this illegal warrant, these adjournments were oppressive; and I have no difficulty in saying, that if he had been kept in jail all the time, that would have amounted to oppression; but then he was not. But he says that being compelled to grant the bond of caution amounted to the same thing, and that the bond of caution was taken as an equivalent for incarceration. That may be true in a strict and technical sense. But the question is, is it true, in the only sense which is of importance in dealing with a question of oppression? Supposing the magistrate had under the Act power to incarcerate during adjournment, and had found it necessary to adjourn, and had then inquired whether the defender was in a condition to find caution, and had been informed that he was, would not that be a good reason for adjourning to a later and more convenient day than he would have named if the party had to be carried to jail? I therefore think that the operation of this unlawful warrant does not help the complainer here in the question of oppression. I do not think that the fact that the party was under bail makes these adjournments more oppressive; I am therefore led to the conclusion, that, so far as we have gone, there is no good ground for quashing this conviction.

I think the illegality of the warrant did not interfere with the jurisdiction of the magistrate, nor vitiate the subsequent procedure; and I do not think the adjournments can be considered illegal as against either the Act or common law, and therefore are relevant as grounds of suspension, only if they can be brought up to oppression, to which I do not think they amount.

Lord Cowan.—By the interlocutor of the Lord Ordinary, it is found "that the diet of 29th September 1859, at which the judgment complained of was pronounced, was an illegal and incompetent adjournment from previous diets," and on this ground the conviction is set aside as the necessary result.

The first inquiry regards the power of the magistrate before whom this complaint was brought, to continue the diet in the manner shown by the record of the procedure in this case.

(1.) Generally as to power to adjourn. Laying aside, for the present, the effect of the warrant for incarceration contained in the interlocutor of 23d August, it is for consideration whether there was power in the magistrate to adjourn the diet, having regard to the nature of the case, and the provisions of the statutes of Geo. IV. and Vict., on which the complaint is laid.

[95] The prosecution is for penalty, and, failing payment, for imprisonment, as provided by the 30th section of the statute 9 Geo. IV. In such cases at common law, I apprehend there exists in the judge a power to adjourn the diet either on the motion of the parties, or with a view to his maturely considering the judgment which, on the proof and pleadings, ought to be pronounced. Any oppressive exercise of the power will not be permitted; but within certain bounds—due regard being had to the interests of all concerned—it is not to be questioned that the diet may be adjourned in the discretion of the judge. The promotion of the ends of justice, whether as regards the prosecution or the defence stated to it by the accused, requires that there should be that power. It is accordingly exercised by judges every day in criminal cases. Even after verdict of the jury, and with a view simply to the consideration of the sentence that ought to follow, the diet is continued. But it is more material to observe that a power to adjourn the diet has been recognised by the Court of Justiciary to be possessed by Justices of the Peace, under statutes very similar to those founded on. Thus in Malonie *v.* Jeffrey, 22d January 1840, 2 Swinton, 485, it was decided that a complaint under the statute 17 Geo. III., c. 56, with regard to purloined or embezzled materials, might be persisted in at several diets of Court regularly adjourned; and the objection sustained was, that it was not at the adjourned diet, when the Court did not even meet, but on a subsequent day, to which the diet had not been adjourned at all, that judgment was pronounced. And in like manner, in White *v.* Watson, 21st November 1836, it was ruled that, under the statute 4 Geo. IV., c. 34, regarding the

desertion of workmen, adjournments of the diet were quite competent. In both of these cases the proceedings commenced by warrant for apprehension of the party complained against. I cannot doubt, therefore, that the power of adjournment was possessed by the bailie in this case at common law.

But (2) there may be some provision in the statutes founded on, or either of them, which excludes the power to adjourn, otherwise competent.

By the 23d section of 9 Geo. IV., the manner of complaint, and form of procedure, are regulated. A warrant is to be granted to summon the party complained against to attend the hearing at a time and place to be specified, at least six free days before the diet of appearance; at which time and place, whether the party appear or not, the Sheriff, Bailie, or Justices, are to proceed with the cause, a record being preserved of the charge and judgment, but without any written pleadings or record of evidence,—"provided always, that if such Sheriff, Bailie, or Justices, shall see cause, it shall be lawful to adjourn the hearing of such complaint to a subsequent day, to be by them at that time appointed." Unless this express power to adjourn the diet can be held to narrow the discretion of the judge in the matter, there is plainly nothing to take away the power possessed by him at common law to continue the diet. On the contrary, the statutory provision takes for granted the existence of that power, for it empowers the judge to call for production of documents, which it may be impossible to get without adjournment. But then it is said that the words limit the judge's power to prorogate to a single continuation of the diet. The answer to this, as I think, is, that it is an adjournment of the hearing of the cause to another time, before being entered on at all, which the clause contemplates. The judge is not compelled to go on with it on the day fixed, if there be cause for delaying the hearing of it. He is empowered, in that event, to adjourn the diet to a time to be then fixed. In any view, however, I cannot construe the clause so narrowly as to hold that the words are confined to one adjournment. The word "hearing" is not to be confined to the leading of the proof. The adjournment may very well be made with the view, if the judge shall see cause, of hearing parties upon the proof, or on the defence, or of considering the judgment and sentence.

Then by the statute of Victoria, though there are certain changes made in the procedure, there is nothing to derogate from the powers of the magistrate under the statute of Geo. IV. There is, by section 16, power given, instead of granting warrant to summon the person complained against to appear at the hearing of such complaint, "to grant warrant for the apprehension of such person, and, after such apprehension, to inquire into the truth of the allegations in such complaint, and otherwise to proceed under such complaint as if such person had appeared under such a summons." This plainly leaves matters as they stood under the statute of [96] Geo. IV. Whatever the judge could do under it, he may do although he has issued a warrant of apprehension, and the accused party has been brought up under the warrant. Again, by the statute of Victoria, immediate imprisonment may be ordered, instead of a delay of four days being allowed for payment of the penalty. Still, this is only permissive, and may be ordained although the accused is not present when the sentence is pronounced. It does not appear, therefore, how the power to adjourn can be at all affected by this provision of the Act of Victoria. It is to the prior statute that resort must be had in considering whether the prosecution has been legally conducted or not.

(3.) The complainer says that the adjournments were causeless, and ascribes them to the difficulty felt by the magistrate in disposing of the plea stated in defence, viz., that having been already convicted three times, he could not be convicted a second time of a third offence, but was exempt from statutory prosecution in all time coming—for to that it must come—there being no provision in the statute as to a fourth offence. It is plain that, without going into the merits of the case, and the effect of the proof (which we are not entitled to do), we cannot hold these adjournments by the magistrate to have been so causeless as to amount to such an abuse of his discretionary power as to make the adjournments illegal and incompetent. And however to other minds the plea stated may seem to require but little consideration for its disposal, it is scarcely in the mouth of the complainer to hold out his plea to be so little deserving of serious consideration.

The second branch of the argument raises the question whether the warrant of incarceration renders the procedure illegal and incompetent, and destroys the con-

viction? This is the peculiarity of the case which plainly has made the greatest impression on the Lord Ordinary, and which, I own, did at first seem to me of a very grave character.

That the procedure was duly instituted before the magistrate is not disputed. The statute allowed the warrant to apprehend, and the complainer was properly brought up to answer for the complaint. The blot in the procedure is alleged to arise from the warrant to incarcerate, granted at the time of the first adjournment on the 23d August, until bail should be found to attend all future diets. I am certainly not prepared to affirm the legality of that warrant. The only allowance of the statute is, to apprehend so as to secure the presence of the accused at the hearing of the complaint. Thereafter it is expressly provided that the procedure should be the same as when the accused attended on a citation to appear. It may be that there was power to detain not merely until the accused could—all reasonable diligence being used by the officer for that end—be brought before the magistrate, but, during the hearing of the cause, should that not be overtaken at one diet. For by the same statute power is farther given to the magistrate to order immediate imprisonment, if on conviction the penalty be not instantly paid. But when the hearing was adjourned till a subsequent diet, either under the statutory power or under the power to do so at common law, it is certainly not allowed by any express words in the statute to incarcerate the accused. I cannot hold the allowance to apprehend to carry with it so serious a power by implication. It may be that at each diet to which the cause may be lawfully adjourned, the presence of the accused may be enforced by a new warrant of apprehension. In this way he would be left at liberty, and the object of the statute be secured. And thus a bail-bond to meet that view might not be objectionable. But it will be observed, that although in this respect the statutory provision may be defective, and the power to issue warrant to apprehend be held exhausted by its first exercise, this is of no moment as regards the procedure and conviction. Unlike proper criminal cases, this prosecution may be proceeded with, although the accused be absent. Conviction may go out against him, whether present or not, for the penalty and for imprisonment, even immediate, failing instant payment. It is his interest to be present at each diet of procedure, as this complainer was, with his agent. And if he remains away, *sibi imputet* that he is convicted in his absence, and without being heard in his defence. Still his presence, when considered necessary for identification, or otherwise, at any adjourned diet, may possibly be enforced by a new apprehensive warrant. I express no opinion as to the illegality of any such course. That is quite different from the warrant that was here granted, [97] as to which I shall only say that the magistrate who issued it placed himself in a serious and responsible position.

But, assuming the warrant to be illegal, how does it affect the legality and competency of the procedure, and specially of the adjourned diet, as to vitiate the conviction? Imprisonment did not actually follow on it. The accused was not thereby prevented from attending to his defence, and preparing his cause. There is no room for alleging that the hearing of the case was affected to the prejudice of the complainer, or that the mere issuing of the warrant was in itself oppression. That would have been quite a different state of matters. It is urged that a bail bond was wrongously exacted, and that his presence at the several diets was secured under the compulsitor of this alleged illegal bond. It is forgotten that his presence was not indispensable, and that his absence did not prevent conviction, and that his interest lay in watching over every step of the proceedings. And, after all, what was the accused party's remedy against this illegal warrant and the relative bail bond? It clearly lay in suspension and liberation, while his redress lay in that course so usual when unhappily an order for incarceration has been unwarily granted *ultra vires* of the magistrates. This remedy he would have got, but the proceedings under the complaint could not thereby have been touched. These remained to be judged of on their own merits, and must stand or fall by the legality of the steps of procedure in themselves, apart from the assumed illegal excrescence, so to speak, which has been grafted on them, and which might require excision by other process.

Lord Benholme.—I think this is an interesting and important case; but having listened to your Lordships' opinions, and being satisfied that there subsists a full coincidence between the opinion of your Lordship and that of Lord Cowan, I think it sufficient to say that I entirely concur. I shall only add that there was one point on

which at first I felt considerable difficulty in concurring in the opinion of your Lordships. This was in reference to the legality or illegality of the incarceration or detention which has formed so important a feature in this case. It was not till after repeated consideration that I came to concur in the opinion that this warrant was illegal. It was argued that there was a power of detention; and the Lord Ordinary has sanctioned that idea; but it is difficult to understand how that detention could be exercised, from day to day, without something amounting to incarceration. I therefore doubt the soundness of the idea that there was a power of detention from one diet to another. It is a different thing to say that, under this Act, you may secure the attendance of a party at the various diets of Court, because that may be effected by repeating the warrant of apprehension so as again to bring the party into Court without any incarceration. Again, it may be said that the first warrant of apprehension is all that the statute authorises, and that there is no authority for a second warrant; but that having once been brought up, the case is to proceed against him under the words of the statute, as if he had appeared on a summons. On that point of doubt it is unnecessary to speculate, as we are all of opinion that the warrant to incarcerate was illegal. And I do hope and trust that our perfect unanimity on that point will not be without its effect in guiding the conduct of magistrates acting under this statute.

Lord Wood was absent.

The Court pronounced the following interlocutor:—"Recal the interlocutor reclaimed against, and repel the objection to the validity of the conviction complained of, founded on the illegality of the warrant of incarceration of 23d August 1859, and on the adjournments of the Inferior Court, and remit to the Lord Ordinary to hear parties on any other objections to the conviction which may still remain to be disposed of under this suspension, and to proceed further in the cause as shall be just, reserving in the meantime all question of expenses, and with power to his Lordship to dispose of questions of expenses hitherto incurred both in the Outer and Inner-House."

[Sequel, 24 D. 184. Cf. *Kelly* v. *Rowan*, 25 R. (J.C.) 6.]

No. 24. **XXIII. Dunlop 111.** 7 Dec. 1860. 1st Div.

James Lord, Petitioner.—*Sol.-Gen. Maitland—Young.*

Alexander Colvin (Peter Cochrane's Executor), Respondent.—*Macfarlane—Gifford.*

Hugh Ferrier and Others (Next of Kin as at 1852).—*Fraser—A. R. Clark.*

Susan Moorhouse and Husband.—*G. G. Bell—Millar.*

Succession—Accumulations—Act 39 *&* 40 *Geo. III. cap.* 98 (*Thellusson Act*).—A domiciled Scotchman, by will executed in London in the Scotch form, directed his estate, after certain preferable purposes were fulfilled, to be divided between his two sons on their attaining twenty-five years of age; failing them, on their children; failing whom, on the children of Mrs. M. The testator died on 18th June 1831. His will was proved in England. Both sons died intestate, and without issue, before attaining the age of twenty-five; but the eldest left a widow, who married again, and by the law of England the title to the whole estate and interest which belonged to the sons was vested in her husband, James Lord. At the expiration of twenty-one years from the death of the testator, viz. 18th June 1852, Mrs. M. was alive, but without family. She was then in her fifty-third year. *Held* (*dub.* Lord Deas), on a case from Chancery for the opinion of the Court of Session, 1. That by the effect and operation of the trust-settlement accumulations after June 1852 of the profits or produce of his personal estate, destined to the child or children of the testator's daughter, were impliedly directed; 2. That such accumulations were prohibited by the Act 39 & 40 Geo. III. cap. 98; 3. That they fell to the heir

ab intestato, and that the person holding that character was to be looked for as at the date of the death of the testator, not the period when it should be ascertained that he died intestate as to part of his estate.

[112] On 28th June 1859, James Lord presented a petition to the First Division, stating that, in certain suits depending in the High Court of Chancery between him and certain parties therein named, an order was pronounced on the 12th day of June 1860 by the Right Hon. Sir Richard Torin Kindersley, one of the Vice-Chancellors of the said Court, in the following terms:—"'Upon motion this day made unto this Court by counsel for the plaintiff James Lord, and upon hearing counsel for all other parties in these suits, and by consent, this Court doth order that a separate case be prepared and settled by the Judge in chambers, and that the questions of Scotch law arising out of the same be settled by the said Judge, in order to ascertain whether the income of the estate of Peter Cochrane the elder, which has accrued since the expiration of twenty-one years from his death, is now divisible; and if so, who are or is entitled thereto, and if more than one, in what proportions: And it is ordered that such case, with the questions so settled, be remitted to the Court of Session, being the Superior Court of Scotland, whose opinion is desired upon the law of Scotland as applicable to the facts to be set forth in such case: And any of the parties are to be at liberty to apply to this Court as they may be advised.'

"That a case has been prepared and settled in terms of the said order, and is herewith produced, along with the relative trust-disposition and deed of settlement.

"That the petitioner, therefore, makes the present application to your Lordships, under the Act 22 & 23 Vict. cap. 63, humbly praying 'that it may please your Lordships to take the said case into your consideration; to appoint an early day for hearing parties thereon; and to pronounce your opinion on the questions of law thereby submitted.'"

The case referred to was as follows:—"Peter Cochrane, formerly of Clippens, in the county of Renfrew, in Scotland, Esquire, deceased, hereinafter referred to as Peter Cochrane the elder, has been held in these causes to have been, at the date of the trust-disposition and deed of settlement hereinafter mentioned, and thenceforward to and at the time of his decease, domiciled in Scotland.

"On the 13th October 1829, the said Peter Cochrane the elder duly made and executed, according to the law of Scotland, a trust-disposition and deed of settlement sent herewith, and marked A.

"The said Peter Cochrane the elder departed this life on or about the 18th June 1831, without having in any manner revoked or altered the said trust-disposition and deed of settlement, leaving (according to the decree in these suits) Margaret Douglas Fearon or Cochrane, who is hereafter called Margaret Douglas Cochrane, his widow, and Peter Cochrane (hereinafter called Peter Cochrane the younger), and John Cochrane, his only lawful children—of whom the said Peter Cochrane the younger was his eldest son and heir-at-law.

"The said Margaret Douglas Cochrane, David Colvin, and James Colvin, duly proved the said trust-disposition and deed of settlement as the will of the said Peter Cochrane the elder, in the Prerogative Court of the Archbishop of Canterbury, on the 18th day of October 1831—power being reserved of making the like grant to Alexander Colvin, the senior partner of the firm of Colvin and Company, agents in Calcutta, and as such the other executor named in the said will, when he should apply for the same, and they were duly confirmed in Scotland executors of the said trust-disposition and deed of settlement, conform to confirmation from the Commissary Court of Edinburgh, dated the 26th June 1834, and the said Margaret Douglas Cochrane, David Colvin, and James Colvin, and the survivors and survivor of them became, and thenceforth, down to the times of their respective deaths hereinafter mentioned, continued to be the legal personal representatives and representative of said Peter Cochrane deceased.

[113] "On the 19th September 1834, the said Margaret Douglas Cochrane departed this life, intestate, leaving the said Peter Cochrane the younger her heir-at-law; and the said Peter Cochrane the younger, and John Cochrane, her only children and next of kin, and the said David Colvin, and James Colvin, her co-executors and trustees, her surviving.

"The said John Cochrane attained his age of 21 years on or about the 12th September 1834, and departed this life, under the age of 25 years, viz., on the 25th of April 1835, intestate, and without having been married, leaving the said Peter Cochrane the younger, his only brother and sole next of kin, and heir-at-law, him surviving, who obtained letters of administration from the Prerogative Court of Canterbury to the estate and effects of his deceased brother John Cochrane.

"The said Peter Cochrane the younger attained his age of 21 years on the 18th December 1832, and departed this life under the age of 25 years, viz., on the 24th July 1835, intestate, leaving his widow Eleanor Cochrane, but no lawful issue, him surviving.

"On the 27th January 1836, the said Eleanor Cochrane obtained letters of administration from the Prerogative Court of Canterbury to the estate and effects of her deceased husband, Peter Cochrane the younger, and also letters of administration *de bonis non* to the estate of John Cochrane deceased.

"On the 11th day of June 1836, the said Eleanor Cochrane intermarried with Charles Barton, who died on the 23d day of February 1840, leaving the said Eleanor Barton, his widow, him surviving.

"On the 26th July 1839, the said David Colvin died, leaving the said James Colvin, his co-trustee and executor, him surviving.

"On the 14th day of June 1842, the said Eleanor Barton married the plaintiff James Lord, and died on the 30th December 1844, leaving the said James Lord her surviving.

"In the month of August 1845, the said James Lord obtained letters of administration from the Prerogative Court of Canterbury to the estate and effects of his deceased wife Eleanor Lord, with her will annexed, and also letters of administration *de bonis non* to the estates of Margaret Douglas Cochrane, the widow of the testator Peter Cochrane, and also of Peter Cochrane the younger, and of John Cochrane, and thereby became, according to the law of England, the legal personal representative of the said Eleanor Lord, Margaret Douglas Cochrane, Peter Cochrane the younger, and John Cochrane, respectively; and whereby, according to the law of England, all the estate and interest which the said Margaret Douglas Cochrane, Peter Cochrane the younger, and John Cochrane, would respectively have been entitled to if now living, became, and now are vested in the said James Lord, as such administrator.

"On the 20th May 1847, the said James Colvin died, and the defendant Alexander Colvin, the senior partner of the firm of Colvin and Company, agents in Calcutta at the time of the death of the said Peter Cochrane the elder, and as such the other executor, proved the said trust-disposition and settlement as the last will and testament of the said Peter Cochrane the elder, in the Prerogative Court of Canterbury, and was duly confirmed in Scotland executor of the said trust-disposition and deed of settlement, conform to confirmation from the Commissary Court of Edinburgh, and the said Alexander Colvin thereby became, and now is, the sole legal representative of the said Peter Cochrane the elder.

"All the persons to whom annuities are given by the said trust-disposition and deed of settlement are dead, except George Crow, whose annuity has been provided for.

"Susan Moorhouse, mentioned in the said trust-disposition and deed of **[114]** settlement, is still living, and is in the 53d year of her age. She has had no child living since the death of the said Peter Cochrane the elder.

"The defendants Hugh Ferrier, John Ferrier, Isabella Ferrier, and Mary the wife of Robert M'Kennie, represent the class who would have been some of the next of kin of the said Peter Cochrane the elder, according to the law of Scotland, if he had survived his two sons, and died on the 18th of June 1852, or on any subsequent day.

"The principal part of the residue of the personal estate of the said Peter Cochrane the elder has been invested, and is standing in the name of the Accountant-General of the High Court of Chancery, in trust, in a certain cause of Cochrane *v.* Cochrane, which was a suit instituted for the administration of the estate of the said Peter Cochrane the elder, and the dividends of the sums so invested have from time to time been invested and accumulated.

"It has been contended in these causes that by the effect and operation of the said deed of trust-disposition and settlement, accumulations are directed which are prohibited by the Act of the 39th and 40th of King George the 3d, cap. 98, intituled 'An

Act to restrain all trusts and directions in deeds or wills whereby the profits or produce of real or personal estate shall be accumulated and the beneficial enjoyment thereof postponed beyond the time therein limited,' and that the accumulations of the personal estate of the said Peter Cochrane the elder, since the 18th of June 1852, being the end of twenty-one years from his death, ought to go and be received by the person who would have been entitled thereto if such accumulations had not been so directed.

"There is now standing in the name of the said Accountant-General, in trust, in the said cause of Cochrane *v.* Cochrane, the sum of L.245,256, 2s. 8d. bank 3 per cent annuities, which has arisen from the residuary estate of the said Peter Cochrane the elder, and the accumulations thereof.

"A large sum, amounting, as it is alleged, to the sum of L.50,000 or thereabouts, a portion of the said sum of L.245,256, 2s. 8d. bank 3 per cent annuities, has arisen from accumulations of the personal estate of the said Peter Cochrane the elder since the 18th June 1852, being the expiration of twenty-one years from the death of the said Peter Cochrane the elder.

"For the purposes of this case, the right and interest (if any) which the executors of the said Peter Cochrane the elder, or any of them, had in the said accumulations, are to be taken as vested in the said James Lord.

"The questions for the opinion of the Court are—

"1. Whether, by the effect and operation of the said deed of trust-disposition and settlement, any, and what accumulations or accumulation are or is, expressly or impliedly directed, which are or is prohibited by the said Act of 39th and 40th years of the reign of his late Majesty King George the Third, cap. 98?

"2. If so, who are or is entitled to the accumulations or accumulation of the personal estate of the said Peter Cochrane the elder, which are or is prohibited by the said Act of Parliament?

"3. And if more than one, in what shares and proportions?"

The trust-disposition and settlement referred to in the preceding case disponed to his trustees his "whole means and estate, heritable and moveable, real and personal, of every kind and description," including, &c., "and whole dividends, interests, and profits thereon accruing, or to accrue," &c., "dispensing hereby with the generality hereof, and admitting the same to be as good, valid, and sufficient, to all intents and purposes, for carrying and conveying the whole estate of every description, now pertaining and belonging, addebted, and due to me, or which shall pertain and belong, and be addebted and due to me at the time of my death, and wherever situated, **[115]** with the whole accessories thereof, as if each particular article of the same were herein enumerated, and *per expressum* disponed and conveyed, notwithstanding any law or practice to the contrary."

The purposes of the trust were, 1. For payment of the necessary expenses of carrying the settlement into execution. 2. For payment of deathbed and funeral expenses. 3. For division of household furniture. 4. The fourth purpose directed certain lands to be conveyed to the truster's wife in liferent, and his eldest son in fee. 5. The fifth purpose provided for certain annuities. The 6th and 7th purposes were to the following effect:—"Sexto, After the foresaid preferable purposes of this my trust-deed are fulfilled, and after a corresponding sum is set apart to meet the foresaid several annuities, and payment of the foresaid monthly sum to the foresaid Reheim Beebee, with reservation of the foresaid house in Calcutta, of which she is to be the occupant during all the days of her life, I hereby direct and ordain the remainder of my whole personal estate, wherever situated, and the whole accessories thereof, to be divided equally betwixt the said Peter Cochrane, my eldest lawful son, and the foresaid John Cochrane his brother, my youngest lawful son, and their lawful children respectively, declaring the same to be payable to themselves on their respectively arriving at the age of 25 years complete, and that the proceeds of my foresaid house in Calcutta, and the capital sums corresponding to the foresaid several annuities, shall in like manner, as the same shall be respectively freed by the death of the said Reheim Beebee and by the expiration of the said annuities, be also divided equally betwixt my said two lawful sons and their said lawful children respectively, on or after theirselves respectively arriving at the said age of 25 years complete; and in case of either of my said two lawful sons predeceasing me, or dying before their arrival at the said age of

25 years complete, without leaving lawful issue of their bodies, I direct and ordain the remainder of my said whole personal estate, and the whole accessories thereof, the proceeds of my said house in Calcutta, and the capital sums corresponding to the foresaid several annuities respectively, as the same may be freed as aforesaid, to be paid and delivered over to the survivor of them and his lawful children as in manner aforesaid; and in the event of both of my said lawful sons predeceasing me, or dying before they arrive at the age of 25 years complete, without leaving lawful issue of their bodies, I hereby direct and ordain the remainder of my said whole personal estate, and whole accessories thereof, and the proceeds of my said house in Calcutta, and the capital sums corresponding to the foresaid several annuities respectively, as the same may be freed as aforesaid, to be paid and delivered over to the eldest lawful son, in the case of more than one son, and in the case of only one son, then to that only son, and to their lawful children procreated or to be procreated of the body of Mrs. Susan Cochrane or Moorhouse, wife of Lieutenant Moorhouse, of His Majesty's 13th Regiment of Light Infantry, and who shall on receiving the same take, as by acceptation thereof he hereby binds and obliges himself to take, assume, and bear the surname and arms of Cochrane, in all times thereafter; and in the event of the said Mrs. Susan Cochrane or Moorhouse having no lawful son of her body, or in case of her having more than one lawful son of her body, and of her said eldest or only lawful son predeceasing the said survivor of my said two lawful sons, and his children, without leaving lawful issue of his own body, to be divided equally betwixt her other lawful children, in case of more than one other lawful child; and in case of only one other lawful child, then to that only other lawful child, and their lawful children respectively; declaring, that in the event of any one or more of her said other lawful children predeceasing their brother-german, who is hereby appointed to my said eventual succession, or the survivor of my said two lawful sons and their children respectively, without leaving lawful issue of their own bodies, [116] his, her, or their shares therein should accrue and be divided equally betwixt his, her, or their surviving brothers and sisters, or their lawful children, and the lawful children of such of his, her, or their brothers or sisters as may have predeceased themselves. *Septimo*, I hereby direct and ordain my said trustees and trustee acting for the time, during the non-payment of the aforesaid remainder of my said personal estate, and whole accessories thereof, proceeds of my said house in Calcutta, and the capital sums corresponding to the aforesaid several annuities respectively, as the same may be freed as aforesaid, to make payment of a suitable allowance out of and from the annual rents, dividends, or interest of the foresaid remainder of my said whole personal estate, to each of my said two lawful sons till the same become payable to them, which allowance should, in my opinion, be limited to an yearly sum of L.500 sterling each, but without prejudice to my said trustees, or trustee, acting for the time, exercising their own discretion in regard thereto, in the same way and manner as if I had expressed no opinion in the matter, and which several provisions above conceived in favour of my said two lawful sons, I hereby declare to be, and of which they, and each of them by acceptation of the same, shall be and are bound to accept in full contentation, and satisfaction to them, not only of all conventional provisions conceived in their favour in my foresaid contract of marriage with my said well-beloved wife, Mrs. Margaret Douglas Fearon or Cochrane, their mother, but also in full of all other conventional provisions, as well as legitim and portion natural, and all other legal provisions whatsoever, and of every thing else they, or any of them, can ask, claim, or pretend, out of or from my means and estate whatsoever, heritable or moveable, real or personal, or from my heirs or representatives whomsoever."

The case was heard at great length on the 13th, 17th, and 18th July 1860.

For Lord, as representing the heirs *ab intestato* at the date of the death of the testator, it was pleaded;—That the first question was, whether Dr. Cochrane's settlement, expressly or impliedly, directed accumulations contrary to the Thellusson Act. The word "directed," which occurs in the preamble, and in the latter part of the clause declaring illegality and nullity, does not occur in the prohibitory part of the clause. This was important in reference to a distinction between an express direction to accumulate and such a disposal of an estate as necessarily led to accumulations, although not expressly directed, both cases being equally a contravention of the statute. Now the trustees were here directed, in the event—which has happened—of the

testator's sons dying childless before attaining the age of twenty-five, to hold the whole residue of his estate for any child or children of Mrs. Moorhouse. She has had one child, and her husband is still alive, but that child is dead, and there is no provision for the case of Mrs. Moorhouse dying childless; therefore, there is here a direction, expressed or necessarily implied, to accumulate the proceeds and interest of the trust-estate for behoof of that child, if it should ever come into existence, or, if not, for behoof of the heirs *ab intestato* of the testator. Should Mrs. Moorhouse die childless, there is intestacy. Therefore, assuming that the Thellusson Act applies, the accumulations since 18th June 1852, when the twenty-one years expired, belong to those who would have been entitled to them had no such accumulation been directed, either expressly or by implication.[1] The trustees are directed to hold the estate, and whole accessories thereof, for behoof of Mrs. Moorhouse's children, and of course were to hold the same so long as she lived, although she had no children. Therefore they could not do otherwise than accumulate. The will could not be executed without accumulation. Suppose the will had contained express directions to accumulate, [117] the trustees would have stood in exactly the same position as they do now. The direction is as imperative where clearly implied as where expressed. It is the purpose of the Act to prevent this accumulation. If there be no express or implied direction to accumulate, then the interest and proceeds not only beyond but within the twenty-one years are immediately intestate succession, the intestacy not being subject to any contingency, but being immediate and certain, and the heirs *ab intestato* being entitled to the same, on the simple ground that no provision was made by the will for the accumulating interests of the estate during the time that the trustees were directed to hold it.

Upon the general construction of the statute, the authority of the Court of Chancery must be of weight.[2] The case has been put, that there may be lawful accumulation for forty years when trustees are directed to hold for the benefit of a testator's infant child who dies just before attaining majority, and is succeeded by an infant for whose behoof the trustees are directed to hold till he attains majority—these two respective periods making together a period of forty years; but the conclusive answer is, that accumulation by a beneficiary—which is really the case supposed—is not struck at by the statute.[3] The case is different where trustees are directed to hold and accumulate for behoof of a beneficiary for a period beyond twenty-one years, and thereafter to make over the estate to him. The period of twenty-one years is the limit of lawful accumulation; beyond that the interest of the property must be dealt with as if there were no direction to accumulate, express or implied. To the first question, the answer ought to be, that by the effect and operation of this deed of settlement, accumulations are directed to be made subsequent to 18th June 1852, and that the same are prohibited by the Act.

The answer to the second question should be, that the accumulations are "to go to the heirs *ab intestato*." The question, who are these heirs? arises the moment the truster dies, and has nothing to do with the period of ascertaining the amount of the succession undisposed of. There might be testacy of the stock, and intestacy as to the proceeds. There was neither authority nor principle for looking for a man's heirs at any other period than as at the time of his death. The estate in dispute—the fund that has accrued—is just in the situation of a lapsed legacy. It has never been disposed of by will, except contingently. At the testator's death, there is a case of conditional testacy or intestacy. Until the event happens upon which testacy or intestacy depends, it is uncertain whether he dies testate or intestate; but it is quite certain who his heirs-at-law are, whether they will take anything under the deed or not; the right is in them the moment the death of the ancestor stamps them with that character, and the whole succession which shall turn out not to have been well alienated from them and given to others by will, is vested in them. The trustees here are directed to hold and accumulate for a person who might never exist. The law steps in and stops that accumulation beyond a certain point; and if so, then, beyond

[1] Griffiths *v.* Vere, Nov. 1803, 9 Vesey, p. 127.

[2] M'Pherson *v.* Stewart, 16th Nov. 1858, 7 Weekly Reporter, p. 34.

[3] Tench *v.* Cheese, May and June 1855, 18 English Jurist, p. 1087, and 6 De Gex, M'N. & G.'s Chancery Reports, 453.

that point, the accumulation goes to the heirs-at-law as at the date of the testator's death. Where a will contains a direction applicable to a principal sum of money, to be implemented after the lapse of two or three years, but is so expressed that there is no direction applicable to the interest after the expiry of the first year, there is testacy as to the interest for one year, but there is no testacy as to the interest between the expiry of the first year and the time for payment of the principal. Shall the heirs-at-law, as at the death of the testator, be excluded because their beneficial **[118]** enjoyment is postponed for a year—because the interests which are in question had not come into existence at the date of the testator's death? They were vested with the intestate succession, and the only question is, what is the intestate succession? It may not be possible to answer that question on the testator's death. The mere uncertainty whether, on the expiry of twenty-one years, the heir-at-law should take anything—or what—was not sufficient to oust him from the succession, the right to which had vested in him at the date of the testator's death.

It cannot be maintained here that, failing a child of Mrs. Moorhouse, the heir-at-law takes in the same way as if he had been called by substitution, because a substitute takes under and by virtue of the deed of settlement. If the heir here cannot claim irrespective of the will altogether, he has no right; and therefore Mrs. Moorhouse's child would not have excluded him, in the proper sense of that term. It was only on the failure of the will that he took irrespective of it, just as if it never existed. All questions of substitution are therefore irrelevant to the present case, where, *ex hypothesi*, the succession is and has always been intestate. The general proposition has no exception that, in looking for heirs *ab intestato*, there is no other date to look to except that of the death of the testator (a point illustrated by the recent decision in Grant *v.* Robertson);[1] and that is the principle which has been adopted in the English cases on the Thellusson Act.[2] The case of Dick *v.* Gillies[3] is referred to as an adverse authority. But the Judges there were divided in opinion; and Lord Ivory pronounced a contrary decision in Tod and Others *v.* Skinner's Trustees, 18th March 1848, which was compromised in the Inner-House.[4] *

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[1] 2d Dec. 1859, *ante*, vol. xxii., p. 53.

[2] Hargreave's Treatise on the Thellusson Act, p. 166; M'Donald *v.* Bryce, 2 Keane's Reports, p. 276; Eyre *v.* Marsden, 2 Keane, 564, and 4 Mylne and Craig's Reports, p. 231; Griffiths *v.* Vere, *supra;* M'Pherson *v.* Stewart, *supra;* Tench *v.* Cheese, *supra.*

[3] Dick *v.* Gillies, 4th July 1828.

[4] See also Maxwell *v.* Wylie, 25th May 1837, 15 S., 1007.

* "18th March 1848.—The Lord Ordinary having advised the minutes of debate, and resumed consideration of the closed record, writs produced, and whole cause, in respect that the trust-purposes and provisions which disposed of the residue of the trust-estate have lapsed, in consequence of the failure of the residuary legatees before any right became vested in them—Finds that the succession of the truster must so far be dealt with as intestate, and the said residue held consequently to have belonged to the party who, supposing no trust to have existed, would, as at the date of the truster's death, have been entitled to succeed *ab intestato:* Further, finds that the late Robert Skinner having been such party, his said residuary interest was validly and effectually carried and conveyed by the last will and testament executed by him in favour of the claimants the Reverend James Thomson and others, as his general trust-disponees and executors; and these findings being in themselves sufficient for the determination of the present competition, finds it unnecessary to pronounce farther in regard to the more special pleas and grounds of preference which have been *hinc inde* submitted by the parties: Therefore advocates the cause, and recals the interlocutor submitted to review, so far as not in conformity with the above findings; but of new ranks and prefers the said claimants as having sole right to the fund *in medio*, under deduction always of the expenses allowed by the Sheriff as incurred by the raisers in bringing the action into Court, and condescending on and ascertaining the said fund: Repels the competing claim of the claimants George Tod and others; and, in the whole circumstances, finds no further expenses due to or by any of the parties in the cause; and decerns.

(Signed) J. Ivory.

[119] There is no difficulty here in the matter of title, for the testator's trustees have been confirmed, which carried all the moveable estate *ex bonis de-* **[120]** *functi;*

"NOTE.—The Lord Ordinary has directed his most anxious attention to the case of Dick, 4th July 1828, and has carefully perused and considered the printed pleadings on which the judgment proceeded. The result has been a conviction, that the Court did not there intend, by any means, to give it forth as a universal principle, applicable to all testamentary provisions which happen not to lapse till after the death of the testator—that the benefit accruing through such lapsing must necessarily take effect, in the party holding the character of legal heir, at the date of the lapsing, instead of falling back, as an integral part of the intestate succession, or in other words, as a portion of the unappropriated residue, and so belonging to him who was proper heir *ab intestato* at the time of the ancestor's death. They seem, on the contrary, to have proceeded on some supposed speciality of construction, arising out of the peculiar terms in which the L.2000 provision was given, and to have pronounced their judgment more as if dealing with the substantive matter of the provision itself, than with the amount thrown back into the intestate residue, in consequence of its having lapsed. In this point of view, the decision (whether in itself otherwise well-founded) would not truly be adverse either to the principle of Lord Pitmilly's judgment, or to the doctrine more precisely expressed by Lord Mackenzie, viz.—'That, in general, the residue of a trust-fund, failing directions for its disposal, falls to the natural heirs *ab intestato* of the truster, in the same proportions in which they would have succeeded to the trust-estate if the trust had not existed.'

"Indeed, when it is kept in mind that all properly lapsed interests must necessarily be dealt with on the footing of intestacy, how is it possible to let in any, but him, and him only, who would have taken up the general succession *ab intestato?* The matter must be regulated either *provisione hominis*, or *vi juris*. But the latter inseparably connects the intestacy (as an operative fact) with the date of the intestate's death. The former is altogether inconsistent with the fundamental hypothesis of a lapsed interest. Where the deed contains a destination over, in favour of the heirs generally of the testator, there is of course no lapsing, and therefore no intestacy; and it must necessarily, in such case, be a question of construction, upon a consideration of the whole *enixa voluntas* of the testator, who are the heirs intended to be called. But in the opposite case of a lapsed interest, there is no room for construction, first, because there is no legally effective expression of intent to test at all. Nor is it any answer that the deed perhaps embodies matter showing a purpose to disinherit; for such a purpose is to all intents inoperative, unless where the property is actually destined to another, and it is the very absence of such a destination that is the occasion of the lapsing, and of the consequent intestacy.

"The argument from certain contingent provisions in the deed that there could be no vesting *ab intestato*, as at the time of his ancestor's death, in him who was then the heir *ab intestato*, is rested on a fallacy. And the Lord Ordinary is not sure how far the operation of this fallacy was detected, or was sufficiently in the view of the majority of the Court, when deciding the case of Dick. It was no doubt perfectly true in that case, that the provision of L.2000, as a provision conferred by the deed, did not vest, and never could have vested in Mrs. Gillies. But the intestate residue of the estate did unquestionably vest in her. And, accordingly, as regards the residue generally, she was found entitled to take. Now, what was the L.2000, when the testamentary provision in regard to it lapsed, but a portion of this residue? The contingency, upon the failure of which the lapsing had effect, did not, it is true, take place till after Mrs. Gillies' death. But the provision, while contingent, was but a possible and eventual burden upon what had been from the first her general interest as residuary *ab intestato*. And the moment, therefore, this portion of the residue became freed from its contingent burden, it necessarily fell back into the unappropriated mass of the intestate succession; and so (notwithstanding the *morata solutio*, while matters hung *in dubio*) accresced to Mrs. Gillies' share of the general residue.

"The Lord Ordinary cannot help thinking that the case of Blackwood—26th February and 11th July 1833, 11 S. and D., 443 and 699—(though not certainly on all-fours with the present) is strongly illustrative of the above views. There, the purpose to disinherit the eldest son of the testator was in the strongest possible terms

and, at any rate, by the Act 6 Geo. IV., c. 98, the rights of the next of kin vest even without confirmation; and their rights cannot be defeated, unless they have been disinherited, which, by the law of Scotland, they cannot be, except by the estate being effectually conveyed to some one else, to their prejudice. Here the right of the legatee has, so far as the accumulations go, proved to be no right; and, accordingly, that right which was vested in the next of kin from the beginning, is not prejudiced by the gift to a third party, that third party not having appeared. Their right is never contingent, as it arises, not by force of the deed, but by force of law. It is only the existence of the fund which is contingent. If the fund shall ever exist, the right is in them. The right in Mrs. Moorhouse's children is contingent. Should Mrs. Moorhouse have a child, that right will for the first time vest. But, by its vesting then, that bequest, which was made by Dr. Cochrane to the prejudice of his next of kin, will come into operation, so far as not struck at by the Act; and the right of the next of kin will, to that extent, prove a right of no use or practical avail at all. But they will not be the less next of kin. They will not be the less called by law to take the estate, in so far as that estate is not well given away from them.

It is farther said that the deed simply postpones the vesting. But it does not in terms postpone the vesting, nor by any necessity of construction. The argument is merely an endeavour to get quit of the principle, that you cannot disinherit an heir-at-law without giving the property to some one else. In cases arising upon an ultimate bequest to heirs whatsoever, the parties who were the heirs *ab intestato* at the death take; and express words and intention must be found in the deed to enable any contrary result to set aside this rule. It is unnecessary to consider the third question sent for the opinion of the Court.

For the executors of the testator it was pleaded, in answer to the first question, to which their argument was confined;—That the Thellusson Act does not apply, as the deed contains no direction, either express or implied, necessarily leading to the accumulations in question; and the Act does not prohibit accumulations arising, not from the terms of the deed, but from accidental circumstances which have emerged, and the application of the ordinary rules of law to them. The sixth purpose is the leading provision in this question. It is material to keep in view that, when this testament was made, and when the testator died, which was three years after the date of the settlement, his eldest son was twenty years of age, his youngest son **[121]** eighteen, and Mrs. Moorhouse twenty-four. It appears, although it is not stated in the case, that Mrs. Moorhouse had been married only two years previously, and had a child, who died however before the testator. Therefore, there was every human probability, 1st, That the testator's sons would take; 2d, That his sons would have issue; and, 3d, That, if they had no issue, at all events Mrs. Moorhouse would. In these circumstances, he made no provision for the failure of all these parties; and the direction in the will contains on the face of it no trust for accumulation. That word does not occur once in the whole deed—distinguishing it in this respect from almost every other

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expressly set forth. There, too, so far as the specific destination of the deed went, it was equally impossible to say that there was any right properly vested in the son thus disinherited, so long as he lived. That there was an ultimate destination over to the testator's 'nearest heirs and assignees whomsoever,' made the case even less favourable for the son, inasmuch as it left matter for construction, upon the strength of the testator's general intention to disinherit, whether there was not enough *tota re perspecta* within the deed to exclude the son meant to be disinherited, and to let in the heirs next entitled to succeed. Yet, this notwithstanding, the Court allowed the son, while it was yet *in dubio* whether he might not have issue (in which case he would certainly have been excluded *in toto*) to appropriate the rents, upon caution to repeat, in case of another party eventually appearing and establishing his right. And it was even observed by one of their Lordships—'If it could be demonstrated that the pursuer would not have heirs, I would allow him to possess the estate absolutely.'—(11 S. and D., 700.)

"There are some observations upon Dick's case to be found in Carfrae, 3d February 1842 (4 D., 605), which (so far as the Lord Ordinary is able to follow them) would seem to suggest some degree of doubt whether the different members of the Court be, even yet, at one as to the true regulating principle of the judgment."

case which has occurred under this statute in England. The word "accessories" is not an equivalent. Referring to the dispositive clause, the testator evidently uses it simply in the sense of conveying everything belonging to him; and if it carries interest, that is not in virtue of a direction to accumulate. Under the other purposes of the deed, no implied direction to accumulate is really to be found; but undoubtedly a contingency unforeseen by the testator has rendered accumulation necessary. Is that an illegal accumulation directed by the testator, so as to be struck at by the Act? The statute requires, as the condition of illegality, that the accumulation be "directed." This is a restrictive or disabling, not remedial, statute; and it is therefore to be strictly construed.[1] Accumulations effected by force of law, extraneous to the directions in the deed, will not be struck at by the statute. Now the wish, meaning, and intention of this testator, was to have his estate at once handed over to the beneficiaries; but the law has ordered the trustees to retain it, till it be seen whether the intended beneficiary comes into existence. The accumulation thence arising is attributable, not to the directions of the testator, but to the necessary operation of the law. That there are cases of accumulation to which the statute does not apply is not disputed.[2] No doubt the Thellusson Act was passed to remedy what was felt to be an evil; but the contrast between the Thellusson will and the present was very marked. The testator in the present case did not, as in the Thellusson case, want to defeat his immediate successors; and therefore this will is not within the mischief which the Act was intended to remedy. To bring accumulations—the necessary consequence of a testator's directions—within the category of a direction to accumulate, there must be inevitable accumulation; that is, where the provisions of the will cannot be carried into effect otherwise than as an implied direction to accumulate, and then the statute applies. Here it is manifest from the terms of the deed that the truster did not contemplate accumulations. He expected his sons to survive him, and empowered his trustees to apply the whole proceeds towards their maintenance and upbringing.

The term "accessories," which he uses, is equivalent to part and pertinent. It is important (1) that there is no indication of the testator's intention to accumulate, and (2) the natural course of events which he contemplated would have led to no accumulation. It was just possible that it would. It was barely probable. It was not inevitable. It is not necessary to the carrying out of the settlement, and arises solely from circumstances not expected by the testator, and for which he gave no direction. Had the present question been raised during the twenty-one years, it could not have been held that this settlement, or any portion of it, was struck at, or [122] rendered invalid, in respect of the Thellusson Act. It is anomalous to say that for twenty-one years the settlement was good, and not struck at by the Act, but that thereafter it became illegal and invalid under the statute; and in this particular deed there was, in a sense, sufficient at least to displace the Thellusson Act,—a vested interest held by the testator's executors for the child that may yet be born of Mrs. Moorhouse, or failing the child, for the testator's representatives. Would not such representatives, on the principle of the case of Scheniman,[3] be entitled to apply to the Court, setting forth, that as Mrs. Moorhouse had had no child for twenty years, he was reasonably entitled to possession on finding caution to meet the possible contingency of her having issue? At all events, there could be no room for applying the Act till after the lapse of twenty-one years from the expiry of the first twenty-one years.[4]

Mrs. Moorhouse adopted the argument for the executors.

For the next of kin, as at 1852, the argument was directed exclusively to the

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[1] Tench *v.* Cheese, *dictum* of Sir J. Romilly, reported 19 Bevan, p. 27; Wilson *v.* Wilson, 1851, 1 Simon (new series), Chancery Reports, 298; Barrington *v.* Liddell, 1852, 2 De Gex, M'Naughton & Gordon, 502.

[2] Lord Eldin's opin. in Griffiths *v.* Vere, *supra;* Elborne *v.* Good, 1844, 14 Simon, 165 and 174; Bridgenorth *v.* Collins, 1847, 15 Simon, 538; Lombe *v.* Stoughton, 1841, 12 Simon, p. 344; Bryan *v.* Collins, 1852, 16 Bevan, p. 14.

[3] Scheniman *v.* Wilson, 25th June 1828, Sh. vol. vi. p. 1019.

[4] Turnbull *v.* Cowan, 13th June 1845, *ante*, vol. vii. p. 872, aff. Bell's App. vol. vi. p. 22; Hargreaves, p. 118.

second and third questions, on the assumption that the Thellusson Act applied to accumulations subsequent to 18th June 1852. The question then was, to whom do these accumulations belong? Mr. Lord claims, as representing the testator's sons; but it was only if there was any right vested in them prior to their death, that he could now claim as their representative. The statute does not say that, as regards accumulations after the lapse of twenty-one years, the testator shall be considered as intestate; nor does it say to whom these accumulations shall go. It only says they shall go to such persons as would have been entitled to them but for the direction to accumulate. Therefore, the point of time at which the statute seems to point is that at which it (the statute) comes into operation,—not the period of the testator's death, but the period at which the accumulations ceased to be legal. Where there are no residuary legatees, the statute obviously points at the next of kin.[1] Where there is a residuary legatee, the Court have found that the accumulations were only to be null and void, to the extent of preventing the residuary legatee from being kept out of his legacy. They have not recognised the contention of the heir-at-law in this case, that there was an intestacy, which let in the right of the next of kin *a morte testatoris*. Therefore, this truly is a demand for accumulations non-existing during the life of the persons whom Mr. Lord represents, which, therefore, cannot be said to have vested, in any sense, in these parties at the time of Mr. Cochrane's death.

A more general question has arisen before, namely, whether the next of kin take the whole personal estate of their ancestor as at his death, assuming that the testator leaves a deed, which may eventually become inoperative by the failure of conditional legatees,—the conditions being such as do not postpone payment, but preclude vesting; and the case of Dick *v.* Gillies is conclusive against the pursuer upon that point. That case remains authoritative until shown to have been wrong decided. Although the next of kin, as at the date of the death, were called under the express will of the testator only *sub conditione*, so that no right, under this settlement, vested in them; yet it is said they have another character, viz., that of next of kin *ab intestato*, which enables them to claim in that character what they could not claim in the character of legatees under the will. But the principle of law is, that the right of succession depends upon the express or implied will of the deceased equally in testate or intestate succession. It is not that the law gives, by its mere enacting force, the right of the next of kin to take as at the death of the testator. Suppose the next of kin spe- **[123]** -cially called as at the death under a destination to A, then to B, then to C, whom failing, the next of kin, whom failing, to D,—shall it be said that, as specially called under this destination, no right vested in the next of kin as conditional legatees, and yet that, under the implied will of the testator, they are called as postponed to D, who may fail; and, therefore, their right, in that character, vested in them *a morte testatoris*? The testator surely can postpone vesting, and commit his estate to be held by trustees until it shall be seen whether a certain event shall be purified. The testator has done so here; yet the contention is, that the persons who are conditionally called had a vested right *a morte testatoris*. The true principle is, that the estate is held for those who are to be his next of kin as at the time when his express direction fails to come into operation. The condition failing the liver only supplies the ulterior destination, "whom failing to my next of kin;" and, in construing the deed, it must be read as if these words had been introduced into it.[2]

In the event of Mrs. Moorhouse dying childless, the same argument would entitle the next of kin, at that date, to claim the capital destined to the child of Mrs. Moorhouse.

A child possessing the character of heir has no right as opposed to character. There must arrive a certain period at which it can take up a succession before there can vest a right. Character and right are essentially distinct. Thus, under the former law of Scotland as to moveable succession, nothing vested in the next of kin without confirmation. But it is said that confirmation is now unnecessary; the only effect of that is, that the trustees hold, in the first place, for the possible legatee, and for the next of kin as substitutes to the legatees, and nothing vests in anybody till at

[1] Ogilvy, 18th July 1846, *ante*, vol. viii. p. 1229.
[2] Erskine's Prin. 3, 8, 1; Ersk. Inst. 3, 8, 2; Stair, 3, 4, 2.

least 1852. It then vests in the next of kin called as at the opening of the intestacy.[1] This testator was testate for twenty-one years after his death. Is it to be held that he was intestate, in the face of the administration of his estate for that period by his executors? Succession is what gives the heir the right, and he can only have a right when the period arrives at which he can take it up, and claim the benefit of it. Moreover, the obvious intention of the testator is an element here which ought to have its due weight.

Of this date, the case was advised,—

LORD PRESIDENT.—There has been remitted to us by Vice-Chancellor Kindersley, under the provisions of the 22d & 23d Victoria, c. 63, a case with certain questions annexed, relative to a suit going on in Chancery as to the trust-estate of Peter Cochrane. The questions put to us have reference to the application of what is called the Thellusson Act—39 & 40 George III., c. 98. Having heard a full argument from the bar, it is necessary for us now to construe both the Act of Parliament and the deed of trust, and to consider the application of the one to the other. In regard to the deed of trust, I think it may be proper to consider it irrespective of the statute, and see what it would have accomplished supposing there had been no such statute in existence. Now, reading the deed as a whole, and not going into details or criticism on the words, but stating the result of my opinion,—reading the deed as a whole, and having regard to all its provisions and expressions, I am of opinion, first, that the testator intended the interest of the capital sum to go, in the event which has occurred, viz., the failure of his sons, to the children of Mrs. Moorhouse, and not to any other person; and, second, that the deed is framed so as to accomplish that object, if not interfered with by the statute. Then, in regard to the statute, which is peculiarly expressed, I am of opinion that it is applicable to the case which has arisen under the deed. Various cases have been cited to us which occurred in the sister kingdom. As these cases were stated, it rather appeared to me that there was a difference of opinion among learned Judges in regard to the circumstances under which a direction to accumu- **[124]** -late would be implied so as to import a contravention of the statute. I have therefore considered this case by examining for myself the statute and the will, and applying them to each other. The statute is directed against the accumulation of the profits or produce of real or personal estate, and the preamble sets forth that it is expedient that all dispositions of real or personal estates, whereby the profits and produce thereof are directed to be accumulated, and the beneficial enjoyment thereof is postponed, should be made subject to restrictions. The leading enactment is, that no person or persons shall, after the passing of this Act, by any deed or deeds, &c., settle or dispose of any real or personal property, "so and in such manner that the rents, issues, profits or produce thereof, shall be wholly or partially accumulated for any longer term than" the life or lives of such granter or granters, &c., or the term of twenty-one years from the death of such granter, and so on. The enactment is in substance that no person shall settle or dispose of his property so and in such manner that the rents, issues, produce, or profits thereof shall be wholly or partially accumulated beyond a certain time. The thing to be prevented is the accumulating the profits and produce; and the statute forbids any manner of settlement whereby that result shall be attained. That is the leading purpose of the statute, and what it prohibits. Then the statute goes on to say, "in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto, if such accumulation had not been directed." Here the word "directed" is introduced for the first time—The expression is "so directed." These words must, I think, be read with reference to the previous enacting part of the clause, which is directed against any deed whereby such accumulation shall be brought about. Every such deed expressly or impliedly directs accumulation, and is struck at by the provisions of this statute. The latter part of the clause not only provides that such direction shall be null, but points out where the accumulations are to go to, which, but for the

[1] *Bell's Pr.* sect. 1642; Justinian's Institutes, 3, 1, 1; 3, 1, 7; and 3, 2, 6.

statute, would have gone to the party favoured by the will. In the present case the deed is, in my opinion, so framed as to carry the accumulations after twenty-one years, that is, after June 1852, to the children of Mrs. Moorhouse, in the event which has occurred. That is, I think, the necessary effect of the deed; and that being so, I am of opinion that it is an implied direction to accumulate. It is not an accumulation resulting from the operation of law, as may happen in regard to minority; it is an accumulation resulting from the provisions of this deed in the circumstances which have occurred, accumulating after the period of twenty-one years, irrespective of any such consideration as minority. I am therefore of opinion that this statute does apply. In that view of it, the answer which I should be disposed to make to the first question put in the case is, that, by the effect and operation of the deed of trust-disposition and settlement, accumulations are impliedly directed which are prohibited by the Act referred to, and that these accumulations are the accumulations since 18th June 1852.

Then arises the second question, which is one of great importance. It is, who are or is entitled to the accumulations or accumulation of the personal estate of the said Peter Cochrane the elder, which are, or is prohibited by the said Act of Parliament,—that is, in the view I take of the state of matters, the accumulations after 18th June 1852? The statute, in the clause which I have already read, says, that in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits or produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed. In the circumstances of this case, as I read it, the accumulations from and after 18th June 1852, impliedly directed by this deed, are the accumulations in question. The direction in regard to them is null and void, and those rents or profits which are so impliedly directed to be accumulated, shall, so long as the same shall be accumulated, so long as that implied direction shall subsist, go to and be received by such person or persons as would have been **[125]** entitled thereto if such accumulation had not been directed. The result of that is to deny effect to the direction, and to deal with this subject as if there had been no direction, and as if the testator had not disposed of it. The testator did dispose of it, or endeavour to dispose of it. He did deal with it as a subject over which he had control. It was a subject over which he had control, and he could have dealt with it in any way he chose, except in that one way in which he did deal with it; and in that one way he is excluded from dealing with it by the statute. It was not a subject which he might not have disposed of. He might have directed the interest after a certain period to have been paid over from year to year to some one for beneficial enjoyment, but he has not done so. He has not dealt effectually with that part of his estate. He has directed it to be accumulated, and the statute has struck at that direction to accumulate. What he has tried to do is prohibited by the statute. The statute says that if a person does that, the direction shall be of none avail, and the rents, &c., shall go to certain other parties. The result then, is to produce, in regard to that fund, a state of intestacy. The effect of that is, I think, to give these accumulations to the heir *ab intestato*. The meaning of that is, to the person entitled to take by reason of the deceased not having disposed of that estate. This implies a right in reference to the date at which he died intestate. It may be that the question whether he died intestate may not be solved till long after his death. It may depend on contingencies,—the contingency of life, or of birth, or of marriage, or of conduct, or of litigation. But if the ultimate result is an ascertainment or development of the condition of intestacy, matters must be referred back to the date of intestacy, not to the date of the ascertainment of the fact, or of the purifying of the condition,—that is, not to the ascertainment of the non-existence of a circumstance or event, which, if it had existed, would have prevented intestacy, but which having never had existence, could not prevent intestacy or impress the character of testate succession. I therefore think that the representative of the person who at the death of Peter Cochrane the elder would have succeeded to him as heir *ab intestato*, is the person entitled to the accumulations since 18th June 1852. That person appears to me (according to the statements in this case, which we are to take as to the condi-

tions of the matter, with reference to the party in right of succession in that way), to be the litigant Mr. Lord. That appears to me to be the state of the matter according to our law. The case of Dick *v.* Gillies has been cited and dwelt upon as an authority the other way. That case underwent a great deal of discussion. I have read it more than once, and I have also had the benefit of seeing the notes furnished to us by some of the parties, that were kept by my respected predecessor, who was one of the Judges who dealt with that case. It was a very complicated case, and involved many questions; and the only point of it in reference to which any precedent could be deduced here, or has been endeavoured to be deduced, was one among many points in the cause, viz., the right of Mrs. Gillies to a certain sum of L.2000. Now, it appears to me, that in reference to that particular matter, the judgment of the Court did not proceed upon any general or broad ground or principle, such as we are now called upon to decide. If it had proceeded upon any such principle, I think there was no room for the various considerations that were introduced into the opinions of the Judges who dealt with that question. I see that the Judges who dealt with the rights in reference to that sum of L.2000 felt much difficulty, that their opinions fluctuated in the course of the repeated hearings of that case, and that on all the occasions elements were introduced as grounds of opinion which are foreign, or at all events unnecessary, to the consideration of the question upon the general ground on which I am now dealing with it. Some of the Judges went mainly on the particular clauses and words of the will; some dealt with the question upon the principle of conditional institute, and some on other grounds. But if the question had been merely whether a lapsed interest went to the heir *ab intestato* at the time of the death of the party, or to a person who had come into the position of being the nearest representative at the period of the occurrence of the contingency of the lapsing, these various elements of judgment would have been of no importance in the decision of the cause. I do not, then, look upon the case of Dick *v.* Gillies as being an authority here, and I am relieved from canvassing the merits of that judgment. It was argued to us that the judgment could not be supported upon any ground except that of having decided the matter of [126] general law in a way adverse to the view that I take of it. That argument does not weigh with me, when I do not see in the deliberations of the Court, that such was the ground on which the judgment proceeded; for I am not to import a ground for supporting the judgment which does not appear in the deliberations of the Court. I do not go into the question whether the grounds which do appear to have entered into the minds of the Judges, were sufficient to support that judgment. I assume that they may, but I decline to go into that question, and I decline to import a ground of judgment which I do not find in their deliberations, more especially as in my own view of the merits of the ground that is proposed to be imported I would not be disposed to regard it as a ground for supporting the judgment, but rather as a ground for arriving at an opposite judgment if not controlled by other considerations. Such being my view upon the whole matter, I am of opinion that it is unnecessary to answer the third question, for the answer to the second includes it.

LORD IVORY.—I have given the most deliberate attention to this case, and to all the questions that are involved in it; and I have come to a result which completely coincides with that which your Lordship has just announced. As regards the first question, whether by the effect and operation of the said deed of trust-disposition and settlement, any and what accumulations are expressly or impliedly directed which are prohibited by the Act 39 & 40 George III., c. 98, I am of opinion that the whole profits and produce of the estate since the expiration of the twenty-one years from and after the testator's death, fall within the prohibitions of the Thellusson Act. If there had been express words in the deed, it could not have been disputed; but it is said that it requires positive direction, or at least the distinction between that proposition and that which was said is so very thin that I can hardly follow it. It is not necessary that there be express words of direction, as I read the statute, and as I understand the statute to have been read in the sister country, where many questions of this sort have arisen. For if by the inevitable operations of the directions which the deed gives to the trustees as to their dealing with and management of the estate, accumulations must take place in the extrication of the testator's mind, the necessary implication to be gathered from this is as clear as the most express direction. The statute uses the word "direction," but not throughout. I do not wish to carry the implication into

the reading of the question, but I am stating what would be my view on a deed of this sort, regarded as a purely Scotch deed, and if we had nothing at all but the statute and the deed to go upon. The statute enacts "that no person or persons shall, after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property so and in such manner, as the rents, issues, profits, or produce thereof, shall be wholly or partially accumulated for any longer term than" the period mentioned in the Act, and the accumulation so resulting shall "go to and be received by such person or persons as would have been entitled thereto, if such accumulation had not been directed." It is clear from this that the evil to be prevented was the partial accumulation, and the postponement of the beneficial interest in any party; for the statute goes upon the preamble, that "it is expedient that all dispositions of real or personal estates, whereby the profits or produce thereof are directed to be accumulated, and the beneficial enjoyment thereof is postponed, should be made subject to the restrictions hereinafter contained." The question therefore is, whether the natural and necessary operation of this deed is not to produce the accumulations prohibited? Now, I cannot read the deed without being satisfied that the whole estate, with all its future produce and fruits, were conveyed to and vested in the trustees. The trustees are to hold for the purposes of the trust,—they are to hold not only the *corpus* of the estate, but the produce of the estate,—and if they be such that they are not practically to come into operation until a later date than the twenty-one years after the testator's death, the trustees are so to hold, that they are to deal neither with the *corpus* of the estate, nor with its accumulated produce for that time. Of course, while the purposes have not yet come into action, the accumulations, which it was the intention of the testator should follow the fate of the *corpus* of the estate, are and must be accumulated. You cannot follow the directions of the testator to preserve them until the event which he has contemplated, without seeing that it is the duty of the trustees,—a duty which they could not avoid,—a **[127]** duty which is expressly laid upon them by the provisions of the deed, to see that that produce be saved and laid past, or, in other words, accumulated, and then the *corpus* dealt with on the ultimate execution of the trust by applying the whole fund then remaining in their hands. The beneficial interest of every party is postponed during this time. No party has, in the meanwhile, any right of beneficial enjoyment. The trustees have no power of disposal of that which they thus received, and, therefore, the result, as I said, is a matter of necessity, and a matter of necessity arising under the deed itself; such a matter of necessity, to use the words which have been used in other actions where such a question arose, from which neither the beneficiary nor the trustees have any possibility of escape. That being the inevitable operation of the deed itself, it is clear that the deed directs that which renders any management but a management of accumulation impossible in the hands of the trustees. It was said, that not being an express direction, and not being an implied direction, in the sense to which I have just been speaking, that the accumulation is truly an act of the law, by which the trustees must accumulate. It is not an act of the law in the sense of the law being the source of the duty. The duty originates in the deed, and is to be fulfilled in the terms of the deed. There is no general law regarding the subject. It is the will of the testator. But there is a misapprehension in the use which has been made of that observation, for the illustration which was given was that to which your Lordship has already alluded,—the case of trustees or curators acting for pupils, or for persons otherwise incapacitated from managing their own estates, lunatics and such like, when the trustees are compelled so to manage the estate which they have been intrusted with, that all the produce shall be gathered together and dealt with as a portion of the estate eventually to be extricated. Well, that is very true. There is no direction there, and it is in such a case that the law interposes; but the distinction lies here, that in the case of an estate which has fallen to a minor as a fee-simple estate, burdened with no contingency, no directions, no accumulations, so far as the deed goes, then the estate is pure and simple. It is an estate which belongs to him after the death of the testator from the first; and the Thellusson Act does not deal with accumulations in the interests of a party to whom the estate itself belongs, and who is in the beneficial enjoyment as well as in the vested right to the whole estate. The case there is the case of funds of the successor being placed in such a situation that it is necessary to throw the protection of the law over them. The trustees, or the receivers of Court,

or whoever else is placed in charge, must deal with the estate, so that all the beneficial results from that estate shall fall to the party whose the estate is. But that is not at all the kind of case which the Thellusson Act points at.

On the first question, therefore, I have no sort of doubt, and with reference to the second, viz., if the Thellusson Act applies, who are or is entitled to the accumulations of the personal estate of the testator, so prohibited, I am of opinion that the parties entitled to the prohibited accumulations are those who would have taken *ab intestato* at the time of the testator's death. The question raised necessarily involves the principle of intestacy. There are no directions in the deed for the disposal of these accumulations, other than that they shall remain in the hands of the trustees, to be dealt with along with the *corpus* when the time for dealing with both arises. There is no beneficial enjoyment—no right or interest in anybody whatever. In the face of this, the statute enacts that the accumulations, in so far as prohibited by the statute, are to be received by such person or persons as would have been entitled to them if the accumulations had not been directed. That is, in other words, just saying that they are to be dealt with on the footing of the principle of intestacy. They are the fruits of an estate which belonged to the intestate. They are a parcel of that estate, necessarily connected with it, and not appropriated by the testator; which is just saying that they would have fallen within his succession if not otherwise dealt with.

Now, this case arises under circumstances peculiarly favourable, for it is not only with reference to these accumulations that the intestacy reaches. The question will very soon arise (it may be doubted whether the question has not already arisen, when the mother of the proposed beneficiaries has attained the age of fifty-three), but when Mrs. Moorhouse dies without issue, the question will arise as to the whole *corpus* of this estate, and all the accumulations that will go on till her death. The [128] case of Dick *v.* Gillies was the only matter urged on the other side which creates any difficulty in my mind in regard to this. But, in the first place, I am of opinion that that case was not decided on the footing of intestacy at all, but upon the ground that it was the will of the testator that was to be read, and that it was out of the terms of that will that the ruling principle which regulated that decision was to be got; in other words, that it was *provisione hominis*, not *provisione juris*, that the decision was arrived at. But, secondly, I am of opinion that, if the principle of intestacy was supposed to be involved, and was made the rule of the decision, the case was ill decided. I have no hesitation in saying so. My opinion has been growing in regard to that ever since the case of Todd *v.* Skinner, which I had occasion to decide myself; and, truly, the note which is appended to my judgment in that case leaves me very little to say in the present instance. I have re-studied the decision which I pronounced in that case—which, unfortunately, never came to any ultimate decision, having been compromised—and I am more and more satisfied that the reasons which I assigned for not adopting the result arrived at in the case of Dick *v.* Gillies as a rule for my judgment are well founded. Intestacy may arise in two situations. Of course, it necessarily arises if there be no testament. But it equally arises if the testament becomes inoperative. Where there is no testament to regulate the succession, the succession must be dealt with as a case of intestacy. Another observation which I would like to make is, that I see no sound distinction between the case in which what renders the testament inoperative occurs before, or that in which it occurs after the death. The essential point is, that when there is no provision for the case *provisione hominis*, the law must necessarily be called in to deal with the estate as unprovided, unappropriated, or otherwise, as intestate. Accordingly, if there had been a disposal of the residue—that is to say, if the residue had been so disposed of by the deed as to gather everything within it that had not been validly otherwise conveyed, there could be no doubt that such a fund as that which we are now considering would have fallen into the residue. If not, where could it fall? If the residue itself be left upon intestacy, why then the fund falls into the general estate of the deceased, so far as it is intestate and unappropriated. I am aware that, regarding residue, it sometimes has been debated whether the deed, upon the whole, be not such as to give the residue a special character, and so to exclude, on the assumption that such was the will of the testator, the possibility of such a fund as this falling into it. It may be that the residue was so dealt with, as to shew that the residue which the party intended to make was not the general residue of his estate, arising on all

contingencies whether foreseen or not. But the case does not present any difficulty of that sort. It has been said here that there is a condition in the bequest, and that it is only on the evolvement of that condition that the question arises. But what is a conditional bequest? If the condition be purified, then no doubt there would be testacy, and the bequest would take effect *provisione hominis*. But if the condition be not purified, the provision falls. The event shews that there has been no bequest, because no operative bequest from the beginning; and the fund thus falls back just as unappropriated as in the case of no provision having ever been made regarding it, and comes to be dealt with *vi legis*. It is said that the next of kin at the date of the succession opening must prevail, and that the succession must be held to open at the time when the condition attached to the provision becomes inoperative. But it is a mistake to say that the lapsing of a legacy in this way is the case of a succession opening. It is not the case of a succession opening, but of the *conatus* to test failing. The succession in such cases is the succession which opened at the death. The extrication, and the operation of the testament in dealing with that extrication, is alone suspended; but that is a suspense of the settlement merely *in operando*. It is no suspending of the vesting of rights subject to the condition which has been attached to them. The succession is still the universal succession of the party *ab intestato*, in so far as this inoperative provision goes; and it is a mistake, therefore, to imagine, that a man can die testate in the year so and so, and that he can die intestate in half-a-dozen years afterwards. The conditional bequest is a contingent burden upon the succession which has opened *a morte testatoris*. It is no more than a burden, and therefore, when the burden falls, the succession expands, and becomes again as at the death of the testator; and all that has taken place in regard to it is, that the **[129]** condition which embarrassed it has flown off, and the succession then is free from the burden which that condition, if in operation, would have attached. It would be a very important question if we should come to any other conclusion, for it is a matter that must have been heard of long before now; but it never occurs. It should apply to every legacy operative after the testator's death, and contingent on a condition which might not happen. For example, a marriage-contract or testament provides a sum to the children of the marriage on their attaining majority or on marriage; has it ever been doubted, that if, after the death of the testator, survived by such children, a child shall predecease in minority, that provision, if not *per expressum* ordered otherwise, would lapse and fall back into the general estate? That is a case which must happen very frequently, almost from day to day, in the ordinary occurrences of life; and I never heard that the lapsing of a legacy in that way was such a lapsing as would call in, not the party who would take otherwise, but a party who would take when the condition had ceased to affect the case.

Now I have said that the case of Dick *v.* Gillies does not proceed on any such rule. If it had, that case would have had a very short issue, for it was impossible to deny that the beneficial operation of the right in the L.2000 did not come into operation till the death of Mrs. Gillies, and all that took place would have been unnecessary had it been a general rule that every legacy that lapsed after the death of the testator fell to the heir who would have been heir as at that date, for they would just have said the death of Mrs. Gillies is the *punctum temporis* which must be taken, and there is no use to say more. It would not have been necessary to go into all the puzzles which embarrassed the Court in that case. The Court indeed dealt with the case as an exception from the ordinary rule, and it was from that, and from that alone that their difficulty proceeded. With all deference I cannot say that I read that case with any very intelligent notion of what were the precise grounds on which the Court went. One Judge went upon one thing, another Judge went upon another, and the Judges were not very consistent with themselves, and they fluctuated in their opinions over and over again. But be that as it may, one consideration was the presumed will of the testator; another was the notion of a conditional institution which was implied in the tenor of the deed; a third was, that the fund out of which the annuities were to be given to the parents was to be held heritable, and when liberated from the annuity by the death of the parent, being then heritable, it was heritable in that party, and was not carried, therefore, by the death of Mrs. Gillies. Her want of power, and the inability of her conveyance, was the ground of decision. Then another ground was an implied destination. But one and all of these grounds establish, that the

Court were looking at the case as originating not in intestacy, but in a construction of the deed and a meaning of the testator—in other words, as a case of implied testacy. It was not intestacy at all. The Lord Justice-Clerk Boyle, at the last advising, expressly says that he goes entirely on the terms of the deed. It was a reading of the deed. It was not a consideration of what was the general rule of law, but it was, this is a special case; there are matters within the four corners of this deed which enable us to read the mind of the testator; and the mind of the testator so read out of the deed drives me to this conclusion, that there was no vested interest in Mrs. Gillies at a particular time, and that, therefore, she had not the power of conveying it to her husband, and that that conveyance was not heritable. That is testacy, and not intestacy; and therefore that is what satisfies me, that here we are not in the least to be puzzled by the application of that case. But if necessary, as I said before, I am prepared to hold it to have been ill decided, and to have been decided under such circumstances, and with reference to such differences and want of precision in the views of the Court, that I should be indisposed to follow it as a hampering judgment.

If there be intestacy at all, what is the *punctum temporis* to be looked at? The *punctum temporis* in intestacy must surely be the death. The man died intestate; the man died without making *provisione hominis* any deed which should regulate his succession. If he died intestate at that time, how is that intestacy to be postponed till a later date, when a particular result is to take place from certain contingencies which he has attached to it? The operation which suspends the working of the intestacy, and which may ultimately raise a question whether a particular **[130]** portion of the estate be testate or intestate, may introduce a later point of time. The working of the provision has a course of time, but the intestacy has none. The *punctum temporis* in intestacy is one and indivisible. A man must be intestate at the time of his death, or he cannot become intestate six years after. What is to give the time? The testator has not given it. It is supposed that he has done nothing. The case falls either to be dealt with on the footing that the deed provides for it expressly or by implication, or if it does not so provide for it, then it is to be dealt with as having fallen free from the contingency. That is satisfactory ground, at least to my mind, for supporting the answer which I have given to the second question. As to the third question, difficulties might have arisen if I had come to a different result in regard to the second; but as Mr. Lord is admitted, on the face of the case, to be the party who would have taken at the date of the death, I think he is entitled to the accumulations.

LORD CURRIEHILL.—I. The first question, as stated in the case, involves two enquiries. One, which depends upon the construction of the testator's trust-disposition and settlement, is, whether by its operation and effect, any and what accumulations or accumulation are or is expressly or impliedly directed? The other, which depends upon the construction of the statute 39 & 40 Geo. III., c. 98, is, whether such accumulations or accumulation, if so directed to be made, are or is prohibited by that statute?

1. I am of opinion that, according to the true meaning and sound construction of the trust-disposition and settlement, the revenue of the remainder of the whole personal estate left by the testator, beyond what was required for fulfilling the first five purposes of that trust-disposition and settlement, were directed to be accumulated for behoof of the parties to whom that remainder was thereby provided. The subject of that provision consisted not only of such remainder of the testator's personal estate, but likewise of the whole *accessories* thereof; and, in my opinion, the yearly revenue of such remainder falls under the description of its accessories. The yearly revenue produced by an estate or fund is, according to the proper and usual meaning of that expression, an accessory of what produces it. One of the most familiar examples of the relation of principal and accessory, is that of a subject and its fruits, natural or civil. And it appears to me that this was truly the meaning which the testator expressed in this direction in the settlement. He must have intended either that that revenue should be included along with the capital in the testamentary provision of the residue and its accessories,—or that he should die intestate as to that revenue, and that it should belong to his next of kin as his legal representatives. But the latter alternative was plainly not what he intended. There are clear indications to this effect in the

settlement. One of these is, that, although he contemplated the survivance of his sons (who, in that event, would be his next of kin), he directed that until the testamentary provisions should become payable to them, a suitable allowance should be paid to them out of the revenue of the estate, and expressly limited that interim allowance to L.500 per annum,—a limitation which indicated that he did not intend that the whole of that revenue should, in the meantime, belong and be payable to them. The same thing is indicated by his direction, that the discharge and exoneration of the trustees, on all the purposes of the trust being fulfilled, should be granted by those who, on that event, should be the residuary donees. As it is utterly improbable that the testator should confer upon these donees the function of so dealing with anything beyond what was included in the donation to themselves, this direction plainly implied that the yearly revenue of the remainder of the free personal estate, was intended to be included in the gift to these donees, and was to be accounted for and paid to them, and not to persons who might never be in that position. I have, therefore, no doubt that the "accessories" of the remainder of the personal estate, which were directed to form part of this donation, were intended to include the yearly revenue of that remainder during the period between the death of the testator and the date of the vesting of the provision.

It was maintained in argument, that in the *dispositive clause* of the trust-settlement, the testator used the word "accessories" in a different sense,—because he there declared that the general conveyance in the settlement should carry everything which should belong and be indebted to him at the time of his death, with the whole accessories thereof, as if each particular of the same were therein enumerated, **[131]** and *per expressum* disponed and conveyed. But accessories of what? Plainly of what should be left by him as part of his own estate *at the time of his death.* Whatever rents, interests, or dividends become due and payable to a person during his lifetime, form part of the estate belonging to him at the time of his death, as much as the capital from which they have been derived; and a conveyance of what belongs to him at his death includes these arrears as part of the subjects or capital so conveyed, and the revenue arising therefrom after his death is an accessory of what is so conveyed.

2. Assuming that, according to the true construction of the 6th purpose of the trust, the provision thereby made was to include not only the free remainder of the truster's personal estate, but likewise the subsequent revenue thereof, during the period between the date of his death and the time when that provision should become payable, I am of opinion that this imported a direction to the trustees to accumulate that revenue during that period for behoof of the donees of that provision, whoever these might eventually be. And this being the case, that provision as to the revenue beyond the first twenty-one years after the testator's death is, in the circumstances stated in the case, null and void, in virtue of the enactment in the first section of the Thellusson Act. Without repeating the remarks of your Lordship on this point, in which I entirely concur, I am of opinion that whatever truly imports such a direction, according to the sound construction of the settlement, falls under the nullifying clause of that enactment.

II. The second question, as stated in the case, is,—who is entitled to these accumulations in so far as they are prohibited by that statute,—that is to say, who is entitled to the accumulations since the 18th of June 1852, when twenty-one years from the date of the testator's death elapsed?

By the statute it is enacted that such accumulations shall go and be received by such person or persons as would have been entitled thereto, if such accumulation had not been directed. And if no such accumulation had been directed by Dr. Cochrane's settlement, who would have received the revenues of his personal estate during the period in question? So far as I know, this question has not been settled by authority, and therefore the decision of it must be regulated by the established rules of law.

There is something anomalous in these rules, in consequence of such revenue not coming into existence until after the death of the owner of the estate by which it is produced, and, of course, after his ownership of that estate has ceased,—and, moreover, not coming into existence even then all at once, but periodically from time to time thereafter. Notwithstanding this anomaly, these rules are well established and in

daily operation in practice; and I shall state shortly what I understand them to be, and how they apply to the question now before us.

On the one hand, when the defunct himself has not effectually provided for the separation of the revenue arising after his death from the *corpus* or capital of the estate left by him, that revenue, by the principle of accession, belongs to the party succeeding to the capital. This is what happens in the simple case of a defunct dying intestate, and being succeeded by his legal representative. In that case the right to the *corpus* or capital of the estate vests, on his death, in the representative, and the future revenue thereof belongs to the representative himself, as the natural accessory of his own estate. In that case such revenue is never *in bonis defuncti*. In the case also when a defunct has made a trust-settlement of his estate without directing his trustees to convey either the *corpus* or capital itself, or its future revenue, to any other party, the defunct's legal representative is the party for whom alone the beneficial right to the trust-estate is held by the trustees. And as such representative is truly the owner of the *corpus* or capital itself *a morte testatoris*, the revenue arising from the same thereafter, as its accessory, belongs also to him. And even when trustees are directed to make over the *corpus* or capital immediately on the truster's death to a third party, the future income belongs to the donee himself as an accessory of what thus becomes his own estate. Moreover, the case is the same, although the trustees are directed to hold the trust for a period of time for the beneficiary, provided that, in the meantime, the beneficial right to the *corpus* or capital of the estate itself vests in the donee. The right to the income thereof during the period while the actual enjoyment of the estate itself is withheld from him, falls to him as an accessory of the estate itself. And [132] accordingly, when in such a case the period while the capital is so withheld from the donee exceeds twenty-one years, the Thellusson Act is held to be contravened, and the subsequent revenue, as the accessory of what belongs to the donee himself, becomes payable to him. This was decided in the case of Ogilvie, 18th July 1846, D. viii. 1229.

On the other hand, when by testamentary settlement the testator has settled his estate so that after his death the right to the *corpus* or capital thereof, and the right to its future income, are separated from each other, the principle of accession cannot regulate the succession to the latter. In such cases the income is dealt with by the law as being part of the estate of the defunct himself, and belongs either to the parties to whom he has provided it, if he has tested upon it,—or to his own legal representative at the time of his death, as intestate succession, if he has not tested upon it.

In the first place, if the testator, in such a case, has disposed thereof by his settlement, his directions, according to common law, are effectual. His power, as owner of the estate which belongs to him in his lifetime, enables him thus to dispose of what it may produce after his death. And this disposal of such posthumous income is not the exercise of a mere faculty or power of disposing of what belongs to a different party, but is the exercise of the power of disposal of what the law holds to belong to himself. His power of disposal is the same as to such income as it is in regard to the *corpus* or capital itself. If he leave directions to his testamentary trustees to employ such fruits or income for any purpose not prohibited by statute, such direction is effectual. The present case is an example,—the direction to accumulate the posthumous income of the testator's personal estate being quite effectual, except for the period prohibited by the Thellusson Act. And even when a testator directs the posthumous income of his estate, or part thereof, to be employed for a particular purpose, but omits to dispose of the *corpus* or capital by which the income is to be produced, his directions as to the former are effectual, although his legal representatives succeed to the latter as intestate succession. This was exemplified by the case of Trotter *v.* Trotter's Trustees, 29th May 1849, Dunlop, xi. 1066.

In the next place, when in such a case a testator conveys his estate to trustees, and directs them to hold the capital or *corpus* thereof, in such a manner as that the beneficial right thereto is not to vest in any person for a period of time after his death, and it is even a matter of contingency who may eventually succeed thereto, and leaves no effectual directions to give the fruits or profits thereof in the meantime

to any person whatever, the law deals with such posthumous but undisposed of fruits or income as belonging to the intestate estate of the testator himself; and as his intestate succession, it falls to his legal representatives. This was exampled by the case of Cowan *v.* Turnbull's Trustees, where a testator conveyed all his estate and effects to testamentary trustees, with directions that, on the convalescence or death of an imbecile son, they should make an entail on certain parties of all the free trust-estate; but from the manner in which these directions were expressed, it was held that the rents and other income of the trust-estate, during the intermediate period, were not included in them; and it was found by this Court, and by the House of Lords, that all the free revenue or income during that period were to be dealt with as the intestate estate of the truster, and that the trustees were accountable for the same as such to his legal representatives.—(Bell's Appeal Cases, vi. 223.) On the same principle, if, in such a case, there is an express direction to accumulate the yearly revenues with the capital, and to invest the accumulated mass in land, and on the occurrence of some contingent event to make an entail thereof, and such direction be ineffectual, in virtue of the Thellusson Act, as to the revenues, beyond the first twenty-one years, the revenues during the latter period are held in law to consist of intestate succession of the truster, and as such must be accounted for to his legal representatives by the trustees. This was decided in the case of Lord Keith's Trustees, 17th July 1857, Dunlop, xix. 1040.

Since, in this class of cases, the income of a trust-estate, when not disposed of by the testator during the period while the beneficial right to the capital of the trust-estate has not vested in any one, is held to consist of the testator's intestate estate, and is succeeded to by his representatives *ab intestato*, it follows that, according to the regulating principle of intestate succession, the right to the whole of such **[133]** revenues vests *a morte testatoris* in these legal representatives. In such cases the right vests in the legal representatives without their making up a title by confirmation or otherways, both in virtue of the statute 4 Geo. IV. c. 98, and in consequence of the estate itself being vested in trustees for their behoof. And what so vests in them is *the whole of the intestacy*, including the undisposed of revenues, during all the period while the beneficial right to the capital may remain in suspense. The parties who are in the position of being the legal representatives at the time of the testator's death, and when the right to the intestate succession vests, have right to all the revenue which may become due during the whole of the period while the capital may be held in suspense, although they may die during its currency; because all of it, from first to last, is equally included in the intestate succession of the defunct. The right itself, although the subject of it may so become payable by instalments at different periods of time, is a *unum quid*; and it vests at once and entirely in the representatives of the defunct immediately on his death. The circumstance that the subject of a right consists of annual payments is quite consistent with the right itself being such a *unum quid*, and indivisible as to succession. This is exemplified by the case of annuities; for if a person having right to an annuity, payable during the continuance of another person's life, dies intestate; what his legal representative succeeds to is the right of annuity itself during the whole of its currency; and not merely such instalments thereof as may become payable during his own lifetime. And an annuity, although in other respects it differs from a right to the income of a trust-estate in the class of cases we are considering, serves to shew that a right may be a *unum quid*, although the subject of it may consist of instalments payable during an indefinite period of time. Were it otherwise, such an intestate succession of even personal estate would consist of a series of successive liferent rights; and instead of each liferenter, after the first, deriving his right from his immediate predecessor, according to the rule of intestate succession, all of them would derive it successively from the same predecessor. Such anomalies are utterly unknown in the law of intestate succession.

This being, in my opinion, clear, the same principle would operate, although in such a case the testator should have effectually disposed of the income of the trust-estate for a certain portion of the period after his death, but should leave that income undisposed of for the remainder of the period, while the right to the capital is to remain in suspense. To the extent to which he may have so disposed of the income, his intestate estate would, of course, be diminished. But it would only be diminished in extent. Its nature or legal character, so far as left unaffected by the settlement, would

not be changed, and would still be intestacy; and, as his intestate succession, the right thereto would vest immediately on his death in the parties who would then be his legal representatives, and would be subject to their disposal. If, in such a case, the period of suspense of the right to the capital should continue for a period of thirty years, and the testator had disposed of the instalments of the posthumous income for the first twenty-one years of that period, but not for the remainder of that period, the instalments for the remaining nine years would still retain their character of intestacy, and belong to those who would be in the position of being his legal representatives at the time of his death. This, accordingly, was the view which appears to have been held by this Court and the House of Lords in the cases to which I have referred. In each of the cases of Cowan *v.* Turnbull, and of Lord Keith's Trustees, the parties who were found to be entitled to the incomes of the trust-estates, so far as undisposed of, were those who were the legal representatives of the truster at the time of his death; and although, in these cases, the same parties remained in that position when the question came to be tried, yet not only were the undisposed of fruits or income found to belong to them as the representatives *ab intestato* of the truster at the time of his death, but what they had so succeeded to was expressly found to include the future income of the trust-estates, which would continue to arise until the contingencies should happen, when the trustees were to denude of the capital.

This principle is applicable to the present question; because, while the revenue of the trust-estate for a period of twenty-one years after the truster's death falls under the directions in his settlement, the income during the remainder of the period while the right to the *corpus* or capital of the estate remains in suspense, is freed from these directions by the operation of the statute, and must be dealt **[134]** with as intestacy. And, in conformity with this principle, I am of opinion that the income of Dr. Cochrane's personal estate, since the year 1852, must be held to consist of intestate personal succession; that the beneficial right thereto vested *a morte testatoris* in those who were his legal representatives at the time of his death, and who were his two sons, Peter Cochrane the younger, and John Cochrane; that the right so vested in them has been duly transmitted to Mr. Lord by the progress set forth in the case; and, consequently, that he is the party who is entitled to the income since that date.

It is maintained that the decision in the case of Dick *v.* Gillies is an authority adverse to the opinion I have expressed. I do not think it is. There were two questions in that case. The main one related to the capital of sums which were appointed to be set apart for providing annuities during the lifetime of Forbes Dick and Mrs. Gillies; and it was decided, on the principle which is the very foundation of my opinion in the present case, viz., that although the sums directed to be set apart for certain future purposes may not become payable until these purposes be served, yet, unless these sums are otherways effectually disposed of, the right thereto, as intestate succession, vests in those who were the truster's legal representatives at the time of his death; and the vesting thereof in them takes place, not when the fund becomes disengaged, but *a morte testatoris*.

The other question in that case related to another capital sum of L.2000, which was provided to any children which Mrs. Gillies might leave at her death. That provision lapsed by the failure of such children; and the sum was found, by a majority of the Court, after much vacillation of opinion, to belong, not to those who were the legal representatives of the truster at the time of his death, but to the person who was in that position on the death of Mrs. Gillies without issue. But the subject in dispute in that case was the capital sum which had been so settled. And the ground of the judgment of the ultimate majority of the Court on that question was, that the directions of the testator regarding that sum, according to what they held to be the meaning of the will, imported a *testamentary destination* of the sum, which prevented it from vesting in any person during the lifetime of Mrs. Gillies. In other words, they dealt with the case on the footing of its being one of testate succession as to the fund there in dispute, and of its decision depending upon the construction and effect of the settlement. This is expressly stated by two of the three Judges who formed the majority of the Court, to be the ground of their judgment. According to the report in Shaw, Lord Alloway held that "it was a kind of destination;" and the Lord Justice-Clerk said, "though I have had different opinions, I am now satisfied Mrs. Gillies had no vested right in the L.2000 which she could convey; *and I go entirely*

on the terms of the will, 'if my sister shall die leaving lawful issue,' and 'but if my said sister shall die without lawful issue,'" &c. Both of these Judges held the contrary opinion so long as they held the L.2000 to be dealt with as intestacy; and they changed that opinion only when they, with great difficulty, came to hold that, according to their construction of the will, it imported a testamentary destination of the fund to those persons who might be in the position of being the testator's next of kin existing at the time of the death of Mrs. Gillies. Whether or not, if the capital of Dr. Cochrane's trust-estate should ever be made the subject of such a competiton, the directions in his will regarding it may admit of similar construction, and whether or not, in such a question, the case of Dick *v.* Gillies would be a safe authority to be followed, are questions as to which I purposely abstain from stating any opinion, in case I should now be prejudicing interests of great magnitude. It is sufficient at present to state, that the subject of the present question is not the capital of the estate, but only the income of it since 1852; that the right to that income certainly cannot be dealt with as testate succession, because, by the statute 39 and 40 Geo. IV., the only directions in the testator's will regarding it are utterly null and void, and, consequently, cannot affect this question; and that this case must be decided on the rules of law regarding intestate succession. The question which was decided in the branch I have last mentioned, of the case of Dick *v.* Gillies, does not, and cannot occur in reference to the fund which alone is at present in dispute in the present case, and as to which he, the testator, made no effectual settlement. Or rather, I should say, that the case of Dick *v.* Gillies, so far as it applies to this question, is an authority in favour of Mr. Lord; because the **[135]** posthumous income, which alone is now in dispute, not being the subject of testate succession, the right to it vested *a morte defuncti* in those who were then his legal representatives, in conformity with the principle which regulated the decision in the other branch of Dick *v.* Gillies. Although, therefore, I think that the decision in the branch of that case relating to the L.2000 may require reconsideration if a similar case should occur, I do not think it necessary, in the present case, to call in question the soundness of that decision. My opinion, in the present case, is quite consistent with that decision.

III. The remaining question requires no answer, as the condition on which it is put—viz., that there are more persons than one who are entitled to the accumulations prohibited by the Thellusson Act—does not exist if my opinion on the second question be correct.

LORD DEAS.—The question whether the will of Dr. Cochrane (or, as we should rather term it, his *mortis causa* deed) contains an implied direction to accumulate the proceeds of his estate for more than twenty-one years,—raises *in limine* the twofold question whether, along with the capital, the deed conveys to the trustees therein named, the whole interests and annual proceeds to accrue on the estate subsequent to the testator's death, and whether the trustees are directed by the deed how they are to dispose of such interests and annual proceeds, as well as the capital.

The deed conveys to the trustees, "all and singular, the whole estate, means, and effects, heritable and moveable, real and personal, of every kind and description, and wherever situated, which do now pertain and belong to me, or which shall pertain or belong to me at the time of my decease." Now, when a man, by a *mortis causa* deed, conveys his whole estate as it shall stand at the time of his death, this necessarily carries to the grantees who get the estate, all interests and profits which shall thereafter arise upon that estate, unless, in subsequent clauses of the deed, you find something to show that this could not have been intended. Whether that be so here I shall immediately inquire. But *prima facie*, the trite maxim applies, *accessorium sequitur principale*—and there is no necessity whatever, nor is it usual, to add "with the whole rents, interests, and profits," &c., which, subsequent to the testator's death, may accrue thereon.

This remark applies both to the personal and real estates. Both are comprehended in the above clause, and are thereby habilely conveyed. An additional remark of the same kind, applicable to the personal estate, arises upon the clause appointing the "trustees and trustee acting for the time, to be executors and executor, and universal intromitters and intromitter with my whole moveable estate whatsoever, and wheresoever situated, with the whole powers to which that office is entitled by law." Your Lordships are familiar with these words, as vesting in the grantees the whole personal

estate belonging to the testator at his death, with all its future interests and profits, for the purposes of the will.

It may be, however, that when you come to the purposes of the will, the conveyance being a trust-conveyance, that you find some portion of the estate, or of the annual proceeds of the estate, left in the hands of the trustees and executors without being disposed of. But that is not to be presumed. If beneficiaries are named or pointed out who are to get the residue of the estate, the natural presumption is, that they are to get the whole of it—interests and profits included—which the trustees themselves got from the testator. In this deed there is nothing to overcome that presumption, but a good deal the other way.

As regards the real or heritable estate specifically disposed of, there can be no doubt at all that the future rents were covered by and included in the direction to convey to the widow in liferent, and the eldest son in fee. It would be difficult to suppose that the rents of the house in Calcutta, which was to be sold, and the proceeds to go into the residue, were so far differently dealt with, from the rents of the other real estate, as to be left unappropriated. Then there were large annuities,—including a life annuity of L.1500 to the widow,—which, from their nature, affected primarily the annual proceeds; and the capital sums corresponding to which, on the death of the annuitants respectively, were to fall into the residue, and to be immediately divided between the testator's two sons, if they had then attained the age of twenty-five years,—thus necessarily giving these two sons, in that event, the whole future interest on these capital sums, along with the **[136]** sums themselves. I cannot, indeed, entertain a doubt upon this will, that if the testator's sons had attained the age of twenty-five, he meant them to have his whole estate between them,—interests and annual profits, which had been in the meantime accumulating, included—and that he did not mean to leave the large sum which he knew must have so accumulated in the hands of his trustees, to go to his next of kin or heirs-at-law, whoever these might be, as undisposed of by his will. If there could have been doubt upon this otherwise, I should think it removed by the clause which authorises the trustees "to make payment of a suitable allowance out of and from the annual rents, dividends, or interest of the foresaid remainder of my said whole personal estate, to each of my said two lawful sons, till the same become payable to them," which allowance he thinks should be limited to L.500 a-year each, but without prejudice to the trustees exercising their discretion as to the amount in the same way as if he had expressed no opinion on that point. It appears to me that this allowance is authorised to be given to the sons out of the annual rents, dividends, or interest of the residuary estate till the same shall become payable to them, in such terms as to imply that when the residuary estate did become payable to them—that is, when they should attain the age of twenty-five—that residuary estate would include the annual proceeds, as having been in the meantime accumulating for their behoof.

In every view I am satisfied that, had the sons attained the age of twenty-five, they would have taken the whole residuary estate,—inclusive of accruing interests and profits,—as beneficiaries under the deed, and not as next of kin, or heirs *ab intestato* of their father.

If this be so, it seems to me to be quite clear that, whatever the two sons would thus have taken under the deed, is destined by the deed—failing their attaining the age of twenty-five—to their issue respectively, and, failing such issue, then to the eldest son or children (as the case might be) of Mrs. Moorhouse. It follows that, in order to fulfil the purposes of the deed, in the event which has happened of the sons dying without issue, before either of them had attained the age of twenty-five, the residuary estate must be retained by the trustees, and the annual proceeds accumulated with the capital, for whatever period may be necessary, to ascertain whether Mrs. Moorhouse shall or shall not have a child or children—a period which has already exceeded twenty-one years from the testator's death, and the precise length of which is still undetermined.

This raises the question whether the Thellusson Act strikes against the accumulation which is thus going on, since the twenty-one years expired? In my opinion it does. If the Act were to be held inapplicable wherever there was no express direction to accumulate, it would be easy, in all cases, to evade its operation. If it were to be held inapplicable wherever it did not appear that the testator had it in view to evade

it, that also would favour evasion by involving an inquiry into what was passing in the testator's mind, which could not be satisfactorily answered. I think it immaterial whether the testator even knew of the Act;—still less whether he intended to evade it, or whether he contemplated (as I think it probable he did) the existence of a beneficiary or beneficiaries, who would take the whole estate, and terminate the accumulation in the hands of the trustees, at some period considerably within the period of twenty-one years from his death. I think it enough that the deed is so conceived that, to carry out its purposes in the event which has happened, there must, necessarily, be accumulation for a period beyond the twenty-one years.

The Act, in its primary and substantive enactment, does not use the terms "direction" or "directed" at all. It bears "that no person or persons shall, after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated for any longer term than the lives of any such granter or granters, settler or settlers, or the term of twenty-one years from the death of any such granter," &c. Now, pausing here, the testator has done the very thing prohibited. He has settled or disposed of his property "so and in such manner" that the rents, issues, and profits thereof must be accumulated—if the will is to have effect in its terms—for more than twenty-one years after his death. No doubt the Act goes on to speak of the party who would take but for the deed "directing [137] such accumulations," and to enact that, "in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void," and the annual proceeds "directed to be accumulated contrary to the provisions of this Act," shall go to those who would have been entitled thereto, "if such accumulation had not been directed." But all this just shews, to my mind, what it is which the statute regards as a direction to accumulate—viz., a settlement or disposal of property, "so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated for any longer term" than the life of the granter, or twenty-one years after his death, &c., which, as I have already said, is the very thing the testator has done here.

On these grounds, I concur with your Lordships in the answer you propose to give to the first question, upon which the opinion of this Court is asked by the Court of Chancery. I may add, however, that, when we have fixed the construction of the will, as destining the interest or annual proceeds, along with the capital, to the successive sets of beneficiaries, the further question, as to the application of the Thellusson Act, is one upon which English lawyers have the same materials which we have for forming an opinion; and, accordingly, although I do not here enter into any analysis of English cases and authorities upon the construction of the Act, I have had these under consideration in making up my mind as to the result to be arrived at.

As regards the answer to be given to the two remaining questions, I confess I should have felt relieved from the greatest possible embarrassment, had your Lordships concurred with me in thinking that, in the divided state of opinion which prevails in the profession, and in the state of the authorities—particularly looking to the decision in the case of Dick *v.* Gillies—it would have been right, before answering these two questions, to have consulted our brethren of the whole Court. The sum at stake is large, and the question of law is both difficult and important; and, although the opinion to be now given may satisfy the purposes of the present case, I do not see how it can settle the law—leaving, as I think it will do, the opinions of one Division opposed to a judgment of the other, in place of an opinion of the whole Court, which would have authoritatively settled the point. The question of law to which I allude is, whether when, in a trust-deed and settlement like the present, a bequest is made—it matters not whether of a specific sum or of general residue—subject to a condition, the occurrence or failure of which cannot be ascertained till a distant day, the bequest, upon failure of the condition being ascertained, falls to those who were the testator's heirs or next of kin at his death, or to those who are his heirs or next of kin at the time when the condition is found to have failed? That is the question upon which your Lordships' opinions have now been given one way, and which, I think, was decided in the case of Dick *v.* Gillies in the opposite way.

In that case, the purposes of the trust (stated briefly) were these:—1st, To pay

debts; 2d, To convert the whole estate into money; 3d, To lend on heritable security a sum sufficient to yield L.400 a-year, to meet certain life annuities; 4th, To pay to the children, if any, of the truster's sister, Mrs. Gillies, L.2000, and to the children, if any, of his brother, Forbes Dick, L.6000; but if they did not respectively leave children, "the sums thus disengaged shall be then applied by my trustees to the purposes underwritten;" 5th, To pay legacies to be specified in a codicil; 6th, To divide the free residue among such institutions as should be named in the codicil or other writing.

The testator left no writing naming institutions, or disposing of the residue. He was survived by his sister Mrs. Gillies, and by his brother Forbes Dick, who were his next of kin, the brother being heir-at-law, and who agreed to collate with his sister the whole succession. The trustees raised a multiplepoinding, during the dependence of which Mrs. Gillies died, and her husband came in her place, in virtue of a conveyance by him in their contract of marriage of her personal estate, but which admittedly did not convey heritage. Her husband and her brother were competing claimants in that multiplepoinding. There were various questions raised, particularly as to what was heritable and what was moveable; but it is unnecessary to go into anything here except what related to the L.2000 mentioned in the fourth purpose of the trust-deed, and which Lord Pitmilly (Ordinary) found, in the third head of his interlocutor of 18th July 1823, "became, by the death of Mrs. Gillies **[138]** without children, a part of the trust-funds unappropriated; and that her share thereof was effectually conveyed to her husband by the marriage-contract, equally as her right to any other part of the residue of the trust-estate." Both parties represented against Lord Pitmilly's judgment.

Lord Mackenzie (the succeeding Ordinary) refused both representations, but with an additional finding as to the heritage, which I need not notice. In the first head of his note, he gave an opinion which embraced the question of the L.2000, viz., "That, in general, the residue of a trust-fund, failing directions for its disposal, falls to the natural heirs of the truster *ab intestato*, in the same proportions in which they would have succeeded to the trust-estate if the trust had not existed." Against this interlocutor both parties petitioned the Court, and the case was fully argued on the petition and answers, and afterwards on mutual memorials.

Now, then, please observe, that Lord Pitmilly and Lord Mackenzie had successively found that, by failure of issue of the body of Mrs. Gillies, and the testator having omitted to name the institutions, or others, who were in that event to take the L.2000, this sum had become part of the unappropriated residue, and that her half of it was consequently carried by the contract of marriage to her husband, along with her half of the residue generally, which had, in like manner, been unappropriated. That was a decision which directly affirmed that, although the failure of the condition was neither ascertained nor ascertainable till the death of Mrs. Gillies, the L.2000, nevertheless, formed part of the general residue, and belonged to her and her brother in equal shares, as next of kin or heirs *ab intestato* at the time of the death of the testator, in place of falling wholly to Mr. Forbes Dick, who was the only next of kin and heir *ab intestato* of the testator as at the date when the condition was ascertained to have failed by the death of Mrs. Gillies without children.

Now, the Court ultimately altered that, and decided that the husband of Mrs. Gillies, as in her place, was not entitled to any part of this L.2000, because the right had never vested in her; that is to say, neither under the deed, nor *ab intestato*,—for it is plain enough that vesting in either way, would have been sufficient to have led to a different result. If the L.2000 formed part of the general residue, one-half of which vested in her *ab intestato*, that was quite enough to entitle her husband, as in her right, to succeed. That was the very thing which Lord Pitmilly and Lord Mackenzie had found that it did; and, whatever may be said about the soundness of the reasons assigned for the judgment, it appears to me to admit of demonstration, that, if your Lordships are right in the opinion you have given to-day, the judgment in that case, which deprived the husband of Mrs. Gillies of the half of that L.2000, and gave it all to Mr. Forbes Dick, was wrong.

Now, that being the nature of the judgment, it is a strong thing to say that we are to get rid of it by holding that the Court thought they were deciding one question when they were really deciding another. I am not prepared to go into that view at all. The case, was, no doubt, complicated by other questions being involved in it;

and I am not surprised that, upon some points, the opinions of the Judges varied. But the position of the L.2000 was clearly enough brought out, and the result arrived at, in regard to it, was one which could not by possibility be according to law, if the opinion now expressed by your Lordships be right. There was no dispute that the bulk of unappropriated residue fell to the heirs *ab intestato* as at the time of the testator's death; and for this plain reason, that there was no suspensive condition attached to it —no condition at all—no postponement till a future day, when it should be ascertained whether a given event occurred or failed. Everybody must agree, and parties did not contest that, so far as the unappropriated residue stood in *that* position, it vested in and fell to the heirs *ab intestato* as at the time of the testator's death. Nor was there any question of this kind, or any peculiarity about the money locked up for a time to meet certain annuities. That was not such a condition as we are now speaking of at all. It postponed the term of payment or enjoyment of the capital, but it created no uncertainty as to what was ultimately to become of it. It could not be known when the annuitants would die, but that they would die was certain, and therefore this was not a condition which could affect or suspend the vesting. The only **[139]** peculiarity was as to the L.2000 destined to the children of Mrs. Gillies, if she should have any, and as to the L.6000 which was destined to the children of Mr. Forbes Dick, if he should have any. The question was not raised directly as to the L.6000, because Mr. Forbes Dick was alive, and might have children. But if he had died without children, the question would have been precisely the same in regard to the L.6000 as in regard to the L.2000. The decision as to the L.2000 would necessarily, in that event, have been a precedent for the disposal of the L.6000.

If, then, the L.2000 had at once vested in the heirs *ab intestato* (as Lord Pitmilly and Lord Mackenzie had found), subject to the condition which had flown off, the necessary result would have been to give the half of that L.2000 to the husband of Mrs. Gillies as in her right, and it could only be because the Court held (differing from Lord Pitmilly and Lord Mackenzie) that where there is a suspensive condition, you must look to the state of matters when the condition is ascertained to have failed, and not to the state of matters at the time of the testator's death, that they preferred Mr. Forbes Dick to the whole L.2000. Now, the Court did not decide that question without argument. As I have already said, there were repeated written pleadings. These were drawn on the one side by Mr. Sandford, and by the late Mr. Robert Jameson on the other. I have read the whole session papers with great attention, and I find it there maintained for Mrs. Gillies, that a trust, whether *mortis causa* or *inter vivos*, does not divest the grantee; that the *mortis causa* trustees hold for the truster's heirs *ab intestato*, subject to the burden of the trust; that the right of the heirs necessarily begins when the right of the truster ends by his death; that the right to a conditional legacy does not vest till the condition be purified; and the fee in the meantime, as it cannot be *in pendente*, must be in the heirs, subject to the burden of that condition. A legacy lapsed, it was farther argued, is to be held *pro non scripto*, and goes to enlarge the fund on which it was a conditional burden. This, it was said, would be apparent, if you take the case where a conditional legacy is left, but no trust created, so that the heir *ab intestato* necessarily takes the administration, and becomes vested in the estate, subject only to the burden of the conditional legacy.

Now, as I understand it, this is just the nature of the argument to which your Lordships think effect should be given here. It is perfectly clear that if the Court had given effect to that argument, they must have preferred the husband of Mrs. Gillies to one-half of the L.2000. It is perfectly certain that they did not do so; and therefore I think the judgment stands in conflict with the law as now laid down by your Lordships. This is what embarrasses me, and makes me feel scarcely in a situation to apply my mind to it as an open question, on which there is much to be said on both sides. Substantially the same question, as Lord Ivory has observed, arose in the subsequent case of Tod *v.* Skinner's Trustees; and his Lordship pronounced an able judgment upon it on 18th March 1848. That judgment was reclaimed against; and, after argument in the First Division, their Lordships proposed to send the case to the whole Judges. In that state of matters, the parties chose to enter into a compromise, by dividing the succession between them. I do not see how we can make much out of that, as affecting the authority of the case

of Dick *v.* Gillies. I was one of the counsel in that case of Tod. I do not know what may have been thought by my brother Lord Curriehill, who was of counsel on the other side, but I confess the impression on my mind was (though I may have been too sanguine of my client's success), that the then Judges of the First Division were not disposed to decide differently in that case than the Second Division had done in the case of Dick *v.* Gillies. It is plain enough that the parties who held Lord Ivory's judgment were not satisfied that they stood secure, or they would not have given up one-half of the succession; so that what occurred in that case does not take away the embarrassment which occurs here.

It is said that the Court dealt with the case of Dick *v.* Gillies as a case of testate succession. I think there is a fallacy in that remark; for in the only sense in which that case could have been held to be a case of testate succession, the present is so too. There is here, as there, a conveyance of the testator's whole estate to the trustees. In both cases equally the trustees fell to hold and administer the whole estate in the meantime, and it depended on what was future and uncertain how the disputed sums should be disposed of. Whether these sums might be prin- **[140]** -cipal or interest, or both, could, it appears to me, make no difference. If Mrs. Moorhouse had had a child within the twenty-one years, the whole residuary estate would have gone to that child as testate succession. If the testator had said, that failing such child the estate should go to his own heirs whomsoever, this, it seems to be thought, would have carried the estate to those who were his heirs when the failure occurred,—as happens in tailzied destinations of real estate; and the law, it is then said, gives effect to this as his presumed will, in the same way as if it had been expressed. That argument deserves to be weighed along with the decision in Dick *v.* Gillies; and I feel great difficulty in concurring with your Lordships in the face of that decision, while it stands untouched by any subsequent authority. On the other hand, I am not prepared to say, that if the question were open, I would come to the same conclusion which was arrived at in that case. I think it a question deserving to be reconsidered by the whole Judges. But while embarrassed by that decision, I could only give a very uncertain response to the second and third questions, for the reasons I have stated.

LORD CURRIEHILL.—I understand, therefore, that your Lordship differs?

LORD DEAS.—I do not say so. I should prefer neither to agree nor differ. My opinion is not necessary, as there is a majority without me. I differ about the course of procedure, which prevents me from giving a satisfactory opinion, where we are not called upon to decide, but to state what we think settled law, as it would be administered in either Division of the Court.

The Court pronounced the following interlocutor:—"The Lords of the Court of Session in Scotland (First Division) having considered the petition of James Lord, with the case therein mentioned, transmitted for the opinion of this Court, by order of the Right Hon. Sir Richard Torin Kindersley, one of the Vice-Chancellors of the High Court of Chancery in England, dated 12th June 1860, and having heard counsel for the several parties referred to in said petition and in said case, make answer as follows to the questions stated in said case for the opinion of this Court:—

"I. By the effect and operation of the deed of trust-disposition and settlement of Peter Cochrane the elder, accumulations, after 18th June 1852, of the profits or produce of his personal estate destined to the child or children of Mrs. Moorhouse, are impliedly directed, and said accumulations are prohibited by the Act 39 and 40 Geo. III. cap. 98.

"II. The right and interest which the parties who would have succeeded *ab intestato* to the personal estate of Peter Cochrane the elder, at the time of his death, if he had died without making a will, and any right and interest which the executors of Peter Cochrane the elder had in the said accumulations being, by the terms of the case, to be taken as vested in James Lord, he is entitled to the said accumulations.

"III. The answer given to the second question excludes the hypothesis on which the third question proceeds."

[Cf. *Storie's Trustees* v. *Gray*, 1 R. 956; *Campbell's Trustees* v. *Campbell*, 18 R. 998; *Ross's Trustees*, 21 R. 997; *Logan's Trustees* v. *Logan*, 23 R. 852; *Young's Trustees* v. *Young*, 3 F. 624.]

No. 25. **XXIII. Dunlop 140.** 7 Dec. 1860.[1] 1st Div.—Lord M'Neill.

SMITH, BROTHERS, & COMPANY, Petitioners.—*Macfarlane—Mair.*

JOHN ROSTRON, Respondent.—*Gifford.*

Sequestration—Bankruptcy (Scotland) Amendment Act 1860—23 & 24 *Vict., c.* 33, *sect.* 2.—Recal of sequestration where the creditors of the bankrupt were resident in England.

John Rostron, formerly of Lancashire, now residing in Edinburgh, upon the 8th June 1860, obtained sequestration under the Bankruptcy (Scotland) Act 1856, and the Bankruptcy and Real Securities (Scotland) Act 1857. **[141]** His creditors all resided in England. The concurring creditor was Betty Warburton, the bankrupt's aunt, and who, it was alleged, had been a domestic servant in his service. She claimed on a promissory-note for L.75, 8s. for wages. Smith, Brothers, and Company, alleging themselves to be creditors of the bankrupt to the amount of L.363, 7s. under the Bankruptcy (Scotland) Amendment Act 1860, presented this petition, praying that the sequestration ought to be recalled. They stated in their petition that a "meeting for the election of trustee and commissioners was held in Edinburgh on 20th June 1860, when Mr. James Hogarth Balgarnie was elected trustee, and William Gaylor, S.S.C., and James Drummond, accountant in Edinburgh, were elected commissioners. The meeting also resolved that a personal protection in favour of the bankrupt should be granted for three months. The only parties present at the above meeting were the said William Gaylor and James Drummond. The said William Gaylor is the bankrupt's agent in the sequestration, and appeared as mandatory for Betty Warburton, the alleged concurring creditor, and the said James Drummond is clerk to the said James Hogarth Balgarnie, and appeared as mandatory for Miss Betty Rostron, residing at Manor House, Holcombe, in the county of Lancaster, an aunt and alleged creditor of the bankrupt. At the above meeting an offer of composition of 6d. per pound upon the debts was made by the bankrupt, and it was agreed to be entertained."

"The bankrupt is a native of England, and a domiciled Englishman. When examined before the Sheriff-substitute of Edinburgh, on the 4th and 5th of July current, he deponed to the following effect:—At the date of his sequestration he carried on business in Lancashire as a commission-agent and fustian-manufacturer, and his own residence and that of his wife and family and servants was there, and is still at Sunnyhill, Cheetham Hill, Lancashire. He regarded his house there as his home, and he had no other residence or establishment elsewhere. The whole of his funds and effects are situated in England, and the whole of his creditors reside in that country. He has no creditors, and no property or effects in Scotland. He came to Scotland only on the 29th of April last, leaving his wife and family and servants at his house at Sunnyhill aforesaid, and he took up his residence in the Waverley Temperance Hotel, Princes Street, Edinburgh, where he resided until the 8th of June. He had no intention of taking up a permanent residence in Edinburgh, or in any other part of Scotland, and his sole object in coming to Scotland was to take advantage of the Bankruptcy (Scotland) Act 1856, and, if possible, to evade the diligence of his creditors, and also to obtain protection against them. He returned to his residence in Lancashire on the same day on which the sequestration was awarded and protection was obtained." The bankrupt's wife was possessed of about L.25,000, over which the bankrupt's right was excluded.

LORD PRESIDENT.—This case clearly falls under the provision of the Bankruptcy Amendment Act.

On a motion for the expenses caused by the respondent's opposition, the Lord-President stated that the expense of this petition could not be allowed, as that was a proceeding required by the statute, whether the respondent appeared or not.

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[1] Decided 20th November 1860.

The following interlocutor was pronounced:—"Recal the sequestration of the estates of John Rostron, mentioned in the petition, and appoint this judgment to be entered in the Register of Sequestrations, and on the margin of the Register of Inhibitions: Find the respondent, John Rostron, liable to the petitioners in expenses incurred by them, subject to modification, and modify the same to L.7, 7s. sterling, and decern."

[Cf. *Riddell* v. *Galbraith*, 24 R. 53.]

No. 26. **XXIII. Dunlop 142.** 7 Dec. 1860. 2nd Div.—Lord Ardmillan.

ROBERT BLACKWOOD (BLACKWOOD'S Trustee), Pursuer.—*Gordon—Macpherson.*

Sir DAVID BREWSTER, Knight, Defender.—*Young—Lee.*

ALEXANDER MILNE (TELFORD'S Executor), Defender.—*A. R. Clark.*

Obligation—Copyright—Edition.—Held, that a reprint of part of a book, to replace copies destroyed by fire in the hands of the publisher, was not an edition entitling the editor of the work (who, by the contract, was to edit all new editions) to insist on superintending the issue and receiving remuneration.

Process—Expenses.—A pursuer of a count and reckoning called several defenders, of whom only one objected to settle on the footing proposed by the pursuer. The objector reclaimed against an interlocutor by the Lord Ordinary. The pursuer opposed the reclaiming note, which was refused with expenses. Expenses of watching the case were claimed by one of the defenders, who concurred in the pursuer's view of the right of parties.—Motion *refused.*

The Edinburgh Encyclopedia Company was formed in 1808. Afterwards a considerable change took place in the constitution of the copartnery, and a new contract was entered into in 1811. Under this second contract Mr. William Blackwood was both a shareholder and the publisher. Sir David Brewster, under both contracts, was a shareholder and also the editor. Telford, the engineer, was also a shareholder, and there were six or seven others. The work was not completed till 1831; and the whole stock and property belonging to the company were sold in 1834, and a large loss was sustained by the company. Blackwood then placed the books of the company in the hands of a Mr. Kerr, an accountant in Edinburgh, who prepared a state of the accounts of the partners, and showing how the losses fell to be borne.

After various ineffectual attempts at an extrajudicial settlement, Mr. Blackwood having died, his trustees, of whom Mr. Robert Blackwood was sole survivor, brought against the surviving partners, and the executors of those who had deceased, an action of count, reckoning, and payment, founding on Mr. Kerr's state as approximately correct.

Defences were given in by Sir D. Brewster, who objected in sundry particulars to the accounts as stated by the pursuers, and said, that instead of his having to contribute anything towards making up the losses, it would turn out that the company was largely indebted to him.

Telford's executors, on the other hand, expressed their readiness to settle on the footing of Mr. Kerr's state.

A record having been made up and closed, the case was remitted to Mr. W. Moncrieff, accountant, and he, in 1855, presented an interim report, requesting the instructions of the Court as to how he was to deal with a variety of questions raised by Sir D. Brewster, many of which seemed to him to be questions of law turning upon the construction of the contract of copartnery. These were disposed of by the Lord Ordinary (Ardmillan) on 5th July 1856, by an interlocutor containing a number of findings, against which Sir D. Brewster presented a reclaiming note. Parties having refused to renounce probation, a proof was allowed.

Of this date the case was argued. The only point not too special to be reported was the following. It was provided in the articles of copartnery, *inter alia*, that "the

said Doctor David Brewster shall superintend any other edition or editions of the work which shall be hereafter published, for doing which he shall receive such sum or salary as the committee of proprietors shall determine."

Founding on this provision, and alleging that "a portion of the stock having been destroyed by fire, a volume or half-volume was reprinted, but the fact was concealed from the defender's knowledge, in order to deprive [143] him of his charge for additional revision," he now claimed compensation, and objected to the accounts in so far as they gave him no credit for a claim on this account.

Blackwood denied that any such destruction of stock had taken place, and contended that, in any view, such a reprint as was alleged did not fall within the category of an edition, so as to entitle Sir David to compensation for work which he admitted he had not performed. On this point the Lord Ordinary pronounced the following finding:—"Finds 9th, That the defender's claim for remuneration, in respect of the reprint of a portion of the work which had been destroyed by fire, and was reprinted without the defender's editorial superintendence, is not well founded—such partial reprint, rendered necessary by an accident, not being a new edition of the work, and it being admitted that the defender rendered no service in regard to it for which remuneration can be due."

Lord Benholme—(who delivered the judgment of the Court on the whole case)—The additional remuneration agreed upon, on the publication of a new edition, had reference to an increased demand by the public, in which case the editor, it was very fairly provided, should share in the success of the work; but this reprint, on Sir David's own showing, had no reference to any such demand by the public. It was, on the contrary, merely a replacing of so much of the original edition as was destroyed by fire. I concur in the finding of the Lord Ordinary upon this point also.

The Court adhered to the interlocutor of the Lord Ordinary on this point, and also on several other points. On the question of expenses, the Court were about to find Sir David Brewster liable in expenses to the respondents, when

Clark, for Telford's executor, claimed expenses also.

Young—Telford's executor should not have been here. He was Sir D. Brewster's co-defender, and was not a respondent in the reclaiming note. All the parties were not entitled to the expenses of appearance, where, as here, the pursuer of the action properly represented the interests of all.

Clark—Telford's executor, though called as a defender, was as much interested in maintaining the Lord Ordinary's interlocutor as Blackwood's executor was; and had the latter been induced to acquiesce in the prayer of the reclaiming note, he would have been entitled to have resisted it. He had incurred no unnecessary expense, but had merely watched the proceedings in Court.

The Court pronounced the following interlocutor:—"The Lords having resumed consideration of the reclaiming note for Sir David Brewster, defender, against Lord Ardmillan's interlocutor of 5th July 1856—in so far as regards the second and ninth findings thereof excepted from the interlocutor of this Division, refusing said note as regards the other findings reclaimed against on the 10th January 1860, and having heard counsel on the proof since led, and whole evidence in the cause—Adhere to the said interlocutor of the Lord Ordinary, as regards the second and ninth findings thereof, and remit to the Lord Ordinary to proceed further in the cause as shall be just: Find the reclaimer liable to the respondent, Blackwood's trustee, in the expenses incurred since the date of the interlocutor reclaimed against, and remit to the auditor," &c.

No. 30. **XXIII. Dunlop 147.** 12 Dec. 1860. 1st Div.—Lord Ardmillan.

THE LORD-ADVOCATE, Pursuer.—*Lord-Adv. Moncreiff—Sol.-Gen. Maitland—Boyle.*

CHARLES BALFOUR, Defender.—*Cook—A. R. Clark.*

Teinds—Tack—Statute 1617, *cap.* 12—*Prescription—Heritable Title—Inhibition.*—A charter of resignation under the great seal, followed by infeftment, granted in 1784, in favour of an heritor of certain lands in a parish who had a tack of the teinds, contained a general description of different parcels of land, only some of which were described as conveyed with the teinds; it contained also a grant both of the patronage and teinds of the parish generally, and concluded, "cum decimis tam rectoriis quam vicarijs omnium et singularum terrarum aliorumque predict." Admittedly the heritor possessed neither the patronage nor the whole teinds of the parish, but had possessed the teinds of his own lands (which teinds were not specifically granted) uninterruptedly since 1784, but he had in 1789 applied to the Crown for a renewal of the tack, which, however, was not granted. *Held* (altering judgment of Lord Ardmillan), that the general clause carried the teinds of the whole lands, and that the charter, notwithstanding the limited nature of the possession, afforded a good prescriptive title, so far as followed by possession.

The Lord Advocate, on behalf of her Majesty, presented an information against Charles Balfour of Balgonie, in Fifeshire, setting forth that Mr. Balfour was indebted in the sum of L.3287, 8s. 1d. for the teinds of (1.) The lands and estate of Balgonie, in the parish of Markinch, and (2.) "That part of the lands in Kirk Markinch and Nether Markinch, which formerly belonged to, and was acquired by him or his predecessors from the Earl of Leven, also situated in the said parish and county aforesaid, and that after deduction of stipend payable from the said teinds, which teinds belong to Her Majesty, for the crops of the years 1849 and 1856, and intervening crops."

It appeared that the teinds of the parish and parish kirk of Markinch formerly belonged to the Priory of St. Andrews; and by tack, dated the 16th of June 1580, Robert, Earl of March, Bishop of Caithness, as then commendator of the said priory, with consent of the convent thereof, let the teind-sheaves and other teinds of the said parish and parish kirk, as well **[148]** as of the parish and parish kirk of Kennoway, to George Douglas of Romgay, brother-german to William Douglas of Lochleven, during his lifetime, and to two heirs successively succeeding and served to him, and to his assignees whatsomever, for nineteen years space thereafter. The revenues of the Priory of St. Andrews afterwards became part of the benefice of the Archbishop of St. Andrews. By tack granted by King William and Queen Mary, under the Privy Seal of Scotland, dated the 15th of December 1690, which proceeds on the narrative of the above mentioned tack of 1580; and on the further narrative, that the teind-sheaves and other teinds of the said parishes and parish kirks were fallen, and become in their hands by the abolishing of Prelacy in their said kingdom, and that the said tack had then expired, their said Majesties set, and in tack and assedation let to David, Earl of Leven, for all the days of his lifetime, and, after his decease, to two heirs *successive* succeeding and served to him, and to their heirs and assignees, for nineteen years thereafter, "All and Sundry the teind-sheaves and other teinds, profits, emoluments, rents, and duties of the said parishes and parish kirks of Kennoway and Markinch, with their pertinents." In 1789, the then Earl of Leven applied to the Barons of Exchequer for a renewal of the said tack held by his predecessors; but although a signature was prepared for the purpose, admittedly no renewal of the tack was granted.

In defence, Mr. Balfour stated, that the tack of 1690 had never been put an end to by inhibition. But, at the same time, he claimed an heritable right to the teinds, and produced a series of titles:—

A signature, passed in Exchequer, of date July 31, 1706, duly subscribed by Queen Anne, as containing a grant of *novodamus*, giving, granting, and disponing a great variety of lands and others, and, *inter alia*, "all and haill, the advocation, donation, and right of patronage of the paroch kirk and parochin of Markinch, with the teynds, fermes, rentes, profits, duties, privileges, and emoluments thereof," to and in favour of

George, Earl of Melville, during all the days of his lifetime, and, after his decease, to David, Earl of Leven, his eldest son, for his liferent, and, after his decease, to George, Lord Balgonie, his eldest son, and the heirs of his body; which failing, to Mr. Alexander Leslie, lawful son of the said David, Earl of Leven, and other heirs-substitute.

No charter seems to have followed on this signature, and Mr. Balfour admitted—"There has, however, been no possession by the Earls of Leven of the right of patronage of the parish, which now belongs to, and is exercised by the Crown, nor, of late years, at all events, of the teinds of the parish generally;" but, he alleged, on the other hand, they, from the date of the above grant down to 1816, possessed the teinds of their own lands within the parish, without any interference whatever on the part of the Crown; and he produced also;—

Contract of marriage between George, Lord Balgonie, with consent of David, Earl of Leven, and Lady Margaret Carnegie, containing procuratory for resigning, *inter alia*, the lands of Balgonie, and teinds, parsonage and vicarage, of the whole lands, dated 27th July 1716.

Charter of resignation under the Great Seal, following thereon, dated 27th July 1719, in favour of George, Lord Balgonie, and Lady Margaret Carnegie, and the heirs therein mentioned, of, *inter alia*, the lands of Balgonie and others; and instrument of sasine following thereon:—The description of the lands in this charter was generally in the same style as in one of 1784, to be noticed more at length—and concluded, "sicuti eadem sunt express et mentionat in prædict. infeofamentis Davidis Comitis de Leven prædict terrarum rexive cum decimis tam rectoriis quam viccariis totarum terrarum aliorumq^e^ prædict."

Charter of resignation under the Great Seal, in favour of David, Earl of Leven and Melville, and the heirs therein mentioned, of, *inter alia*, the lands of Balgonie, and teinds, parsonage and vicarage, of the whole lands, dated [149] 10th December 1754, and instrument of sasine following thereon. The general clause at the end of the description of lands in this charter was in the same terms as that in charter of 1784.

Extract disposition and deed of entail by David, Earl of Leven, of, *inter alia*, the lands of Balgonie, and teinds, parsonage and vicarage, dated 23d July and 11th August 1784.

Charter of resignation under the Great Seal, in favour of Alexander, Lord Balgonie, of, *inter alia*, the lands of Balgonie, dated 20th December 1784, . . . "Totas et Singulas Comitatum Dominia Baronias Terras aliasque infra script cum pertinen viz^t^ Totum et Integrum Comitatum de Leven et Dominium et Baroniam de Balgony inibi comprehenden omnes et singulas Terras Dominium Baronias aliaque generaliter et particulariter postea mentionat viz^t^ Totas et Integras Terras Dominium et Baroniam de Balgony inibi comprehenden particulares villas terras . . . cum molendinis . . . terras molendinarijs multuris alijsq pertinen Omnia jacen infra Baroniam de Balgony et vicecomitatum de Fife Et Similiter totas et integras Terras de Treaton-Myre cum partibus pendiculis et pertinen earund jacen in Baronia de et Vicecomitatu de Fife predic^t^ una cum omnibus et singulis domibus, &c. . . . Et Similiter totum et integrum maneriei locum de Monymail et Mansiones Domum de Melvill cum pertinen ejusd: . . . Et Similiter totas et integras villam et Terras de Lethem cum . . . omnibusq earund pertinen una cum terris de Caldcoats et pertinen earund. Jacen infra vicecomitatum de Fife Et Similiter totas et integras Terras de Monksmyre cum partibus pendiculis et singulis earund pertinen Jacen infra Regalitatem de Lindores et vicecomitatum de Fife Et Similiter terras et Moram de Edinsmuir cum universalibus partibus pendiculis et pertinen earund una cum decimis garbalibus aliisq Decimis fructibus reditibus emolumentis proficuis et divoriis quibuscunq Ecclesiæ et parochiæ de Monymail cum advocatione donatione et jure patronatus dic^t^ Ecclesiæ et parochiæ et Decimis vicariis et rectoriis ejusdem Et totam et integram glebam et Terras Ecclesiasticas vicarii de Monymail nuncupat Montagart liberis et immunibus ab omni solutione Decimarum garbalium aliorumq Decimarum minutarum rectoriarum et vicariarum prout nunc possidentur et continuo ultra hominum memoriam possess fuerunt Excipien et Reservam Mansionem viz^t^ Domos et hortos prope Ecclesiam de Monymail pro habitatione vicarii ejusd pro perpetuo. Ac Ulterius totas et integras terras de Pitlair cum decimis garbalibus earund et dimidio maresii voca^t^ Lurgymyre cum communitate in Mora et Maresia de Monksmoss et Edinsmuir cum domibus. . . . Et Similiter totas et integras Terras de Pitconti et Muirfield cum domibus Liberas a solutione

Decimarum parochiali Ecclesiæ de Monymail prout eadem possesse fuerunt ultra hominum memoram Et Similiter totam et integram villam et Terras de Markinch . . . cum terris de Nether Merkinch . . . Terras de Bighty Pittenchagel et Inchinnie Terras de Treaton cum mossis et moris earund . . . Et Similiter totas et integras villam et Terras de Newton de Merkinch prout eædem nunc possesse sunt per

Tenentes et possessores earundem cum domibus ædificijs hortis pomarijs mossis moris lie grasings pasturagijs toftis croftis partibus pendiculis et pertinen earundem quibuscunque jacen infra parochiam de Merkinch et vicecomitatum de Fife una cum Decimis tam rectorijs quam vicarijs dict terrarum Ac Etiam Advocationem Donationem et Jus patronatus Ecclesiæ et parochiæ de Merkinch Ac Etiam totas et integras illas tres octavas partes villæ et terrarum de Stentoun nuncupat Nether Stentoun cum domibus . . . propter principalem Et Totas et Integras terras de Balbirnie cum molendino terris molendinarijs multuris et sequelis earund Jacen infra vicecomitatum de Fife prædic[t] in speciali warrantizatione et securitate prædic[t] terrarum principalium de Stentown sicuti eadem sunt express et mentiona[t] in Infeofamentis earundem in [150] favorem demortui Davidis Comitis de Leven Cum Decimis tam rectorijs quam vicarijs omnium et singularum terrarum aliorqumque prædic[t] Sed Semper Reservan dic[t] Davidi Comiti de Leven ejus vitalem reditum totarum Terrarum Comitatus Dominorium aliorumque ante mentionat."

Subsequent titles, made up in 1816 and 1824, also contained conveyances of the patronage and teinds in terms similar to those in a crown charter expede in 1846, under which the defender held, conveying the lands, "ac etiam advocationem donationem et jus patronatus ecclesiæ et parochiæ de Markinch cum decimis tam rectoriis quam vicariis omnium et singularum terrarum aliorumque prædict."

It was averred by the defender, that the possession of the teinds of the lands, which had been enjoyed by the Earls of Leven subsequent to 1706, and up to 1816, has been continued by their disponees subsequent to 1816, and up to the present time.

The Crown pleaded;—The defender has not instructed, and cannot instruct, any heritable right to the teinds of his lands, or any part thereof, in respect that the grant in which the said right is alleged to be contained has admittedly not been operative in other respects; and that the possession of his authors, long after the date of the said alleged grant, was expressly ascribed to the tack of 1690. The defender cannot now found upon the tack of 1690 as a good title of possession of the teinds of his lands by himself or his authors subsequent to the year 1787, in respect that it was there expresly stated by the person who would have had right thereto, that the said tack had expired some years previously, and that his rights under the same had been passed from; and further, that no payments of tack-duty have been made to the Crown since that date, or, at all events, within the years of prescription.

The defender pleaded;—Under the signature of July 1706, and possession following thereon, the defender, as coming in place of the grantee in the signature, has right to the said teinds, which right was farther fortified by the long positive prescription of forty years. Assuming the invalidity of the defender's heritable right, he must be considered as having hitherto held the same as assignee to the tack in favour of the Earl of Leven in 1690, which tack never had been terminated by inhibition.

On 27th June 1860 the Lord Ordinary pronounced the following interlocutor:—"Finds that the defender has not instructed an heritable right to the teinds of the lands in question: Finds that the defender, with reference to the admitted facts and the state of the titles, cannot now found on the tack of teinds of 1690 as a good title of possession: Therefore finds that the defender is liable to the pursuer in payment of the teinds of the lands mentioned in the information; but as the amount of liability and of arrears has not been admitted or yet ascertained, appoints the cause to be enrolled for that purpose: Reserves the question of expenses."[1]

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[1] "NOTE.—After careful consideration of these titles, the Lord Ordinary has arrived at the conclusion that the defender has not instructed an heritable title to the teinds of the lands in question. The terms in which the teinds are mentioned in the titles are not uniform; but in the signature of 31st July 1796, which might be held a royal mandate for a charter, and as, perhaps, equivalent to a charter if followed by possession, the teinds are apparently only granted to the Earl of Leven in connection with the patronage of the church and parish of Markinch. Now it is admitted on

[151] The defender reclaimed, contending that a signature in Exchequer might be the foundation of a good prescriptive heritable title to teinds;[1] but that, apart from the signature, he had a good title in the charter of 1784, and prescriptive possession on it, and that he was entitled to attribute his possession either to that title or to the tack, as suited him; and if driven to support it on the tack, it still subsisted, as inhibition was the only competent mode of extinguishing a tack of teinds.

Replied.—A signature gave only a personal right to get a charter,[2] which right had now been lost by the negative prescription. The charters gave no right to the teinds in question. Where the teinds of some of the lands only were specified as conveyed, the general clause at the end could not carry the teinds of the other lands; but here the clause relating to the teinds did not relate to the principal lands conveyed, but only to the warrandice lands referred to at the end of the deed. Moreover, the application for a renewal of the tack in 1789 was an admission that, at that date, there was no heritable title, and that the tack had previously come to an end.

Lord Curriehill.—In this case a claim is made upon the defender, 1*st*, for the sum of L.3287, 8s. 1d., as being the arrears of teind-duty for the crops of the years from 1849 to 1856 inclusive, of certain lands in the parish of Markinch; and, 2*d*, for L.619, 0s. 6d., as interest upon these teind-duties for the period anterior to the date of instituting the action, which was the 2d June 1857. This claim is met in effect by two defences. One is that the defender has an heritable right to the teinds of this parish. The other, which is stated alternatively, is that in case it should be found that the defender has not such an heritable right as he claims, he would be entitled to retain these teinds as lessee under a lease which was granted to the Earl of Leven in 1690, and which, in that view, he maintains had never been effectually put an end to by inhibition. In support of his prescriptive title, he has produced, in the first place, a signature for a charter of resignation and novodamus passed in the year 1706; but he has produced no charter or infeftment following on that signature, and we do not know whether or not it was followed by infeftment. Therefore it cannot be the foundation of a prescriptive title under the Act 1617. But he produces five feudal investitures subsequent to that date. One is a charter of resignation in 1719, and infeftment following upon it; the second is a charter in 1754, and infeftment following upon it; the third is a charter in 1784, and infeftment following upon it also; the fourth is a precept from Chancery in 1820, followed also by infeftment; and the last is a charter of resignation and confirmation in 1846. With reference to the question of prescriptive title, it is unnecessary for us to go further back than the investiture of 1784. But we must go back to it, because this action having been raised in 1857, and it being necessary that the prescriptive title be dated fifty years before, the feudal investiture of 1820 is not old enough, and the immediately prior one of 1784 must be the foundation of the prescriptive title.

If that title, on being examined, be found to be sufficient, there is no doubt that it has been followed by possession. It is an admitted fact on the record that the defender and his predecessor have had possession of the teinds of the lands in question for a period commencing long before 1784, and continued till the present time. This appears from the 4th and 5th articles of the defender's statement, and the answers thereto; and their possession has not been disputed in the argument. Hence the only question is, whether that possession has taken place on a sufficient heritable title?

As I said before, it is unnecessary for us to go farther back than the investiture of 1784, because if there be a grant of the teinds within that investiture, that grant,

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record that the right of patronage has never been possessed by Lord Leven, but belongs to and is exercised by the Crown; and it is also admitted, that the teinds of the parish generally, and in the terms of the signature, have not been possessed by Lord Leven. The Lord Ordinary has not been able to discover any authority for sustaining, as a prescriptive title, such a grant followed by such possession. There is no grant of the teinds of the defender's own lands on which possession could follow; and there has been no possession of the patronage, or of the teinds of the church and parish, in the terms of the grant, assuming its validity."

[1] Spalding, Dict. 15,670; Stewart, Dict. 15,703.

[2] Connel on Tithes, book iii. c. 5; Forbes on Tithes, p. 308; Ersk. Inst. i. 3, 32.

followed by the possession which is admitted, is sufficient. It is of no consequence how the teinds may have got into that charter, because the very purpose which is served by the positive prescription established by the Act 1617 is to preclude all enquiry anterior to the date of the charter in which the right **[152]** appears. Is there then in this investiture a conveyance of the teinds of the lands in question? The charter contains a conveyance of a considerable number of different parcels of lands which are described, not by boundary, but by their general denominations. The lands in question are confessedly included in that enumeration. Then at the end of these descriptions we have this clause, "Sicuti eadem sunt express et mentionat. in Infeofamentis earundem in favorem demortui Davidis Comitis de Leven *cum Decimis tam rectoriis quam vicarijs omnium et singularum terrarum aliorumque prædict.*" We have a grant of the teinds of all and singular the lands and others foresaid, and unless there is something in the context or elsewhere to deprive these words of their natural signification, they apply to the teinds of all and each of the lands mentioned in the preceding description. It is possible that even words so express may be shown by the context, or by some other elements of construction, to have been used in some sense different from their literal and *prima facie* meaning. But as we start with this, that, according to the literal and proper meaning of these words, they extend back to the teinds of all and each of the different subjects in the prior description, it lies with the Crown to show that the teinds of the lands in question were not intended to be included in this general grant. But I think the Crown has failed to show this. The only, or at least the most important suggestion which is offered on the part of the Crown for limiting the meaning of this general clause is that, as in several instances, parcels of lands are conveyed in the dispositive clause with their own teinds, it follows that if the general clause at the end be read as applying to all and each of the parcels of lands in the dispositive clause, the teinds of the parcels in question would be twice granted. That is a consideration certainly not to be left out of view, and it is one element for such an inference as is founded upon it. But it is by no means conclusive. The more natural inference is that the purpose which is to be served by such a clause is just to include the teinds of those parcels of the lands, the teinds of which had not been so specially granted, because the general clause, unless it has this meaning, would have no meaning whatever; and it is not to be inferred that such a clause has no meaning, if a natural meaning can be given to it; and it is very common to add to an enumeration of particulars a general clause for the very purpose.

But there are various other elements which may legitimately be taken into consideration in construing this charter, and which to my mind are conclusive in favour of what I hold to be the proper and literal meaning of the words. In the first place, there is that in the immediately preceding context to this general grant of teinds, we have the words that I have read, after finishing the enumeration, "Sicuti eadem sunt express et mentionat. in Infeofamentis earundem in favorem demortui Davidis Comitis de Leven cum decimis." These words plainly apply to the whole of the preceding context. The *eadem* reaches over the whole. There is a reference to the infeftments —not to one infeftment, but to the infeftments *earundem*, in favour of the deceased Earl of Leven. These infeftments are the infeftments not merely of any one subject, but the infeftments of all the different subjects, some of which are mentioned by date in this charter itself. And as the teinds of the lands in all these infeftments are expressly granted, it follows that the teinds so granted are those of all the teinds in the preceding description.

Secondly, the words *omnium et singularum terrarum* cannot be read as being limited to that one parcel of lands which is mentioned in the immediately preceding contexts, and which is denominated *Stenton*. The description necessarily includes a *plurality* of parcels of lands. And since it is not limited to the lands of Stenton, I then ask how far back are we to go? Where can we stop? The lands immediately preceding Stenton in the description are the lands of Newton of Markinch; but the application of the general grant cannot stop there either, because it happens that Newton of Markinch is one of these very parcels which are granted specially *with the teinds thereof*. Where, then, I again ask, are we to stop when we get beyond the lands of Stenton? I think we cannot stop until we go back to the very beginning.

Thirdly, I have stated that I do not refer to the prior charters as being part of the prescriptive title, but we are entitled to go back to them, in the question of construc-

tion, to aid us in reading the charter of 1784. And when we do so, we find material assistance in that matter of construction. And here the signature of 1706 becomes important. In that signature there is an express grant of the parish [153] of Markinch, and of the whole of the teinds thereof. And this signature, although it was not followed by charter and infeftment, so far as we see, entitled the grantee to apply for a charter, and conferred upon him a personal right to these teinds. And when, in a future charter from the Crown, we find a grant of several parcels of lands in that parish, with the teinds of all and each of these lands, the literal and proper meaning of such general grant is strongly confirmed by such evidence that the grantee had previously obtained from the Crown an unequivocal grant of these teinds.

The subsequent titles may also be referred to as aiding the construction of the charter of 1784. When we turn to the precept from Chancery, the next renewal of the investiture in 1820, we find the grant there so expressed that there can be no doubt about it, because the subjects, of which the investiture is thereby renewed, include expressly the advocation, donation, and right of patronage of the kirk and parish of Markinch, *cum decimis tam rectoriis quam vicariis omnium et singularum aliorumque prædict.* These words are not preceded in that investiture by the lands of Stenton, which were in the investiture of 1784, which makes it clear that the grant of teinds in 1784 was not limited to the teinds of Stenton. This is made still more clear by the narrative of this precept, which begins by setting forth that, by inquisition, it had been found that the defunct Earl had died infeft and seised in all and whole the subjects underwritten, which subjects include expressly, and among others, the teinds of the lands of Markinch. The subsequent renewal in 1846 is in the same terms. I therefore think that we are aided in our reading of this charter of 1784 by the terms both of the prior investitures, and also of the subsequent investitures.

And, fourthly, and above all, we have the possession, which, in questions of this kind, serves a double purpose. One is to establish prescription under the statute 1617; another is to aid the reading of the deeds upon which it has followed. It is a principle of construction to which we have of late given effect in several cases regarding grants of teinds, that the best interpreter of old writings is the contemporaneous and subsequent possession following upon them; and we have it an admitted fact, in the present case, that the possession of the teinds has been enjoyed without interruption by the grantee of those different deeds.

When I put all these circumstances together, I think that they completely support what I hold to be the literal and proper reading of the charter of 1784.

I think the only other objection that has been made to the prescriptive title is this, that in 1789—five years after the date of the charter of 1784—the grantee of the charter applied for a renewal, so far as regarded his own lands, of a tack of the teinds which had been granted nearly a century before, viz. in 1690, of all the teinds of the parish to a predecessor of his, and that the Crown agreed to grant that renewal. All that is quite true, and if the grantee had really obtained such a tack, and had been possessing upon it from that date to the present time, and paying the rent therein stipulated, I would have held it to exclude the construction he puts on his feudal title. In that case, the possession which he has been enjoying since 1789 would not have been prescriptive possession upon the heritable title, but would have been possession as tenant of the Crown under a lease. But then the fact is, that no such lease was ever granted. We have no explanation why it was ever applied for. But the fact is that it was not granted, and that no rent has ever been paid. That is an admitted fact on the record. And I therefore think the circumstance of this application having been made, and having been proceeded with to a certain extent, tells the other way. The natural explanation of that is, that it had been discovered that the teinds already belonged to the applicant by a better title than that which he was asking, and accordingly he never gets that title, and he does not possess under it for a single hour. This shows that there was a misapprehension at the time the application was made, but that the misapprehension had been cleared up *tempestivè*, and was never followed, so as to produce any bad effects against the grantee; and I think that that occurrence shows only more clearly that the subsequent possession, which was enjoyed by the grantee of the charter 1784, without paying rent, was possession upon the heritable title.

The defender puts his claim to exemption alternatively, that if he had not an heritable right, the old lease of 1690 would still be a subsisting one, to the effect of

protecting him from the claims in question, because, in that alternative view of [154] the case, nothing would have occurred to put an end to that lease, as there has been no inhibition upon it. Inhibition is the habile mode of putting an end to a lease of teinds; and therefore, supposing the view which I have stated to be wrong, and that there is no heritable right, I do not see that anything has occurred, in that view of the case, that would prevent the defender from founding upon his tack as to the rents and teinds in question, which are only those for the seven years anterior to the institution of this action. As to the future rents, this action might be a very good inhibition; but as to those anterior to the institution of this action, I think, in that view, the claim would not be good. But if I am right in the view which I have taken as to there being an heritable right, this alternative claim does not arise at all, and there is no occasion to consider it.

Lord Deas.—When I heard this case pleaded, and looked into the terms of the Crown titles in connection with the argument, I was impressed with the probability that it had not been intended by these titles to give Mr. Balfour a right to the teinds which he claims. But when I came to consider that the question we have to deal with is a question upon the long prescription, I at once saw that that probability was by no means so important as it might otherwise have been. If we were here upon those titles, without any question of prescription, the circumstance that, along with various parcels of the lands in these charters, there is a right given to the teinds of these particular lands, before you come, at the end of the description of the whole lands, to the general clause founded upon, would, I think, have fairly driven us to an inquiry into the terms of the whole previous progress of titles, in order to see whether that general clause had been imported from some previous charter of the particular lands which came last in the description, or whether it had always been expressed as a general grant of the teinds of the whole lands in the charter. But unless we go into that inquiry—unless we demand production of all the previous titles, in order to ascertain how that general clause came there—we are in the position, that there are produced a charter and sasine dated upwards of forty years ago, which, *ex facie*, and taken in their terms, contain the teinds of the whole lands, subject only to the puzzle said to arise in respect of the teinds of some particular parcels of lands being given in a way which is superfluous where it is followed by a general grant of the whole teinds. Now, if you have nothing more than this puzzle, although it might, in some circumstances, give rise to an inquiry, I do not think that, by itself, and without inquiry, it is sufficient to prevent the general clause from having its natural and legal effect.

Well, then, in this view of the case, the party takes, and is entitled to take, his stand upon the charter of 1784, with the infeftment following upon it. He has thus a title which, upon the face of it, gives him the teinds of the whole lands; and he says this title has been followed by possession of the whole teinds for more than forty years. Here, then, it is said, is possession upon a good prescriptive title, which bars all inquiry into the previous titles, or into their history. Now, I am clearly of opinion that that is a sound argument. I do not think that the Crown is entitled, in this question of prescription, to go into an inquiry, in order to show how that clause came there, and so as to deprive it of its natural effect. Mr. Balfour is not bound to go into the previous titles at all, unless he thinks it for his interest to take his stand on some earlier title as his prescriptive title. I do not say he might not do that. I do not say he might not take the charter and sasine of 1754, or the charter and sasine of 1719, as his prescriptive title; and, so far as I see, if he had taken either the one or the other, his position would have been much the same as it is here. But he is not bound to go back to these titles; nor was he bound even to exhibit them. As regards the signature of 1706, he does not connect himself with it at all. He does not require to go upon it; and the question, therefore, does not arise, whether it could be used as a title of prescription.

Now if a party has a charter and sasine—if he even has the charter without a sasine—of teinds, followed by prescriptive possession, I am not aware that, in our law, anything can be said against it, as a complete right and title to these teinds. Teinds are so far peculiar, that, if not previously feudalised, they may be held without sasine. In other respects, I take it, that the law of prescription about teinds is very much the same as the law of prescription with reference to other heritable property. There is a case of Gordon *v.* Kennedy (M. 10,825, and 5 Brown's Sup. p. 358), which

illustrates this very strongly. There was there an [155] adjudication of the teinds, not followed by infeftment, but with forty years' possession. The adjudication had been led against a party who clearly had no right to the teinds at all; but it was held, nevertheless, that it formed a perfectly good prescriptive title to these teinds. Substantially the same thing was decided in the case of Irvine *v.* Burnet, M. 10,830. Erskine (3, 7, 3) says—"A bare adjudication, with possession upon it for forty years, will give to the adjudger a full right to the tithes, though the decree should have been led against one who had not the least shadow of right to them." In the next section (sect. 4) he lays down the general doctrine, with which we are familiar, that "a charter, though granted *a non domino*, by one who himself had no right, is a good title of prescription." I find, in my notes of Mr. Hume's Lectures, a very striking instance of this doctrine, where he refers to a case in which the title of an individual who had granted a disposition was reduced, and yet the title of the disponee, who had enjoyed forty years' possession, was held perfectly good.

Such is the position in which the case would stand upon the law of prescription, apart from the argument founded upon the old tacks. Laying out of view for a moment the effect attributed to these tacks, I do not see, according to the important principles of our law of prescription, in which *bona fides* is not required, how it would be possible to say that there is not a sufficient title in the person of Mr. Balfour, when followed by forty years' possession, to give him a prescriptive right to the teinds.

But then it is said that there was a tack of the teinds granted by the Crown in 1580, and renewed in 1690, the renewal being for the lifetime of the grantee who got it, the lifetime of his two next heirs, and for nineteen years thereafter; and it is maintained that all the possession which the vassal has had of the teinds is to be attributed to these tacks; and this inference is said to be strengthened by the fact that, in 1789, he applied to the Crown for a new tack, which was authorised to be given, but which never was executed. The question then is, whether, having these tacks, and having made that application, we can hold that his possession is attributable to his title as tenant of the teinds, and not to the title to which it is very clear he would otherwise have been in a position to attribute it,—viz., his crown charter and infeftment. Now, I have always understood that a party who has two titles in his person, may, in a question upon the long prescription, attribute his possession to either of these titles he pleases,—to the one he considers most favourable for himself. Mr. Erskine lays this down very expressly in 3, 7, 6. He says,—"Where one's possession of heritage may be supported on two different grounds or titles, the most ancient of which contains limitations on the possessor or his heirs, which the latter is free from, it is lawful for the possessor to establish his right upon the unlimited title, and to ascribe his possession thereto, which possession, if it is uninterrupted for forty years together, will entitle him to the benefit of the positive prescription, and secure him and his successors against any attack from all such deserted infeftments or claims fettering his right, upon which no legal step had been taken during that period." The same doctrine is laid down in repeated passages of the lectures of the same able lawyer, to whom I have already referred. But that familiar doctrine has been applied by decisions of this Court to the very case we are now dealing with,—viz., the case of a party having an heritable right, and likewise a tack, where the subject in dispute was teinds. In the case of the Solicitor of Teinds *v.* Budge, 4th May 1797 (Hume's Dec., p. 455), the circumstances were shortly these:—Budge, professedly in implement of a contract of marriage, disponed the lands of Toftingall, with the teind-sheaves and parsonage-teinds thereof. No infeftment followed, but the family of Budge prescriptively possessed the teinds. In 1790 the Solicitor of Tithes for the Crown raised an action, setting forth—1*st*, That Daniel Budge, the granter of the disposition, had no title to the teinds at all. 2*d*. That the disposition never had been made public by sasine, and that it professed to be in implement of a marriage contract, which made no mention of these teinds. 3*d*. That the family had taken tacks of the teinds from Exchequer of two other parcels of lands in the same parish, conveyed in the same terms by the very same disposition. 4*th*. That Budge took a charter in 1718 of these lands of Toftingall from Exchequer without any mention of the teinds. 5*th*. That in 1735 he had obtained a decreet of valuation (one of the things so far founded on here, though not rested on) without alleging that he was proprietor. And lastly, [156] That in 1745 he obtained against Sinclair of Ulbster and the Crown, a decree of sale of the teinds as belonging to Sinclair of Ulbster; of

which decree Lord Breadalbane, the patron of the parish, had raised a reduction, which had lain over for a great many years without anything being done upon it. The defence was, that prescriptive possession having followed upon the disposition, this entitled him to the teinds without infeftment. The question was argued on memorials, and very fully considered. The reporter states that the bench had no doubt that the disposition of the teinds was a sufficient prescriptive title, and though there may have been interruption, the forty years possession on the decree of sale would be of itself sufficient. Then there is the case of the Earl of Fife against Innes, 25th of January 1809, also reported by Mr. Hume, (p. 468). In that case the Earl of Fife and Innes were the only heritors in the parish of Grange; and a question arose in the locality in 1793, whether they were both to be allocated upon proportionally as tacksmen of their teinds, or whether the Earl was to be exempt as the titular under an heritable title. The Earl's titles were a decreet of apprising in 1664, followed by a charter under the Great Seal, and an infeftment in 1666; then a disposition of the teinds by a person of the name of Forbes, and Alexander Duff of Braco, in 1682; a special service in 1706, in favour of William Duff, as heir of Alexander Duff; and a crown charter in 1717, and infeftment in 1719. But the Earl had also two tacks of the teinds for nineteen years granted in 1601 by the parson of Keith, and a prorogation of these tacks for ten periods of nineteen years each. The question came to be, whether the Earl's possession was to be attributed to these tacks or to his feudal titles? and it was held that he was entitled to attribute it to the feudal titles, and not to the tacks. That case also was very fully argued on memorials, and President Forbes is reported to have observed,—"We have here a charter and sasine, which is a good prescriptive title. It is true the Earl also has a tack, but having two titles in his person, he may ascribe his possession to the one most favourable to himself."

It appears to me, therefore, that the puzzle which is raised here in respect of these tacks, really does not affect the result. The long prescription runs against as well as in favour of the Crown,—there is no doubt about that;—the Crown have admittedly allowed this party to possess the whole teinds for more than forty years, and I think it is no longer in the power of the Crown to say, your possession is attributable to your tack, and not to your feudal title. On the contrary, I think it is in the power of the party to say, that his possession is attributable to his feudal title and not to his tack, and that this is sufficient for his success in this case.

Although the general doctrine must be familiar to your Lordships, it is, nevertheless, so important to the decision of the present case, that I think it right to conclude by quoting two short passages from my MS. notes of Baron Hume's lectures, which are express. He says,—"If an heritor enter upon a tack to certain lands, and having, at the same time, a sasine of these lands, possess for forty years without paying rents, no inquiry can afterwards be made as to the grounds upon which his possession began." He applies this doctrine to any estate as well as to teinds; and then, in another passage, he says,—"A person who has more titles than one may, at the end of the forty years, ascribe his possession to all of them, or to the one most beneficial to himself."

LORD PRESIDENT.—I felt, as Lord Deas did, great difficulty in this case when it was argued, and I was rather disposed to take the view that the Lord Ordinary had taken of it; and I was very desirous to have a full print of these deeds, that I might see whether there was anything lurking in them that might affect the case one way or other that had not been presented to us in print. Having got the full deeds, I set myself to the consideration of them, reading them fully, going into the whole matter, and looking into the cases; and the result of my consideration has been to lead me to the same conclusion which your Lordships have arrived at. The deeds are not very clear. The clauses of the deeds are a good deal confused and mixed up; and the Lord Ordinary has taken the view, and that is the basis of his judgment, that in the signature of 1706 the teinds are apparently only granted to the Earl of Leven in connection with the patronage of the church of Markinch. And it is admitted that the right of patronage has never been possessed by Lord Leven, but belongs to and is exercised by the Crown, and that the teinds of the parish generally have not been possessed by Lord Leven; and he says that he has no grant of the teinds of the defender's own lands on which possession could follow, and there [157] has been no possession of the patronage in terms of the grant, assuming its validity. I am not disposed to deal with this case

upon the merits of that signature. I look backwards into the titles. I take them at the present date, and look back to see what has been the state of the title and possession for the last forty years; or even we may go back somewhat beyond that, to see whether what we find tends to confirm or to detract from it.

I find that there is in that deed of 1784 a clause at the end of it which has been read in various ways. The natural reading of it, I think, is, that it gives a right to the teinds of all and each of the lands before mentioned. If that be the true reading of it, and if possession has been had upon that title for a period of forty years, then, I think, we need not look further back. I do not think that it is necessary that possession shall have been had of the teinds of all and each of the parcels of lands, for, in a question of this kind, prescription must be measured by the possession according to the ordinary maxim; and if there be a portion of these lands of which the possession has been continuously had under that title, but another portion in which it has not been had, I think that the plea of prescription would apply, and validate the right to that portion of which the possession has been had. If, on the other hand, the reading which the Crown takes of this last clause in that deed of 1784 be the correct one, viz., that it is limited to the lands of Stenton and warrandice-lands of Balbirnie, why, then, it would not be a title to the possession of the teinds of Balgonie. We are, therefore, compelled to read that clause, and to read it in connection with the possession. But I think that the possession does tend to throw a light upon the reading of the clause,—and that the possession of the party from 1784, or from any earlier period, if there be no other title to ascribe it to, would certainly give a construction to an ambiguous clause of that kind as to the right to the teinds. There is said to have been another ground for possession, viz., the tack which the party had of these teinds, which had continued; but I see it stated, on the part of the reclaimer, that that tack came to an end, and that it never was renewed, and that there was not possession upon that tack. On the other hand, again, it is said by the Crown, that after that deed of 1784—viz., in 1789—an application was made by the then Lord Leven for a renewal of the previous tack which he had held of the teinds of his own lands,—those comprehended in that previous tack belonging to other parties, having been granted to them; and he asks to have it renewed to him without fine, and the Crown agreed to renew it, but no renewal took place; and this is pleaded as an admission on the part of the Earl of Leven, that if he had no right otherwise he would not have applied for the grant. That is an observation of some importance; but it shows this also, that the parties were put upon an examination of their relative position, that the Crown at that time had considered the matter of granting a tack to Lord Leven, that they did not grant a tack to Lord Leven, and yet that Lord Leven continued to possess the teinds. The inference from that would be rather that Lord Leven, though allowed to take out a tack without a fine, and not having done it, considered that he had some other right on which he could found.

I think, however, that the reading of that clause in the deed of 1784 may be aided by looking at the other deeds; because that general clause of the right to the teinds of, all and singular, the lands, is, in the first place, not in all the deeds coupled with the clause granting the patronage, as the Lord Ordinary seems to think,—which separates it from that reading. Then, again, in all the deeds, if we look downwards or upwards, it is not always coupled with those warrandice-lands and the lands of Stenton, —which separate it from that reading. That tends to throw doubt on either of these two readings of it, and leaves it standing upon something else, which I can only interpret to be what the ordinary meaning of such words would be,—"with the teinds, parsonage and vicarage, of each and all of the lands before mentioned." I have not looked at the way it is written in the original charter, but in the prints of the deeds it is printed in various ways; and there is a power in the press of giving an eye meaning to deeds by the introduction of capitals and separations which may attach one clause to or separate it from another. But when we find the whole gathered up, *cum decimis*, with the teinds, parsonage and vicarage, of all and each of the lands before written, I can hardly read that as meaning anything else than all the teinds, unless there is something very plain and necessary to the limitation thereof. I think, *in dubio*, it would require **[158]** to be read in that way; and that, with the interpretation which possession has put upon it, I am inclined to think displaces the grounds of the Lord Ordinary's interlocutor, and I am not satisfied that the Crown have substituted any other valid ground

for that which the Lord Ordinary has taken, and therefore I would be disposed to assoilzie the defender.

LORD IVORY.—I have come to the same opinion as the rest of your Lordships, certainly not without difficulty, but that difficulty was lessened as the attention which I gave to the deeds was more and more minute. With reference to the Lord Ordinary's interlocutor, I think it cannot be supported. In the first place, it seems to be rested too much upon that signature of 1706; and, in the next place, it seems to me to adopt a principle which cannot be sanctioned by the Court. His Lordship says, that he "has not been able to discover any authority for sustaining, as a prescriptive title, such a grant followed by such possession." That observation he makes, dealing with the conveyance of the right of patronage as the item of the grant to which the teinds in this case are attached,—"with the teinds thereof;" and the discussion at the bar was in great part maintained on the strength of that word "thereof." I think that word "thereof" only occurs in the signature of 1706, and I do not care whether, in that signature of 1706, the *cum decimis ejusdem* be attached to the right of patronage or not, because I do not think that the case turns upon that. The Lord Ordinary is embarrassed by saying that it is impossible to reconcile either the grant or the possession with a title which connected the teinds with the whole parish. But, in a question of prescription, *tantum præscriptum quantum possessum*, there may have been an original right of prescription to the teinds of the whole parish, which has been lost, except as to the right in the teinds of the individual lands belonging to the party.

The difficulty that I feel in the case is in reading the more modern deeds, and I am not disposed to go beyond the investiture of 1784. I think it is the investiture on which the plea of prescription is very safely rested. There is enough to support it there, according to the view which I have taken; and I think that, whether it is competent to go backwards for the sake of looking at probable constructions or not, it is better not to do so. But there is a technicality within the more recent grant, viz., whether the grant comprehending a variety of subjects, to some parcels of which there is attached a grant of the teinds, it can be held that that more general clause at the end, *una cum decimis tam rectoriis quam vicariis omnium et singularum terrarum*,—which would, as regards the lands, the teinds of which were specified, be a mere repetition,—is not to be confined to the last parcel, where there is no specification of the particular teinds; or whether the ultimate clause, *cum decimis tam rectoriis quam vicariis omnium et singularum terrarum*, be not an over-rider of the whole lands within the charter. Now, if this question had arisen in the original reading of the charter, there might, as your Lordships have observed, have been more delicacy in regard to it. But it seems to me that, in this question of prescription, any ambiguity which might exist is done away, and that we have title enough on the face of the grant, supported as it has been by possession, to give a basis for a title here. I may just notice, though I am not disposed to go into the earlier titles, that there is, in the previous title of 1719, a reading of this general clause which supports the interpretation which possession has put upon it, because it says there "sicuti eadem sunt express et mentionat in prædict infeofamentis Davidis Comitis de Leven prædict terrarum rexive cum decimis tam rectoriis quam vicariis totarum terrarum aliorumque prædict;" that is, all and singular the lands respectively and their teinds, which will not naturally confine itself to a single subject, but which rides over that subject, and goes back to the other lands which are made the other subjects of the grant. Upon these grounds, and without going further into the writs, I am satisfied that, even if I were construing the grant, fortified as it has been and explained by possession, it is a grant of the teinds of all and whole each respective subject which is within the writing. But when, independent of that, I find that there has been uniform possession since 1789 at least,—now more than sixty years ago, and beyond the years of prescription certainly, I find that there has been no payment of teinds, no exaction of tack-duty, no assertion of right on the part of the Crown, with perfect and absolute and uninterrupted enjoyment on the part of the subject, I think such a circumstance is not only of the utmost importance in explaining the construction [159] and reading of the grants, but also *in re ambigua*, if it did not explain the grant thoroughly, is sufficient to support the right of the party who has had no other title than that on which to rest, and who has been allowed for so long a time to go on rearing up his prescriptive title in that way.

As to the tack, the defender did not plead upon it in the debate, and I would

rather not go into speculation as to what might be the defender's right if he was driven to rest on the tack. I think it is not necessary for him, and perhaps it was quite enough for him to found upon his prescriptive title as the title upon which he relied. But clearly he could not be excluded from resting upon the tack, because he had both titles within his hands. It is an ordinary observation in all these cases of prescription where there is a double title, that the party may rest on either, or both, as happens to suit him best. But I would rather say nothing at all in regard to the judicial nature of the rights under the tack, beyond this, that both parties upon the record are at one that the original tack expired, that no new tack was granted, and yet that the prescriptive usage was allowed to run on. The Crown's attention was called to the expiration of the tack, and they were in transaction with the proprietor for the time, on the footing that that tack was to be regarded in the course of the treaty as at an end. Well, did that not call the Crown's attention to the necessity of enforcing their right? I can only presume that, all parties having their attention called to this state of things, nothing was done, because they found that there was this general clause in the grant on which possession had been allowed to run. Why did the proprietors cease to ask a renewal of the tack? Why did the Crown not levy tack-duty, if they were entitled to it, in respect of these teinds? It must only have been because, looking into the right, there was something in the enjoyment of the teinds on the one hand, and the want of right on the other, which came to be satisfactory to both their minds; or, at all events, whether satisfactory or not, was acquiesced in as a ground of possession, and that possession had been allowed to run for nearly twice the prescriptive period. That seems to me to destroy all points of nicety or difficulty of construction that might be raised upon the ambiguity.

The Court pronounced the following interlocutor:—"Recal the interlocutor of the Lord Ordinary of 27th June 1860 reclaimed against: Find that the defender has instructed an heritable right to the teinds of the lands in question: Therefore assoilzie the defender from the demands of the pursuer in the information laid by him, and decern: Find the pursuer liable to the defender in the expenses of process: Allow an account thereof," &c.

No. 31. **XXIII. Dunlop 159.** 13 Dec. 1860. 1st Div.—Lord Ardmillan.

DUNCAN CAMPBELL, Real Raiser and Pursuer.—*Sol.-Gen. Maitland—Ross.*

LOUISA ANNE CAMPBELL and Others, Defenders and Claimants.—*Young—D. Mackenzie.*

JOHN HENRY COOK, Claimant.—*Young—D. Mackenzie.*

Act 5 Geo. IV. cap. 87 (Aberdeen Act)—Provisions to Children—Qualified Condition—Assignation—Competition—Proof—Onus.—An heir of entail in possession granted provisions to his younger children, in terms of the Aberdeen Act. In virtue of reserved power, he afterwards apportioned the amount to each; and thereafter, by codicil, he provided, that out of the sum left to his son Alexander, "he must first repay his brother Duncan a security or debt of L.100 to Mrs. Tucker, and another of L.200 to Mr. Law, which Duncan granted to relieve Alexander in his distress, and to save him." Duncan, having succeeded to the entailed estate, brought a multiplepoinding, in which the competition lay between him and Alexander's assignee, who claimed in virtue of a deed dated the day after the father's death;—*Held* (1), That the assignee could not competently claim the provision and reject the condition; but *question*, whether such a qualified provision would be effectual in a question with an heir in possession who challenged it? (2), That Duncan's right of retention was only available in so far as legally established to have existed at the date of lodging the assignee's claim,—which (3), operated a completed **[160]** transfer of the right and interest then belonging to Alexander Campbell. Therefore (4), that Duncan was entitled to retain the provision so far as to compensate his claim under a bill for L.100 to Mrs. Tucker, dated prior to the bond of provision, but that it was competent for the competing assignee to prove that that debt had been extinguished; (5), that Duncan was not entitled so to retain the provision in relief of a claim

founded on a bill for L.500, dated subsequent to the death of the granter of the provision, which did not bear to be connected with the L.200 referred to by the grantee of the provision, but that it was competent for Duncan to prove that it included that sum. (6), That as in a question with the assignee, it was not competent for Duncan to refer to the oath of the cedent.

The late Archibald Campbell, heir in possession of the entailed estate of Lochnell, on 21st January 1847 executed a bond of provision in favour of his younger children, of whom Alexander Campbell was one, in terms of the powers conferred by the statute 5 Geo. IV. cap. 87, reserving to himself the power of apportionment. On 22d January 1847 he executed a deed of division, which, so far as applicable to Alexander Campbell, was as follows:—"8th, To my son Alexander I leave L.500; but he is only to get L.250 at my death, and the other L.250 sterling is to be applied to the education of his children; but should he have a son, to be named Archibald Argyll, I wish my wife and my son Duncan to support him; and I also wish his daughter, named Louisa Ann, to be supported by my wife and Duncan."

Thereafter, on 8th January 1848, Archibald Campbell executed the following codicil:—"In the disposition of my estate or property made on 22nd January last, I have left a certain sum for my son Alexander on my death. But out of that sum he must first repay his brother Duncan a security or debt of L.100 to Mrs. Tucker, and another of L.200 to Mr. Law, which Duncan granted to relieve Alexander in his distress, and to save him." (Signed) "ARCHD. CAMPBELL of Lochnell."

Archibald Campbell died on 2d October 1855, survived by eight children, of whom Duncan Campbell, the raiser of this multiplepoinding, succeeded to the entailed estate of Lochnell. The amount found due to the younger children was L.7175, 11s., which now formed the fund *in medio* in this process. In consequence of the sums apportioned by the late Archibald Campbell having been calculated at too large a sum, the share to which Alexander was entitled was only L.461, 2s. 9d., with bank interest from 20th November 1856.

This sum was claimed (1.) by Duncan Campbell, who claimed L.71, 12s. under promissory-note of date 14th August 1845, granted by the claimant along with his brother Alexander for behoof of the latter. He also founded upon a bill drawn upon him by his brother, and accepted by him, of date 21st July 1848, for L.593, 15s., under which he said he had paid L.500 to Mr. Law in full of his claims against Alexander Campbell; (2.) By John Henry Cook, who claimed as assignee of Alexander Campbell in virtue of a deed of agreement dated 3d October 1855, in which Alexander Campbell acknowledged being indebted to the claimant in the sum of L.990, 10s. 8d., lent to him and paid on his account, and also in the sum of L.50 for medicine and medical attendance, making together the sum of L.1040, 10s. 8d., by which deed of agreement he bound himself to execute a mortgage upon his interest under his father's will in the estate of Lochnell, which he did of date 10th July 1856.

Duncan Campbell pleaded compensation.

John Henry Cook pleaded that Duncan Campbell, never having had in his possession, or if he had, having paid into bank, and been divested of said sum before making the claim now insisted in by him, the plea of compensation and retention is groundless and untenable. The promissory-note and bills founded on by Duncan Campbell are prescribed according to the law of **[161]** Scotland, and cannot constitute a good ground either of claim or action in this country.

He also pleaded that the attempt of Archibald Campbell to apply part of the sum allocated and provided to Alexander Campbell, in favour of Alexander Campbell's children, and also in favour of his own eldest son, Duncan Campbell, was *ultra vires*, illegal, and ineffectual, and cannot qualify or affect the right to the sum of L.500, conferred upon Alexander Campbell, and now vested in Mr. Cook as his assignee, or impose any obligation whatever upon them.

On 20th January 1858 the Lord Ordinary pronounced the following interlocutor:—"Finds that the plea of compensation urged by the claimant and raiser, Duncan Campbell, is founded on a claim which is illiquid, and on documents which are prescribed; and that on the face of the said documents founded on, it does not appear that the claimant, Duncan Campbell, is creditor therein: Finds that the claimant, John Henry Cook, is the assignee of Alexander Campbell, in virtue of an assignation

dated 10th July 1856, now duly stamped, and not otherwise objected to on the record: Finds that the said claimant, John Henry Cook, was called as a defender in this action of multiplepoinding by the raiser Duncan Campbell: Finds that on 12th December 1856 a condescendence and claim was lodged for Mr. Cook, as assignee, in which he set forth and founded on his said assignation, and in support of which he produced the same in process: Finds that no claim was lodged for the raiser and claimant Duncan Campbell in this process till the 27th of January 1857, being upwards of a month after the claim as assignee had been lodged for Mr. Cook, and after the assignation had been produced: Finds that the claim of Mr. Cook as assignee, and the production of the assignation in his favour, in an action wherein he was called as a defender by the raiser, was in a question with the raiser equivalent to intimation, and that no plea founded on want of intimation, and no averment of want of intimation, has been stated by the raiser and claimant Duncan Campbell: Finds that, under these circumstances, the said raiser and claimant is entitled to prove the debt on which he pleads compensation by the writ of Alexander Campbell, the cedent, prior to the date of the assignation, but is not, in question and competition with Mr. Cook as assignee, entitled now to prove the same by the oath of Alexander Campbell, the cedent: Therefore appoints the cause to be enrolled, in order that the raiser and claimant, Duncan Campbell, may state what course he means to take; and reserves all questions of expenses."[1]

Duncan Campbell reclaimed, and on 18th March 1859 the Court pronounced the following interlocutor:—"Recal the interlocutor of the Lord Ordinary reclaimed against: Find that the claimant John Henry Cook is entitled, as assignee and in right of the late Alexander Campbell, to be ranked preferably on the fund *in medio*, so far as the said Alexander Camp- **[162]** -bell had right and interest therein under the settlements and relative deed of distribution executed by his deceased father, but subject to such rights of retention and deduction, on the part of the raiser and claimant, Duncan Campbell, against the said Alexander Campbell, as the said Duncan Campbell may be able legally to establish to have existed on 12th December 1856, being the date of lodging the said John Henry Cook's claim in this process, and which date falls, in the present competition, to be held and given effect to as the date of intimation of the said John Henry Cook's assignation, and thereby of legal and completed transfer in his person of the right and interest aforesaid then belonging to the said Alexander Campbell: Find that the raiser's said claim of retention and deduction is rested upon two grounds,—viz., 1st, Upon the terms in which the said Alexander Campbell's provision has been attempted to be qualified and restricted by the foresaid settlements and deed of distribution, executed by his father; and 2d, Upon a counter claim of relief alleged by the raiser as arising out of certain bills or promissory-notes, in respect of which he, the said raiser, had come under advances to or for behoof of the said Alexander Campbell: Find, as regards this alleged counter claim of relief, in so far as the raiser is not in a condition to substantiate the same, except by the oath of the said Alexander Campbell, that it is not now competent for the raiser, as in a question with the said John Henry Cook, and in the face of the said John Henry Cook's assignation, as held to have been intimated on the said 12th December 1856, to refer to the oath of the said Alexander Campbell as the cedent to the said John Henry Cook: To all other effects reserve *hinc inde* the questions respectively raised and depending between

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[1] "NOTE.—The Lord Ordinary thinks that the Scottish law of prescription must be applied.

"The documents are prescribed, and the debts can only be proved by writ or oath, in so far as the writ or the oath is binding on the competing party. But the oath of the cedent will not bind the assignee. Besides, the bills, even if they were not prescribed, do not now prove the debt on which the raiser pleads compensation. On the face of these bills the raiser is not the creditor; but he proposes to invert the relations of the parties to the bills as they appear on them, and to prove by the oath of his brother Alexander that he is really the creditor. But this he cannot do by the oath of the cedent after the date of the assignation, and after the date of its judicial announcement and production.

"If this view is well founded, it is unnecessary to dispose of some of the defenders' other pleas.—Stair, 3, 1, 18; Ersk. 3, 5, 9."

the parties; and remit to the Lord Ordinary, with the above findings and this reservation, to resume the cause, and do therein as he shall deem meet; and reserve all questions of expenses."

On 18th June 1859 the Lord Ordinary pronounced the following interlocutor:—"Finds that the late Archibald Campbell of Lochnell executed, on 21st January 1847, a bond of provision in favour of his younger children, under the powers conferred by the Act 5 Geo. IV. c. 87, reserving power to himself to apportion the provision among his said children: That, on the next day, 22d January 1847, he executed a deed of division or apportionment, by which, *inter alia*, he gave L.500 to his son Alexander Campbell; and that thereafter, on 8th January 1848, he executed a writing in the following terms:—'North Church, 8th January 1848.—In the disposition of my estate or property made on 22d January last, I have left a certain sum for my son Alexander, on my death; but out of that sum he must first repay his brother Duncan a security or debt of one hundred pounds to Mrs. Tucker, and another of two hundred to Mr. Law, which Duncan granted, to relieve Alexander in his distress, and to save him.' (Signed) 'ARCHD. CAMPBELL of Lochnell;' Finds that the said bond of provision, and the said deed of division or apportionment, remained in the possession and under the control of the granter, and that on the 8th January 1848, when he executed the said writing of that date, the provision to Alexander Campbell was within his power, and might have been withdrawn or diminished at his pleasure: Finds that Alexander Campbell, taking the gratuitous provision, could not reject the condition attached to it: And finds that payment to his brother, the claimant Duncan Campbell, of the debts mentioned in the said writing, if the same are due, is effectually made a condition of the said provision; but finds that the said debts are not constituted by the said writing, and that the claimant Duncan Campbell cannot plead compensation against the claimant Mr. Cook, the assignee of Alexander Campbell, unless he competently instruct that the said sums mentioned in the writing are due: With these findings, appoints the cause to be enrolled, in order that the claimant **[163]** and raiser Duncan Campbell may state how he proposes to instruct that these sums are due, and reserves the question of expenses."[1]

Both parties reclaimed against the interlocutor so far as adverse to them.

Parties having been heard upon the remaining points in the case,[2] of this date it was advised.

LORD PRESIDENT.—This question arises out of claims made in a multiplepoinding relative to a provision which was made in favour of Alexander Campbell, the younger son of the late Archibald Campbell of Lochnell. A claim is made by Cook, as assignee of Alexander Campbell, to his interest in that provision; and a claim

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[1] "NOTE.—The three writings, viz., the bond of provision, the apportioning deed, and the writing of 8th January 1848, must be read together. The younger children had no antecedent right to the provisions in their favour granted under Lord Aberdeen's Act. It was optional to Mr. Campbell of Lochnell to avail himself of the statutory powers, or to refrain from doing so. He could give what he chose, within the limits of the Act, and he could apportion as he chose (Antrobus *v.* Innes, 25th November 1830). Therefore each provision remained under his control, and no child, taking it as a gratuitous provision, could reject the conditions attached to it. But in the last writing, by which alone any condition is imposed, the existence of a debt is assumed, and the condition is to 'repay.' Mr. Campbell, who granted the deeds, survived till October 1855, and the right and interest of Alexander Campbell was assigned to the claimant Mr. Cook, and the assignation is held to have been intimated as on 12th December 1856. If the debt was paid, discharged, or extinguished, then the condition was discharged. If the debt is due, the condition is effectual. The plea of Mr. Duncan Campbell is compensation, and there can be no compensation unless there was an existing debt. No such debt has yet been instructed. The cause has been ordered to the roll that the claimant Duncan Campbell may state how he proposes to instruct it."

[2] Duncan Campbell's authorities,—Innes *v.* Antrobus, 25th Nov. 1830, 9 S. 27; Strathallan *v.* Northumberland, 20th May 1840, *ante*, vol. 2, p. 840; Affd. 5 Bell's Ap., 396.

is made by Duncan Campbell, heir of entail of the estate, who claims a right of retention or compensation for part of the provision, in respect of certain debts which he says were due to him by his brother Alexander Campbell, or obligations that he had come under for his behoof. Cook's claim is of a simple character. It rests on an agreement entered into between him and Alexander Campbell the day after the death of Archibald Campbell, and followed by another deed whereby Alexander Campbell's right to the provision was made over to him. The claim of Duncan Campbell is explained in the interlocutor which we formerly pronounced, it being also a condition of the provision that Alexander Campbell shall satisfy certain claims that Duncan had against him. It rests also upon a statement by Duncan Campbell that he had paid certain debts of Alexander, in particular a debt to Mrs. Tucker, and which he had become bound for along with his brother, and a debt to Mr. Law, on account of which certain bills were granted. Cook says these debts are not obligatory; that they are cut off by the statute of limitations; and that he has a preferable claim by the law of England. A great many pleas are founded on the law of England which we did not deal with before, and which have more reference to the remedy than the rights of the parties.

The substance of Cook's plea is that the provision is effectual, the condition inoperative, and may be totally rejected; that he has an assignation to the provision; that he is entitled to have the provision, and to reject the condition. Whether a provision, with such a condition attached to it, is or is not an effectual provision at all, is not the question here. Cook has no interest to raise that question, and he has not raised it. We are here in a competition of claims in a multiplepoinding, where the funds are consigned, and each party is upholding the validity of that provision. Cook's plea is that the provision is valid, but that the condition must be rejected. I cannot go into that view. I think that the condition was competently attached to the provision by Archibald Campbell the granter. He chooses to make this provision in favour of his younger children. He was under no obligation to do so. He chooses to distribute or divide his funds. He was under **[164]** no obligation as to the mode in which he was to divide them. It was not an appointment or appointments that he was making under the provisions of a marriage contract; it was a different matter altogether, and I cannot think that Duncan Campbell is entitled to take the provision and repudiate the condition. Therefore I am of opinion that Cook's reclaiming note cannot be sustained.

But Duncan Campbell has also reclaimed against that interlocutor.

The subjects of Duncan Campbell's claim are twofold. In the first place, there is a sum of L.100, mentioned in the writing by his father as a debt which had been undertaken for Alexander's sake, due to Mrs. Tucker; and there has been produced by Duncan Campbell certain writings, which go to instruct so far a strong presumption in favour of his claim—that an action was brought against him and others for payment of that debt—and that he paid L.71 towards extinction of the debt and expenses. Accordingly, his claim is limited to payment of that L.71 and interest; and in the aspect of that case as it is presented, I do not think that any *onus* farther rests on Duncan Campbell. It will now be for Cook to shew that the debt has been extinguished; and, therefore, Duncan Campbell is right in complaining that the Lord Ordinary has put on him the *onus* of establishing the debt, so far as that sum is concerned.

The next point of his claim relates to the bill of L.500, which was accepted by him and drawn by Alexander upon him, and then renewed, in which last bill Alexander's name does not appear at all, and which bill was in favour of Mr. Law. The writing by the father refers to the debt of L.200 to Law; but I do not at present see anything that connects the one of these matters with the other—that connects the L.200 debt to Law with this L.500 bill. We have no statement on record that the L.200 debt was due to Law, or that a security for such a debt had been undertaken by Duncan anterior to his father's death, at least there is no explicit statement to that effect. But Duncan does claim compensation on these bills. It may be that he may be able to establish a right upon these bills, and I think we ought not to preclude him from an opportunity of doing so; and that, therefore, the case should go back to the Lord Ordinary, to afford him an opportunity of making good his claim of compensation in these matters, if he can. But the *onus* is at present upon him. It may shift, but at present it is on him.

LORD IVORY.—The only two competitors are Duncan Campbell and Mr. Cook. Duncan Campbell's claim consists of two items—one a balance of a debt of L.100 due to Mrs. Tucker, the other a bill for L.593, which was granted several years after the provision was made. It is essential to keep these two items of debt separate, because the one seems to rest, in the first place, upon the words of the clause of provision. The other must rest on its own strength, without deriving any support whatever from the clause of the provision.

Cook says that the condition attached to the provision was *ultra vires* of the granter; and there are two senses in which it may be taken, if the question were here raised at the instance of the heir-at-law, or of any of the heirs coming by succession into possession as heir of entail, or if the question were under a deed attempting to burden the entailed estate under the Rutherfurd Act with the full sum of L.500 provision. There might be a great deal to say in regard to the invalidity or want of power in the testator to dispose of a provision in a way not authorised by the Aberdeen Act. But in all of these cases there would be a party interested to contend for the nullity of the condition, because the nullity of the condition might be necessary in order to extend the right of the heir-at-law, or to diminish the burdens on the heir of entail. But here we have no such thing. Cook must take the provision such as the party gave it. The heir of entail making the provision had it in his power to make it or withhold it, diminish it or enlarge it, from time to time. If he has attached a condition to it which he had no power to do, that condition may affect it when there is a proper party in the field. But if Cook maintains that there was no such condition, that will not enlarge the provision. It will, on the contrary, leave it to be dealt with, irrespective of what it is now; but it will not nullify the provision. Now holding that so, take in the first place, the claim of Duncan Campbell on the bill for L.593. A remarkable circumstance with reference to this claim is, that it was not in existence at the date of the provision of 8th July 1848. That is the date of the L.200, and not of the L.593. It is not, therefore, the debt which the provision alludes to. The [165] condition, therefore, contained in the clause, cannot attach to that debt, which did not originate till July thereafter. It might have been that the original debt of L.200 had been expanded by some other transaction, and was included in the bill for L.593; but that is not said. No explanation is given of that debt as having any connection with that alluded to in the clause of provision; and therefore that clause not being operative in regard to it, it must stand or fall by its own strength. Therefore, that is a debt which Duncan Campbell clearly, if he intended to stand upon it, must constitute; and as there are objections to be cleared away, the *onus* as clearly must, in regard to it, lie on him. So far, I think, the Lord Ordinary's interlocutor may, in its substance, be maintained,—not in the sense in which the Lord Ordinary has expressed his interlocutor, because he has dealt with this claim, as well as others, as one which falls within the condition of the provision. I think it does not. It takes no strength whatever from it. It is a posterior debt altogether; and as that clause of the provision could never have authorised Duncan to enforce a future debt against his brother, it cannot be of any use in supporting this.

The other claim is L.100 due to Mrs. Tucker. Now that is a debt which seems to fall within the protection of the clause of provision. That debt originated on 4th August 1845, being three years before the date of the clause. It was put in execution in 1847, and it was not ultimately extinguished, so far as we see, till 1848, being about three weeks after the date of the clause under consideration. That corresponds also, in point of description, to the debt which is there set forth, that out of that sum of provisions of L.500, Alexander must first repay his brother Duncan a security or debt of L.100 to Mrs. Tucker.

It seems to me that, *prima facie*, Duncan has satisfied all that can possibly be held to be incumbent on him in the production of documents. I do not know that there was any *onus*, in the first place, in regard to this claim; for I think that the condition must be operative against Alexander, unless he shew that he has paid the debt there set forth. The *onus*, in the first place, I think, fell upon Alexander. But, much more, where Duncan has done what he has done by supporting the *prima facie* view, that that debt was in subsistence at the date of making the condition in the provision by his father, and therefore stands in the situation which the clause contemplates of

being the consideration in the debt which it falls on his brother to pay. So far, I think, that the *onus* lies on him. I think that the interlocutor, therefore, must so far be altered; and if Duncan chooses to support his claim for L.500 upon the bill, he shall have, as the Lord Ordinary has allowed him, power to do so in terms of law; but that, as regards the debt to Mrs. Tucker, it remains for Cook to support that claim, or to negative the *prima facie* view which Duncan has already supported, and to exclude the operation of the condition itself, which, in absence of all question in regard to the constitution of this claim, I should have held to be absolute, and sufficient to have supported the claim. But it is open to Cook to shew that the natural presumption from that, looking at the distance of time before the maker of the deed died, is, that it never was an advance to Alexander, and that the statement that Duncan paid it for his behoof is not well founded. But he should not be excluded from the opportunity of doing that, and on that part of the question the *onus* should be laid on him.

Lord Curriehill.—Your Lordships have anticipated all that I had to say on both points.

Lord Deas.—I do not know that I substantially differ from the views expressed by your Lordships. I think it very necessary, however, to attend to the state of matters in which the questions arise, and it is this:—There was an application in 1856 to have the estate burdened, under the relative statutes, with a sum of money to pay this provision amongst others, and this was authorised to be done. The interlocutor of Court is quoted in the appendix, and is final. The burdening of the entailed estate with the money now in dispute, for the purpose of paying the provision, was thus settled in July 1856, and we cannot here review or go back upon what was so done, nor are we asked to do so. The substitute heirs of entail are not represented here, and they must be assumed to have been well burdened with the whole of that sum. That goes very far to take away the difficulty, if there be any, as to whether an heir of entail in possession can validly exercise his statutory power by granting a provision to younger children, subject to a condition in favour of a **[166]** third party. We must start with the assumption that the estate has been lawfully burdened with the whole of this provision of L.500, as in a question with the subsequent heirs of entail; and this leaves us to consider the interests of nobody except those of Duncan Campbell, the heir of entail in possession, on the one hand, and of Alexander Campbell, to whom the provision was granted, and those in his right, on the other hand. What interest either of these parties have to object to the validity of the provision I do not well see. The only question is, to what extent Mr. Cook's claim upon it is to be given effect to? We have not here anybody saying, or who can say, that the provision is altogether null in respect of the condition attached to it, or on any other ground. Nor have we anybody entitled to say that we must give effect to that provision without the condition. The heir in possession does not say that, but the reverse. Alexander Campbell cannot say that, nor can anybody in his right, for it is the condition on which he got it. If he objects at all, he must go farther, and say that the condition nullifies the provision altogether. It is not one of those conditions which, in any view of it, can be held *pro non scripto* while the provision itself stands. It is not against public morals or public policy, or anything of that kind. The party therefore cannot take the provision and reject the condition. But I have not much difficulty on this point, for another reason,—viz., that as I read the document, the condition which the father attaches to the provision is simply that the grantee shall pay out of it a certain debt due by him to the elder brother, if instructed to be due. I do not hold that the condition is equivalent to a constitution of the debt. If it were so, it would equally constitute the L.200 and the L.100. But I do not hold that. I think that the fair meaning of the document is to give the son this provision, subject to a stipulation, that out of it he shall pay certain debts to his elder brother, provided they shall be proved to be justly due. That is very different from a condition that the child getting the provision shall hand over a portion of it, or the whole of it, as a gift to a third party. The interest of the grantee to object to the one condition is very different from his interest to object to the other. As regards the interest of the heirs of entail, whose estate is to be burdened with the provision, I have already said that that question is not here—the estate being already burdened with it, by proceedings which are final.

As regards the L.71, which your Lordship proposes to hold as sufficiently established, unless Cook proves the contrary, I do not much object to that finding. The

only hesitation I had was, that it did not occur to me that the Lord Ordinary had dealt with that matter, but had left for subsequent inquiry the question how far the debts were due and resting-owing, or not? But if your Lordships proceed, as I understand you to do, on the footing that the L.71 is established by evidence of the debt,—not that it is established by the document granted by the father,—I do not object to that being now given effect to.

As regards the L.500 debt, I see no statement in the record to connect it with the L.200 mentioned in the document. On the contrary, the very first bill on which the L.500 debt is said to have arisen, appears to be dated subsequently to the document. I see no attempt to connect them together. If that be so, the plea of Mr. Duncan Campbell, upon the L.500 debt, is just that he, being owing a certain sum on the one hand, there is a debt due to him on the other, and that he is entitled to apply the one towards the extinction of the other. I quite agree with your Lordship that we must leave that open, which, I think, the Lord Ordinary has also done. The L.500 debt is peculiar in its position, because the last document on which it is founded, seems to be a bill, of which Law is acceptor, and in favour of Duncan Campbell. Now, when a man claims as creditor in a document of debt against the debtor, the sexennial prescription may apply, but it does not necessarily follow that it does so when he pays another man's debt, and claims relief; and I understand that we intend to leave this also open. Substantially, therefore, my opinion comes to coincide with that of your Lordship.

The Court pronounced the following interlocutor :—"The Lords having advised the reclaiming note for Duncan Campbell, No. 52 of process, and the reclaiming note for John Henry Cook, No. 53 of process, closed record, and whole process, and heard the counsel for [167] the parties thereon, Recal that part of the interlocutor of the Lord Ordinary, of date 18th June 1859, which finds that the debts mentioned in the writing by the late Archibald Campbell, of date 8th January 1848, are not constituted by the said writing, and that the claimant Duncan Campbell cannot plead compensation against the claimant Mr. Cook, the assignee of Alexander Campbell, unless he competently instruct that the sums mentioned in the said writing are due, and, in so far as it appoints the cause to be enrolled, in order that the claimant Duncan Campbell may state how he proposes to instruct that the said sums are due; and in place thereof, find, as regards the first item of Duncan Campbell's claim, being that which has reference to the sum of L.71, 12s. and interest, paid for a discharge of Mrs. Tucker's action, that it is not incumbent on Duncan Campbell to adduce further evidence in support thereof, and that the *onus* of proving that the same has been repaid, or otherwise satisfied, now rests on the claimant Mr. Cook: Find, as regards the second item of Duncan Campbell's claim, being the sum of L.500, contained in his acceptance to W. F. Law, and interest thereon, that the *onus* of proving that the same is due rests on Duncan Campbell, and that effect cannot be given to his plea of compensation against the claimant Mr. Cook, the assignee of Alexander Campbell, unless he shall competently instruct that the said debt is due; *Quoad ultra*, refuse both the said reclaiming notes: Remit to the Lord Ordinary to proceed with the cause, and reserve all questions as to expenses."

No. 32. **XXIII. Dunlop 167.** 14 Dec. 1860. 1st Div.—Lord Benholme.

JOHN ARCHIBALD CAMPBELL and Others (CAMERON'S Trustees), Pursuers and Real Raisers.—*Ross.*

ALLAN GORDON CAMERON and Others, Claimants.—*Pattison.*

Trust - Settlement—Entail—Clause—Construction—Intention. — A truster directed, *inter alia*, that, after satisfying certain purposes, his whole estate, heritable and moveable, should be conveyed to and in favour of a certain series of heirs, "with such restrictions and limitations as should effectually prevent the order of succession" from being altered. The word "entail" did not occur in the course of the deed. When the trustees were ready to denude, the only estate remaining in their hands consisted of land;—*Held* (altering interlocutor of Lord Benholme), on a construction

of the whole deed, that the trustees were not entitled to insert in their conveyance restrictions against the sale of the estate, or contraction of debt.

The deceased Donald Charles Cameron, by trust-disposition and settlement, dated 25th April 1846, conveyed to his trustees his whole heritable and moveable estate, wherever situated, for the payment of his debts and funeral expenses, payment of various annuities, and payment of provisions for his younger sons and his daughters, part of which, on certain events, it was declared should fall and belong to his residuary means and estate, and the trust-deed then proceeded as follows :—"Lastly, with regard to the residue and remainder of my estate and effects, heritable and moveable, real and personal, above conveyed, or of the prices and produce thereof, that my said trustees shall hold the same in trust, for the use and behoof of my eldest son John Cameron, and the lawful heirs of his body whomsoever; whom failing, of my second son Allan Gordon Cameron, and the lawful heirs whomsoever of his body; whom failing, of my third son Donald Charles Cameron, and the lawful heirs of his body whomsoever; whom failing, to my youngest son Patrick Evan Cameron, and the lawful heirs whomsoever [168] of his body; whom failing, to my eldest daughter Maria Grace Cameron or Campbell, and the lawful heirs of her body whomsoever; whom failing," &c.; "declaring that an eldest heir female shall take in exclusion of her sisters, hereby secluding and debarring in all cases heirs-portioners, and that the sons of any heir in possession shall succeed in preference to the daughters of such heir in possession for the time being; whom failing of my own body, to my nephew Allan Cameron," &c., "and to his heirs whomsoever lawfully begotten, with the same restrictions and reservations as imposed upon the heirs of my own body as above in respect to the heir in possession, who must in all cases, if not already a Cameron, assume that ancient name, and my arms, along with his own; all except a Cameron is hereby secluded from the inheritance. And I do hereby appoint my said trustees, that immediately after the lapse of five years from the day of my decease, or as soon thereafter as possible and convenient, they shall dispone, convey, and make over to the said John Cameron, my eldest son, and failing, to his heirs or any of the other parties substituted to him as aforesaid, in the order above expressed, the said residue and remainder of my means and estate, and all the rights and securities thereof vested in my said trustees, but that always under the denomination and destination above written, and with such restrictions and limitations as may effectually prevent the order of succession above set forth from being altered or destroyed, and also under the burden of such of the purposes of this trust as may then be unfulfilled."

The trust-deed conferred full power upon the trustees to enter into possession and management of the trust-estate and effects; "and likewise, with power to my said trustees to sell, dispose, and convert into cash, the whole estate and effects, heritable and moveable, real and personal, above conveyed (excepting always the estate and lands of Barcaldine, as purchased from the trustee of the late Sir Duncan Campbell, Bart., which is hereby forbid to be sold or alienated in any manner of way, although included in the trust hereby created), or as much thereof as may be necessary for satisfying the purposes of this trust, and that either by public roup or private bargain."

The truster, Donald Charles Cameron, died upon the 7th day of November 1848. He was survived by his eldest son John Cameron, who had then attained majority. He also survived the period of five years prescribed by the trust-deed for conveying over the residue estate to him, whom failing, the other parties before mentioned. He was never married, and he died at New Amsterdam, Berbice, upon 29th January 1857, leaving a last will and testament, dated 10th March 1856, in the English form, and which admittedly did not contain words of disposition capable of conveying Scotch heritage. After payment of all his just debts, funeral and testamentary expenses, he bequeathed all his real and personal estate to his brother Donald Charles Cameron.

The trustees having partially carried the trust into execution, found that, in consequence of the depreciation of certain West India stock, they were not able to realise sufficient funds to meet the whole of the provisions specified in the first six purposes of the trust-deed. In these circumstances, the trustees brought this multiplepoinding, stating that they "were ready and willing to convey the estate of Barcaldine, and the other residue estate still remaining undivided, to the party entitled thereto; but that always under the burden of the still subsisting annuities, the balance of the

various provisions to younger children still remaining unpaid, and any other debts owing from the trust-estate; and also under burden of the still unfulfilled purposes of the trust. But various doubts and questions have been lately raised by several of the beneficiaries as to their rights under the foresaid trust-deed; and more particularly, whether the trustees are bound to settle and convey **[169]** the estate of Barcaldine, and the other residue estate of the truster, under the fetters of a strict entail, upon the said Allan Gordon Cameron, the truster's eldest surviving son, and the other heirs and substitutes mentioned in his said trust-deed; or whether the residue, exclusive of Barcaldine, absolutely vested in the said deceased John Cameron, the truster's eldest son, and in so far as consisting of property and effects which could be carried by his last will and settlement, now falls to be conveyed and paid over to the said Donald Charles Cameron, his brother, in terms thereof."

Allan Gordon Cameron claimed a conveyance of the estate of Barcaldine, either under the restrictions as to the order of succession, &c. contained in the head "lastly" of the trust-settlement, and under burden of such of the purposes of the trust as should be unfulfilled at the date of said conveyance, or a conveyance of the estate in fee-simple, "subject only to the burden of such of the trust-purposes as remain unfulfilled after applying to their discharge and fulfilment the whole moveable means and estate of the truster, and his estates in the West Indies."

A claim was also lodged by a tutor *ad litem* for Ewen Somerled Cameron and others, the children of Allan Gordon Cameron, that the estate of Barcaldine should be conveyed to their father under the fetters of a strict entail.

Donald Charles Cameron claimed all the residue in virtue of his brother's will in his favour, except the Scotch heritage.

On 24th February 1859 the Lord Ordinary pronounced the following interlocutor:—"Finds that, under a sound construction of the trust-deed and settlement of the late Donald Charles Cameron, the pursuers, his trustees, are bound to employ the trust-estate, exclusive of the estate of Barcaldine, in the first place, in satisfying the provisions and primary purposes of the trust, and to impose a burden upon the estate of Barcaldine only in the event of the other residue proving insufficient for these purposes: Finds that the pursuers are bound to convey the said estate of Barcaldine in favour of the claimant, Allan Gordon Cameron, and the other heirs set forth in the said trust-settlement, in the form of a strict entail, with all such clauses as are necessary for effectually preventing the succession therein set forth from being altered or destroyed: Finds that with regard to the residue, other than the estate of Barcaldine, still remaining in the pursuers' hands, it is inexpedient *hoc statu* to make any findings until it be more clearly ascertained whether there will remain any surplus after discharging the several purposes of the trust that have yet to be fulfilled, and what is the nature and form of such surplus: Ranks and prefers Mrs. Maria Grace Cameron or Campbell, and her husband, in terms of their claim, and decerns: Ranks and prefers the claim of Ewen Somerled Cameron and others, in so far as relates to the estate of Barcaldine, in terms of the above findings, and decerns: *Quoad ultra*, and specially with reference to the claim of Mr. Donald Charles Cameron and others, before farther answer appoints the trustees to give in a particular state, specifying the amount of provisions still unsatisfied on the one hand, and the nature, amount, and value of the residue still in their hands, on the other."[1]

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[1] "NOTE.—The question whether the destination of Barcaldine is or is not to be in the terms of a strict entail, is a *questio voluntatis*, and resolves into the inquiry whether that is not the only mode of carrying out the granter's intentions. The destination set forth in the trust-deed is a tailzied destination, and, in itself, must constitute an entail. Although that word does not occur in the trust-deed, the latter directs a destination of entail to be made.

"Whether that entail is to be a strict entail, or is to contain only such limitations as would constitute no bar or obstacle to the heir in possession effectually altering the order of succession, seems to depend on the meaning and intention of the testator. The Lord Ordinary cannot hesitate as to that intention, giving to the testator's words their plain and obvious meaning. The cases of Sprot, in 1828, Campbell, in 1836, Stirling, in 1838, and Seton, in 1854, all seem to support the view that the Lord

[170] Allan Gordon Cameron reclaimed, and the Court having appointed parties to lodge in process each a draft of the deed which he proposed to be executed, the only difference between them was, that the one proposed for the children of Mr. Cameron contained a clause of registration in the Register of Tailzies, which the other did not.

At advising,—

LORD CURRIEHILL.—This is a question in regard to the construction of a testamentary deed of settlement, written by the testator himself. At the time of his death the testator, the late Mr. Donald Charles Cameron, was proprietor of the estates of Barcaldine and Foxhall, of a house at Portobello, and of real property in the West Indies, besides various moveable property. All the estate and effects were conveyed to the trustees in general words. It is not necessary to go over the first six purposes of the trust. By the 7th purpose the testator left a sum of L.10,000 to each of two daughters. Each sum was to be invested, and the annual proceeds were to be paid over to the daughter to whom it was bequeathed, during her lifetime. At her death, if she should leave children, these were to have the capital sum, but if she left no issue, one half was to go to any parties she might appoint, and the other half was to fall back into the residue. This shows that the testator contemplated that the vesting of one-half of these two sums might eventually remain in suspense till the death of his daughters, and might then devolve on the parties to whom the residue was provided.

The important clause is that entituled "lastly." By it the trustees are appointed to hold the whole residue and remainder of his estate, "heritable and moveable," for a period of five years after his death, for behoof of his eldest son, John Cameron, and the heirs of his body, whom failing, his other children in their order, and the heirs of their bodies respectively. With regard to what was to be done at the end of the five years, there is the following provision—(*supra*, p. 167). Here the trustees are to convey the said residue, (including, therefore, as before, moveable as well as heritable property), and the securities on which the residue might then happen to be invested. The conveyance is directed to contain such restrictions and limitations as would prevent the appointed order of succession from being altered or destroyed; but it is not stated what these restrictions and limitations are to be.

This conveyance is also to be made under the burden of such of the purposes of the trust as are unfulfilled at the end of the period of five years. As to the management of the estate during the intermediate period, the trustees were prohibited from selling Barcaldine, but they were not directed to employ all the other estate in the purchase of land in Scotland. On the contrary, power was given to them of investing the same either in Government stock, or in the purchase of land, and of changing the investments and reinvesting the funds as they might please.

The testator died on 7th November 1848. The period of five years which was to elapse before the residue was to be conveyed expired on 7th November 1853. The testator's eldest son, John, survived during all that period and till 29th January 1857. He left no children; and, though he left a testament, it was in the English form, and is admittedly ineffectual to convey Scotch heritage. The trustees, finding that there were difficulties in ascertaining the rights of the beneficiaries, raised this action of multiplepoinding on 25th May 1858. Certain claims were lodged, of which two are brought under our consideration by this reclaiming note. The first of these is by the Rev. Allan Gordon Cameron, the second son of the truster, who by the death of his elder brother, has become the eldest surviving son. He claims alternatively, either to have conveyed to him and the heirs pointed out in the trust-deed, the estate of Barcaldine, and the whole residue of the trust-estate, **[171]** so far as not required for the primary purposes of the trust, under such restrictions as would prevent the order of succession from being altered or destroyed; or that the estate of Barcaldine should be conveyed to him in fee-simple. The counter claim is made by his children, who are in minority, and a curator *ad litem*, who was appointed to them. They claim

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Ordinary has adopted, nor does he think that the case of Cumming, in 1832, militates against it.

"As to the residue, besides the estate of Barcaldine, it seems expedient, before determining *a priori* how the surplus is to be disposed of, to know whether such surplus exists, and in what shape."

that the estate should be conveyed to their father under the fetters of a strict entail, with such clauses as will effectually prevent the order of succession from being altered or destroyed. They do not, however, specify the clauses which they require to be inserted for effecting that purpose. The Lord Ordinary, after hearing parties on these claims, pronounced the judgment now under review. The first finding in that judgment not being reclaimed against by any party, is final. The second finding is, that the trustees are bound to convey Barcaldine to Mr. A. G. Cameron "in the form of a strict entail, with all such clauses as are necessary for preventing the succession . . . from being altered." But his Lordship does not say what these clauses should be, although he probably meant that the entail was to be a statutory entail, with the usual prohibitions against sales, contraction of debt, and alteration of the order of succession, fenced with irritant and resolutive clauses. Your Lordships, having heard parties on a reclaiming note against that judgment, were uncertain in what terms the competing parties sought to have the conveyance framed. To clear up the matter, you appointed them to give in drafts of such deeds as they respectively proposed; and each of the parties has lodged such a draft. I have compared the two drafts. Up to a certain point these drafts coincide. There has been introduced into both of them a statement as to a matter of fact, viz., that the other portions of the trust-estate besides Barcaldine will not do more than meet—indeed will not be sufficient to meet—the primary purposes of the trust. But although Mr. Allan G. Cameron and his children are agreed as to that, there are third parties, having a material interest in the matter, who are not parties to these drafts, and are of course not bound by that statement. Both the competing parties are also agreed that there shall be an entail of Barcaldine. Both are agreed that the institute is to be Mr. A. G. Cameron; that the substitutes are to be the heirs of his body and the other heirs set forth in the trust-deed; that a prohibition should be inserted against altering the order of succession; and that that prohibition should be fenced with irritant and resolutive clauses. The difference between the drafts appears to be this; that the children propose that there shall be prohibitions, not only against altering the order of succession, but also against sales and alienation and the contraction of debt, fenced with irritant and resolutive clauses, or, in other words, that there shall be a complete statutory entail. They propose that this shall be done by inserting a clause of registration in the Register of Tailzies, which, under the Titles to Land Act 1858, has the same effect as if all these clauses were inserted at full length. On the other hand, Mr. A. G. Cameron proposes that there shall be inserted no restrictions, except those against altering the order of succession.

The question, then, comes simply to be, whether or not the disposition to be granted by the trustees is to be a statutory entail, containing prohibitions against alienation and the contraction of debt? This is a question of nicety, depending on the fair construction of the trust-deed. That deed must be construed according to the ordinary rules, with the view of discovering the intention of the testator. It is argued, accordingly, for the children, that the direction that the entail was to be under such restrictions as would prevent the order of succession from being altered or destroyed, implied that the entail was to be a statutory entail, because a prohibition against merely altering the order of succession might be defeated indirectly by the estate being sold or attached for payment of debt, unless there should also be restrictions against alienation and the contraction of debt. This is the strength of the argument on the part of the children; and they found upon several decided cases, with which we are familiar, in which a direction by a truster to entail the trust-estate has been interpreted to mean that the entail should be a statutory one.

I am of opinion that this case does not fall under the principle of those referred to. There are several particulars in which it differs from them. One point of difference—on which, however, I do not lay much stress—is, that in the present case the testator never makes use of the word "entail," whereas, in all the other cases, the testator directed an entail to be made; and when this expression is used without [172] any qualification, it is generally understood to mean a statutory entail. The only effect of this difference ought to be, to make us look with more caution whether the testator truly intended the disposition he directed to be made to be such an entail.

The second particular in which this case differs from the other is more important. We have here an express direction to insert one of the three prohibitions which are requisite to make a statutory entail, viz., a prohibition against altering the order of succession. In none of the other cases did the truster thus direct one of the three restrictions to be inserted, omitting altogether any such direction as to the other two. This appears to bring into operation the principle of construction, *enumeratio unius est exclusio alterius*. And it is the more easy to allow this principle to operate that, as the law stood in 1846, an entail containing only a restriction against altering the order of succession would have effectually operated to prevent such an alteration being made by a direct deed, although the destination might be frustrated indirectly by onerous sales or contraction of debt. This was decided in several cases, of which those of Cathcart and of Inglis Cochrane are examples.

A third peculiarity of this deed is of still more importance. It consists in this, that the subjects which the truster directed the trustees to convey by the disposition they were to grant were incapable of being the subjects of a statutory entail. There cannot be an effectual statutory entail of any subjects except Scotch heritage. But the testator contemplated the possibility of other subjects being included in this disposition. It was to make this apparent that I have called attention to what the trustees were directed to make over at the end of the five years. They are to make over the "said residue," referring back to the residue of his estate, heritable and moveable; and not only that, but also the securities in which the estate might be invested at the time, and which might consist of Government securities, or such other securities as the trustees might have thought proper to take. They were directed to convey these investments and securities in the disposition; and they were not enjoined to convert them into cash, and to invest the funds in the purchase of land, or of anything capable of being made the subject of a statutory entail. It is now said to be ascertained that there will remain nothing but Barcaldine which can be entailed; but that was not what the testator contemplated when he made the trust-deed. He contemplated a deed which might convey what was not Scotch heritage. He contemplated that the subject of the conveyance might consist of investments in the Government funds or other personal securities. And, as I have already stated with regard to the two sums of L.10,000 each, bequeathed to his daughters, the deed was to carry right to the half of these provisions which might eventually fall back into the residue in the event of their dying without issue.

Putting all these circumstances together, I am of opinion that the disposition which the testator contemplated was not a statutory entail. Whether this arose from ignorance of the entail law, and whether, had he known its provisions, he might not have given other directions, I cannot inquire.

I therefore think that we should recal the Lord Ordinary's judgment so far as reclaimed against, and should find now that the trustees are not directed nor authorised to insert in the disposition they are to grant in favour of Mr. Allan Gordon Cameron and the heirs of entail any prohibitions against alienation or the contraction of debt. I think we should not go further at present, but should remit the case with this finding to the Lord Ordinary, as there are other matters which may require more discussion.

The other Judges concurred.

Before the judgment was signed, the executors of Mr. John Cameron stated in a minute that they admitted that all the trust-estate except Barcaldine had been exhausted in executing the primary purposes of the trust. A finding to this effect was accordingly embodied in the judgment of the Court.

The Court pronounced the following interlocutor:—"The Lords having considered the reclaiming note for the Rev. Allan Gordon Cameron, No. 17 of process, and the minute for the claimant, Donald Charles Cameron, with consent and concurrence of the acting **[173]** executors of the late John Cameron, No. 25 of process, and having heard the counsel for the parties, Recal the interlocutor complained of: Find that all the estate and effects left by the truster, the deceased Donald Charles Cameron, excepting the estate of Barcaldine, have been exhausted in executing the first six purposes of his trust-deed; and that, excepting the said estate of Barcaldine, there now exists no residue and remainder of the truster's estate and effects to be disponed,

conveyed, and made over by the trustees in terms of the last purpose of the said trust-deed: Find that, according to the sound construction of the said last purpose of the trust-deed, the trustees are not directed or authorised to insert in the disposition and conveyance of the estate of Barcaldine, which ought now to be executed by them in conformity therewith, any prohibitions or restrictions against sales of the estate and contraction of debt; and, with these findings, remit to Lord Jerviswoode, in place of Lord Benholme, to proceed further in the cause."

[Cf. *Sandys* v. *Bain's Trustees*, 25 R. 269, 272.]

No. 33. **XXIII. Dunlop 173.** 14 Dec. 1860. 2nd Div.—Sheriff of Perthshire.

HENRY JACK (Inspector of Poor of Parish of Dundee), Pursuer.—*Sol.-Gen. Maitland—Fraser.*

ROBERT THOM (Inspector of Poor of Parish of Rattray), Defender.—*Patton—Millar.*

Poor—Settlement—Relief—Able-bodied—Stat. 8 *&* 9 *Vict., c.* 83, *sect.* 76.—A parochial board, on an application on behalf of a man labouring under the disease of which he died in February 1849, afforded him pecuniary relief during February and March 1848;—*Held* (*diss.* Lord Cowan, *abs.* Lord Wood) that at the time relief was afforded, the pauper, though in bad health, was able to earn wages, and was not, therefore, such a "proper object of parochial relief" as to render the relief afforded sufficient to bar the acquisition of a residential settlement.

Henry Jack, inspector of poor of the parish of Dundee, raised this action in January 1858, in the Sheriff-court of Perthshire, against Robert Thom, inspector of poor of the parish of Rattray, concluding for payment of L.149, 5s. 11d., advanced by the pursuer for the support of John Donald, a native of Rattray, and after his death, of his children, under deduction of 1s. 6d. advanced before notice was given to the defender, in terms of the statute 8 & 9 Vict., c. 83, sect. 71.

The relief was afforded by the pursuer as follows:—

To John Donald, 1848, February 3d, 1s. 6d.; 12th, 1s. 6d.; 18th, 1s. 6d.; 26th, 1s. 6d.,	L.0	6	0
March 11th, 1s. 6d.; 20th, 2s.,	0	3	6
December 28th,	0	1	6
1849. January 5th, 1s. 6d.; 6th, 1s. 6d.; 8th, 1s.; 13th, 2s. 6d.; 20th, 2s. 6d.; 27th, 2s. 6d.,	0	11	0
	L.1	2	6
To the children, between 3d February 1849 and 21st January 1858,	148	3	5
	L.149	5	11

Defences were given in for Thom, and the Sheriff-substitute allowed a proof. Donald's history, and his circumstances during the time he received parochial relief, as appeared from the proof, were these;—He was born in the parish of Rattray. He married, and became tenant of a house in the parish of Liff and Benvie, in 1835. He resided in that parish till November 1843, when he went to reside in the parish of Dundee. His wife died on 30th January 1848. On 7th February, an application for parochial relief **[174]** for Donald was laid before the inspector of poor for Dundee. The application was in the shape of a schedule, stating a number of interrogatories relative to the applicant. The answers filled in stated, *inter alia*, that Donald had resided in the parish for four years and a-half: he was a widower with five children (the oldest twelve years of age); his earnings were 7s. per week; he had never received parochial relief, or any support, besides sick money from a benefit society. In the column opposite the question,—"State here any bodily disease or infirmity which disables you

from following your employment; and how long you have been afflicted with it," was the reply, "None." And opposite the query, "State here the particular cause of the present application," was inserted "the death of my wife." This application was not signed by Donald. A certificate of the verity of the statements contained in it was subscribed by three neighbours, being rate-payers. The report of the inspector on the application was this,—"Having personally examined this case, it is my opinion, that the applicant is entitled to interim relief on the ground of destitution, being at present resident in this parish, and that the applicant's parochial settlement is in the parish of Liff and Benvie or Rattray." On 10th February the committee of the Parochial Board considered the application, and their resolution was embodied in the following minute:—"The committee of the Parochial Board, having duly considered the case of the applicant, and the inspector's report, find that the applicant is entitled to relief, and that the relief which appears necessary at present should be at the rate of one shilling per week per calendar month. Intimate to the parish of Liff."

Donald was employed in Mr. Caird's factory at Dundee as a weaver. The following extract from Mr. Caird's books shewed his earnings at that work during January, February, March, and April 1848:—

1848.			1848.			1848.		
Jany. 7.	One web.	6/	Feby. 19.	One web.	5/	March 17.	One web.	5/9
13.	„	8/6	25.	„	6/6	18.	„	4/9
19.	„	5/	26.	„	4/9	22.	(5/9)	5/9
22.	„	5/	March 1.	„	6/6	23.	„	4/9
29.	„	4/9	5.	„	6/6	25.	„	5/9
Feby. 11.	„	6/6	9.	Two „	9/6	April 9.	„	4/9
15.	„	4/9	11.	One „	6/6	19.	„	4/9
17.	„	6/6	12.	„	5/9	* *	*	*

There were no further entries of wages paid to Donald till 16th September; from that date till 11th November the entries showed he earned wages of about the same amount as previous to April. A number of witnesses deponed to Donald having been in bad health for some time prior to his wife's death, that he then laboured under disease of the heart, of which he afterwards died; but he endeavoured, notwithstanding his ill health, to maintain himself.[1] In April he went to sea as a common

[1] It was deponed by Mr. Craig, Mr. Caird's foreman during the years 1847 and 1848,—"He then knew John Donald. He complained to me often of being weak in his body. He looked so. I recollect of his wife dying. I think it was in the beginning of 1848. It was prior to this Donald complained of being weak in his body. So far as I know, he was ill off, because he could not work as an able-bodied man could. I recollect of getting money from Mr. Caird to give him; this was before his wife died. My wife gave it to Donald in instalments. If he had then been able to work, he would have got plenty of work. It was on my representation that Mr. Caird gave the money. I never was in Donald's house. I signed my name on his account to an application to the parochial board. I signed that paper of my own knowledge of the circumstances therein stated. In my opinion, Donald's case was one urgently calling for an application to the board. Donald's son was working with me the same time as Donald. He worked regularly. Boys and girls of his age got from 6s. to 7s. 6d. per week in gross, but this was subject to a deduction of from 1s. to 1s. 3d. for winding and gas. The average wages of an able-bodied man would be 13s., that would be subject to 2s. deduction for winding and gas. In the factory books it is the gross wage which is stated. I kept the books. Donald's son's wages were not stated separately, but massed with the earnings of the father; that is to say, the earning of father and son was entered in the father's name. I could not tell by the books the exact amount which each made. Our rule at the factory was that unless a boy or a girl worked a web and a half a-week, that is worth 7s. 6d., we would not keep them; but in the case of a father and son, if the father by working more made up the average, we would keep them. The money I got from Mr. Caird was charity."

Donald's sister deponed,—"He was at times in a weak state of health before his wife's death. He told me his disease was a growth in one of the arteries near the heart. Donald's wife died of fever, but she had some time before that a disease of the

seaman on a voyage [175] from Dundee to Riga.[1] After his return to Dundee he resumed work at Caird's factory, where he was employed till 11th November. He then became unfit for work, and died on 11th February 1849.

The defender led proof to show that at various manufactories the wages earned by weavers in Dundee and Rattray, about the year 1848, averaged from six to nine shillings per week, and on such wages men supported themselves and their children till the latter were able to work.

The pursuer pleaded;—Rattray being the birth settlement of Donald, who applied for parochial relief, which was granted by the Parochial Board of Dundee, on a full examination of the circumstances, and statutory notice of which was received by the inspector of the parish of Rattray before Donald had acquired a residential settlement in Dundee, there was no good defence to the present action. Notice of the relief afforded having been duly made under the statute, the claim for repayment was not barred by *mora*. The Parochial Board, on regular application, and after full investigation, having found Donald a proper object of relief, and admitted him by a formal deliverance to the roll of paupers, and fixed his rate of aliment and paid it, that decision was proof of the facts, until altered or reduced by the competent Court.

The defender pleaded;—Donald, by himself, or with the assistance of his family, was capable of earning a livelihood for himself and them, until he had acquired a residential settlement in Dundee. The advances made to him in February and March 1848 were not, *per se*, sufficient to constitute him a pauper, or to prevent the acquisition of a residential settlement. The pursuer's claim was excluded by *mora*.

The Sheriff-substitute (Barclay) on 9th July 1858 pronounced an interlocutor, in which he found in point of fact—(1st), That Donald was born in the parish of Rattray; (2d), That he married and removed to Liff and [176] Benvie in 1835; (3d), That he resided there till he became a residenter in the parish of Dundee in 1843; (4th), That his wife died in the beginning of the year 1848, and he, having applied for parochial relief, by the schedule in process, was, on 10th February, admitted by deliverance thereon by the pursuer's parish to receive relief at the rate of 1s. per week, of which due notice was on the same day given to the defenders; (5th), That in February and March he received the sums stated by the pursuer; (6th), He received no relief between 11th March and 28th December, having in the meantime gone on a voyage, and had other slender means of support; (7th), "That on 28th December same year, Donald, without any further formal application, but on the original admission foresaid, received an allowance of 1s. 6d., and in January further small sums, amounting in all for the twelve months during which he was on the pursuer's roll, to L.1, 2s. 6d.; (8), That Donald died in February 1849, leaving five children, who, without any separate application, were continued on the pursuer's roll in right of their father, and have received the various sums set forth in the accounts annexed to the libel; and, lastly, That Donald, at the time of his application in February 1848, was in bad

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back. She was sometimes confined to bed, but I cannot tell how long. Donald was not confined to bed at the time of his wife's death, nor off work, but he was not in a healthy state. The eldest boy had the fever just before his mother caught it. I was back and forward at the house at that time. The late Dr. Aiken attended my brother, who also called on him when he was able. The doctor told me what he died of,—namely, a growth in one of the arteries near the heart. John told me there was no hope of his recovery. I could not tell how long this was before his death. John was rather more than two months incapable of work before his death. He often suffered severely. He complained to me often after his wife was gone."

[1] A shipmate deponed as to his condition then:—"He complained at times, but always kept to his work. He never told me what was the matter with him, but said he was badly. He was a very thin man. I have seen as bad as he going to sea. He was not a very strong man, but he kept to his work, although he complained. He said to me he was determined not to go to sea again after he got home. When he left the ship at Port-Glasgow, he said he wished to see his family. Our voyage to Riga lasted two months, or thereabouts. Our wages as common seamen were L.2, 10s. or L.2, 15s. per month. Donald had the same wages as I had. During our voyage we had our victuals."

health and not able-bodied, and in respect thereof, and of his children, he was entitled to parochial relief, and did regularly apply and was admitted by the pursuer's board, and from that time until his death he did not recover his health and ability so as to entitle the board to strike him off the roll, though there were circumstances which did suspend and modify the relief necessary to be afforded him." The interlocutor found, in point of law, "(1st), That the defender's parish, as the parish of Donald's birth, is liable in relief for the supplies afforded to him, and to his children after his death, in the event of there being no subsequent parish of settlement liable in law for such relief. (2d), That the settlement of Donald for himself and his children in Liff and Benvie was lost by continued non-residence for the period of four years complete. (3d), That Donald did not, for himself or his children, acquire a settlement in the pursuer's parish of Dundee, because that previous to the completion of five years from his becoming a residenter therein he had become a proper object of relief, and was actually admitted to the roll of paupers therein. Therefore decerns against the defender's parish in terms of the summons. Finds the pursuer entitled to expenses, and remits," &c.

On 10th August 1859, the Sheriff, on appeal, pronounced an interlocutor, by which he made findings in point of fact nearly the same as those contained in the interlocutor appealed against. He also found, that although it was averred by the pursuer that Donald was a proper object of parochial relief at the date of his application in February 1848, that the evidence did not instruct that averment. It was found in point of law, "that the settlement of John Donald, for himself and his children, in Liff and Benvie, was lost by his absence from said parish for four years and upwards; that he acquired a settlement in the parish of Dundee, in respect of his having resided therein for five years and upwards before he received parochial relief in December 1848; and that the payments made to him in the spring of 1848 cannot be held to constitute the receipt of parochial relief in the meaning of the statute, so as to prevent the acquisition of a settlement by residence in the parish of Dundee, in respect (1) that his own statements in the schedule, upon which said payments were made by the Parochial Board of Dundee, shew that he was not then a proper object of parochial relief, legally entitled to claim such relief; and (2) *separatim*, that the proof does not establish that he was then a proper object of parochial relief: Therefore assoilzies the defender from the conclusions of the summons, and finds him entitled to expenses, and remits," &c.

The pursuer advocated, and pleaded;—(1.) The judgment of the Sheriff was erroneous, in respect it did not give effect to the proof, upon a correct **[177]** estimate of which the advocator was entitled to decree. (2.) The Parochial Board of Dundee having made due and reasonable inquiry before affording relief to the pauper, and having acted according to the best of their judgment, the opinion which they formed as to Donald not being an able-bodied man, and being a fit object of parochial relief, and their deliverance admitting him to the roll, ought not to be over-ruled or called in question, more especially since it is not proved or averred that they acted in *mala fide*.

The Lord Ordinary having made avizandum to the Inner-House in terms of the statute, it was argued for the pursuer and advocator;—The schedule or application for relief was not signed for Donald, and was not subscribed by himself; but taking the answer to the question, whether he had any disease which prevented him from following his employment, along with the question, it did not bear out the argument that he was an able-bodied man. It was consistent with the evidence that he was, though suffering from illness, able to follow his usual employment; but, *esto* that it was a statement under his own hand that he was "able-bodied," it was not to countervail all the evidence in the case. Though able to work at his trade of weaving, the evidence showed that he was suffering so much that he could not earn the wages of an able-bodied man. Though during the whole year 1848 he was, with the exception of February and March, earning sufficient wages for his support, if during these two months he was not doing so—and the excerpts from his employer's books showed that he was not—it was the duty of the pursuer to afford him interim relief. But the man was then labouring under the disease of which he afterwards died—a very material element in the case—and the relief was not pressed upon him by the pursuer, but given on an application, and on a deliverance by the committee of the Parochial Board, after due consideration of the whole case. Relief administered in these circumstances,

where there was not even an allegation of *mala fides*, was certainly sufficient to prevent the acquisition of a residential settlement.[1]

LORD COWAN.—I have given this case the fullest consideration, and have read the evidence with much care. The case seems to me to involve important points in law. The Sheriff has, as I think, mistaken a very important matter, on which, to a great extent, he founds his judgment. He gives too much effect to the schedule annexed to the application for relief, presented to the parochial board in February 1848, and to the statements therein that Donald's earnings were 7s. a-week, and that he was not disabled by disease. He takes this schedule as having been subscribed by the pauper, which it was not, and, therefore, as containing answers given by Donald himself, and he concludes that what is contained in these answers is sufficiently proved. It seems to me that the case is to be determined on the proof, irrespective of the schedule. This pauper went to Dundee on 22d November 1843, and the five years' residence expired on 22d November 1848, and thereby a residential settlement was established, subject to the statutory conditions. What are these conditions? The words of the statute are—"Shall have resided for five years continuously in such parish or combination, and shall have maintained himself without having recourse to common begging, either by himself or his family, and without having received or applied for parochial relief." These words are, in my opinion, very material. That the pauper applied for relief is undoubted,—that he received relief is also undoubted. Therefore, in this state of the fact, the statutory condition has not been complied with, and no residential settlement has been acquired by the pauper.

If the pauper himself had been claiming a settlement, it might very well be questioned whether the mere application for relief might not be stated by the parish in answer to his claim. But the question occurs here between two parishes, one of which has afforded the pauper relief. It seems to me that in this position of facts the *onus* of showing that the condition of the pauper having lived for five **[178]** years in the parish of Dundee without having applied for or received relief, has been purified, lies entirely with the parish of birth. No doubt there is a power and right in the parish of birth to inquire whether the relief proved to have been actually applied for and received, has been properly afforded. That right has been recognised by cases decided in both Divisions of the Court,—the cases of Porteous *v.* Blair, 16th December 1856, *ante*, vol. xix. p. 181, and of Meek *v.* Petrie, 4th March 1859, in this Division, and two cases in the First Division in July 1859. It is material to observe how far these cases go. In the case of Porteous the relief had been pressed on the pauper, not applied for by him, and continuity of residence was therefore held not to be interrupted. In the case of Meek the relief was held not to be legally afforded, as the recipient was able-bodied. The cases in the First Division (Johnston, 13th July 1859; Simpson, 19th July 1859) show that even temporary aid afforded during temporary disability, if given in good faith, prevents the acquisition of a residential settlement. I am not aware of any case where, when a man has been enrolled on the list of paupers, and has received relief in good faith, it has been held that continuity of residence was not broken merely because he was, to some small extent, able to earn wages. It is only when it can be clearly proved, that at the time the relief was afforded, he was earning such an amount of wages as made it wrong on the part of the Board to give him anything more, that we have recognised a right to interfere with the discretion of the Board.

It is said that this man was able-bodied, and the test proposed of that is that he earned wages to some extent. I think the profession have accepted the definition of *able-bodied* given by your Lordship in the chair in the case of Petrie, and previously given in substance by Lord Brougham, "That by an able-bodied man is meant one who suffers under no personal inability, bodily or mental, to work." But if that definition is to be carried to this extent, that a man who is able to work so as to earn wages, although, from disease, incapable of earning an amount necessary for support of himself and his family, is to be held able-bodied, I must dissent. I cannot think that the disability must be to such an extent as to disable him from working at all. I con-

[1] Johnston *v.* Black, 13th July 1859, *ante*, vol. xxi. p. 1293; Simpson *v.* Allan, 19th July 1859, *ibid.* p. 1363; Turnbull *v.* Kemp and Russell, *ante*, vol. xx. p. 703.

sider that a man is not able-bodied who from disease is disabled from earning sufficient to support his family, and that, in such circumstances, there is no illegality in the Parochial Board assisting him to support his family. I consider that the Parochial Board of the parish of residence of such a pauper, acting in good faith, have the power, and are bound to give him needful relief. Their discretion in that respect ought not to be lightly reviewed. Unless a wrongous or illegal exercise of their discretion can be shown, I am clear that their acts ought to be held conclusive as to the fact that the pauper has received, on this application, parochial relief. And the legal consequence of that fact is to be judged of on the statutory provision. Now, here I think the relief was not wrong or illegal, because, in my view of the case, there is no sufficient evidence that the man was able-bodied. The evidence shows that in February, when the application was made, he was labouring under heart-disease, although he was working a little, and earned somewhat for support of his family. That disease never left him, and ultimately carried him to his grave. His case appears to me clearly to have been one proper for the consideration of the Board. It was considered, and assistance was given. Afterwards, no doubt, he went on a voyage and earned wages, and did not require assistance for some time. But he applied for, on 16th November, and obtained on 21st November, relief from a sick society with which he was connected, and that is material as shewing the decline of the man's health, and the reason for his not applying to the parish sooner. From 28th December till his death he received regular relief. The inspector made no new report, but continued him on the roll as he was before.

I am not satisfied that he was not disabled by disease when first admitted on the roll of paupers. It has been said that there is no better criterion of his being able-bodied than the amount of wages earned by him during the period he received relief. Between 1st January and 11th February his total earnings were 35s. 9d. That, according to my estimate, after deducting 2s. a-week for winding, leaves only 4s. a-week. The point I make is, that at the time the application was made, he was not earning sufficient to support his family. Whatever may have been the statement in the schedule, are we to hold that the Parochial Board, making advances to a person in such circumstances, where no fraud is alleged, were acting improperly? If I could hold that every one able to gain a pittance was able-bodied, [179] I would adhere to the Sheriff's judgment. As it is, I am for altering the Sheriff's judgment, and reverting to that of the Sheriff-substitute.

Lord Benholme.—After very anxious consideration, I have at length come to be satisfied that it would be wrong to disturb the Sheriff's judgment. Donald resided in Dundee for upwards of five years, and this in itself would, under the poor-law statute, give him a residential settlement. But then it is said that the application for, and receipt of relief during the five years, under the 7th section, prevented the acquisition of a settlement. To determine this, it is necessary to look at the clause in the statute, and also at the interpretation which has been put upon it by the Court. Under one construction of the words, they might mean that mere application for relief, even although refused, much more if successful, would be sufficient to prevent the acquisition of a settlement. That, however, was not the construction put on this clause by this Court and the House of Lords; because parochial relief was held to mean that to which the party was entitled by law, and no application for relief, successful or unsuccessful, would satisfy this clause in the statute, unless the party applying was a fit object of relief under the statute. Since that construction of the statute has been adopted, it appears to me that the issue in all cases like the present must be, not whether an application has been made, or has been complied with, but whether the applicant was legally entitled to relief. I do not mean to say that the fact that relief has been granted is not *prima facie* evidence that the party was legally entitled to it, especially where the parish granting it is the parish to pay for it. But where the relief is granted by a parish in such circumstances as the parish of Dundee, where they are not the parties who will ultimately pay, and who look to recover their relief from some other parish, the fact that relief is afforded is not such strong *prima facie* evidence that the relief was rightly afforded. Besides, in the present case there is a circumstance weighing strongly with me, viz. that the deliverance affording relief was accompanied by an order that intimation should be given to two other parishes that they were the parties liable in the burden. The case is distinguished by this singular feature, that

while at the time there was some correspondence, it breaks off in 1850, and since that date, for seven years there is no attempt to enforce or obtain a recognition of the claim, which during that time has swollen from a few shillings to L.140. In these circumstances I do not attach much weight to the fact that the application for relief was successful. The delay was calculated to make it difficult to ascertain whether the recipient was a proper object of relief. But it so happens that in this case evidence has survived of a very particular kind, viz. that during the time relief was afforded the recipient was earning wages to a certain amount. Lord Cowan has made some observations on the term able-bodied, from which I am not prepared to dissent. An able-bodied man is not entitled to relief, but the converse is not necessarily true, as there are many stages between being able-bodied and entire disability, in which a man may be more or less disabled, and yet not be a proper object of parochial relief. While the evidence shows that the party here laboured under partial weakness from a mortal disease, it does not enable me to say that he was a proper object of relief, because that circumstance seems to me to be ascertained by the schedule. The statement in it that he was not entirely disabled is not contradicted by the proof. The proof, as well as the schedule, shows that he was at the time earning 7s. a-week; while in December previous and March afterwards he was earning upon an average 15s. per week. If in January and February he was earning 7s. or 8s. a-week, a very important consideration is forced on my attention, and the evidence obliges me to say that although at this time the man was weakly, and labouring under the disease which ultimately carried him off, he was able to earn no inconsiderable wages. Now is that a person of whom you can predicate that he was entitled to parochial relief? Perhaps my views in this respect may be influenced by my having sat for many years as a member of the Board of Supervision, where questions of this kind came constantly under consideration. My impression is most distinct that we would not have held a man to be entitled to relief who was able to earn 7s. per week. In this case, where the Board which afforded relief is pursuing another parish, I do not think it unfair to take the schedule, the document on which they profess to have acted in affording relief, as evidence of the facts upon which they went. I think, therefore, that the Sheriff-principal has taken the sound view of the evidence.

[180] LORD JUSTICE-CLERK.—Along with both your Lordships, I have had very considerable difficulty in forming my opinion in this case. Did I suppose that there was any question of law, or any general principle involved, my difficulties would be greater. But I am satisfied that this is entirely a question of fact. The question is, whether the pauper's settlement was in Dundee. He lived there for five years, and so acquired a residential settlement, unless his industrial residence was interrupted by his receipt of parochial relief. The question, then, is, Was that relief properly given? And that resolves into the question whether at the time he was, in the sense of the statute, an able-bodied man. Now a man may be able-bodied, though not so strong as some other men are. The expression "able-bodied" is a comparative term. What the statute means by an able-bodied man, is a man not labouring under any disability (bodily or mental) to work so as to earn his subsistence. It was settled in the case of Petrie, that such a person has no right to parochial relief, and that the fact of relief being given does not hinder the acquisition of a residential settlement, if it was not properly given. In holding that, we followed the decision of the House of Lords in the cases which have been referred to; and therefore, the only question for us here is, whether this pauper was an able-bodied man or not. The difficulty suggested in the words of the 76th section of the statute is without foundation. If we were to give these words the meaning sought to be put on them, we should be obliged to hold that the decision in the case of Petrie was wrong; because if that strict construction was put upon the statute, the mere fact of an able-bodied man applying for relief in the course of a five years' residence, would be sufficient to prevent his acquisition of a settlement. An interpretation that would lead to this absurdity cannot be entertained. We must hold the meaning of the clause to be that if, being entitled to relief, a person received relief, or, having applied for it, was improperly refused, the receipt of relief, or application for it, in such circumstances, would prevent the acquisition of a residential settlement.

The matter, then, resolves into a mere question of fact, in considering which, it must be remembered that it arises between two parishes, and not with the pauper. If

this is not kept in view, the consideration of the man's circumstances is apt involuntarily to induce a feeling which is quite out of place. The question is, whether the Parochial Board did right in granting relief; and therefore it appears to me that the document on which the Board proceeded is of the last importance, and instead of leaving out of view the statements made in the schedule, I think it is the first thing we are bound to look to, because it is what the Board produce as a justification of their proceedings. In that schedule the applicant stated that he was in good health, and was earning 7s. a-week, and that he had to support a family. Though the document was not signed by the applicant, it was what the Board proceeded on, and not unnaturally, because it was signed by three neighbours, who may be considered unexceptionable witnesses. I think the Parochial Board of Dundee is thus in this unfavourable position, that they have relieved this man on his own statement that he was an able-bodied man earning 7s. a-week. And I find that the inspector in his report says, that the man is entitled to interim relief on the ground of destitution—that is to say, that being in destitute circumstances for the time, he was entitled to get relief, notwithstanding that he was an able-bodied man. It may be very generous to afford relief in such a case; there is very good ground in what the inspector says for private charity, but not for parochial relief. Because nothing, except that a man is under inability to work, affords any ground for giving him parochial relief. Therefore, I think these documents entirely destroy any presumption in favour of the Board; they go to raise a strong presumption that this man was not a fit object of parochial relief, and they throw the burden of proving the contrary entirely upon the Parochial Board of Dundee. But this is all. The Parochial Board of Dundee may prove that he was a proper object of parochial relief.

On the evidence, I confess I have some difficulty. Had I been acting as a member of the Parochial Board, with the documents and evidence in this case before me, I must on the whole matter have come to the conclusion that this man was not a proper object of parochial relief. That evidence is partly matter of opinion, and partly matter of fact. To that part of it which consists of expressions of opinion, I confess I do not attach much weight at this distance of time, when the facts on **[181]** which these opinions were founded may have been lost sight of. But there are pieces of real evidence which I consider very important. We have a statement of the actual wages received by this man, not only at the time of the application to the Parochial Board, but for the whole year, and both before and after it. It is impossible, in the face of that evidence, to hold that his inability to work was such as to render him unable to support himself. At the time of his application some of his family had fever, and his wife died; and that is sufficient to account for his earning less then, than for some time previously. It has not been proved that the diminution of his wages, and his destitution in January and February, were caused by his inability to work. If it were proved that during that period he was suffering greatly from the disease of the heart under which he laboured, I think that might have brought the case within the principle of the cases recently decided in the First Division, in which judgments I entirely concur. But there is nothing to show that during that period his bodily health was worse than it was during the rest of the year. There were, as I have noticed, circumstances in his family which may account for his being, during these two months, unable to earn his usual rate of wages; but even during that time he did not earn so little as to entitle him to relief. But the mere circumstance that his wages became diminished is quite insufficient, without proof that his bodily health was worse during these two months than during the rest of the year.

For some time during that year he was at sea as an able-bodied seaman, and earning the same wages as other able-bodied seamen, and he worked as an able-bodied weaver during the rest of the year. Therefore, chiefly on the real evidence, and considering it not proved that the diminution of wages in January and February resulted from inability to work, I come to the conclusion that the judgment of the Sheriff is right, and that there was nothing to prevent the acquisition by Donald of a settlement in the parish of Dundee by his five years' residence there.

Lord Wood absent.

The Court pronounced this interlocutor:—"Advocate the cause: Recal the interlocutors of the Sheriff and Sheriff-substitute, dated respectively 13th August

1858 and 10th August 1859: Find that John Donald was born in the parish of Rattray: Find that he took up his residence in the parish of Dundee on or about the 23d November 1843, and resided there till February 1849, when he died: Find that on the 7th February 1848 he applied for parochial relief to the Parochial Board of Dundee, and that in the said month of February, and in the month of March following, he received pecuniary aid from said Board: Find that when he so received pecuniary aid, he was not legally entitled to parochial relief: Find that at no other time, within the period of his residence in Dundee between November 1843 and November 1848 inclusive, did he become a proper object of parochial relief, or apply for or obtain such relief: Therefore find that, at the time of his death in February 1849, and from the 22d of November 1848, the said John Donald had a residential settlement in the parish of Dundee: Of new assoilzie the defender from the conclusions of the summons, and find him entitled to expenses in this Court and in the inferior court, and decern: Remit," &c.

No. 34. **XXIII. Dunlop 181.** 15 Dec. 1860. 1st Div.—Lord Kinloch.

ROBINSON and NIVEN, Pursuers.—*Young—A. R. Clark—Watson.*

LUDWIG WITTENBERG, Defender.—*Patton—W. M. Thomson.*

Process—Summons—Authentication.—Held (*alt.* judgment of Lord Kinloch) that an omission by a writer to the signet to sign one page of a condescendence is not fatal to the summons.

Robinson and Niven, merchants in Greenock, used arrestments *ad* **[182]** *fundandam jurisdictionem* against Ludwig Wittenberg, shipowner at Neckermunde, in Prussia, and thereafter brought an action of damages against him.

The defender objected to the formality of the summons, in respect one page of the condescendence was not signed. The Court of Session Act (1850), provides "that the pursuer of any summons before the Court of Session shall set forth in such summons, in such way and manner as the Court, having regard to the forms set forth in schedule (A) hereunto annexed, may from time to time prescribe by Act of Sederunt as applicable to the various forms of action now in use, the name and designation of such pursuer, and the name and designation of the defender, and the conclusions of the action, without any statement whatever of the grounds of action; but the allegations in fact which form the grounds of action shall be set forth in an articulate condescendence, together with a note of pursuer's pleas in law, which condescendence and pleas in law shall be annexed to such summons, and shall be held to constitute part thereof." In schedule A the direction as to the formal part of the summons is, that it is "to be signed on each page by a writer to the signet, and signeted in common form," and, as to the condescendence and note of pleas in law, that they are "to be signed on each page by the same writer to the signet who signs the above."

The defender pleaded;—3. The summons is null and void by reason of its failure to comply with the provisions of the statute 13 and 14 Victoria cap. 36; and the diligence used thereon is inept, the same having proceeded on an illegal warrant.

On 1st December 1860 the Lord Ordinary, "having heard parties' procurators on the defender's third plea in law, Sustains the same, dismisses the action, and decerns: Finds the defender entitled to expenses; appoints an account thereof to be lodged, and remits," &c.

The pursuers reclaimed, and prayed the Court to repel the defender's third plea in law, "or otherwise to authorise the unsigned page of the condescendence annexed to the summons to be now signed."

The pursuers pleaded;—That admittedly all the sheets were signed. It was only page nine that was not signed. Each page was written upon, and had the ordinary catch-word. No authority had been referred to. But the purpose of the statute 13 and 14 Vict. c. 36, was to expedite procedure and to dispense with signing, not to impose a greater strictness in regard to authentication. It altered the form of the summons, and required that it should contain only three things,—the name of the

pursuer, the name of the defender, and what was concluded for; and it provided that the grounds of action should be stated in a separate paper, viz., the condescendence.

The Act of Sederunt of 31st October 1850 contained no provision for authentication, which was therefore still regulated by the old practice, and there was no statutory requirement that each page of a summons should be signed.[1] Such a writ bore a certain analogy to deeds, with regard to which it was settled law that when the deed consisted of only one sheet it was properly authenticated if signed only on the last page.[2] Where a departure from a statute was in itself harmless, the Court would not attach to it the sanction of nullity, simply because it was a departure from the statute, unless there was an express sanction of nullity attached to it by the statute itself, or where nullity followed by necessary implication. Here the summons was libelled in accordance with the statute, and nullity in regard to it was neither expressed nor implied. In judging of these things, the Court would consider the magnitude and materiality of the departure from the [183] statute, and for all the purposes of the statute the summons was here sufficiently authenticated.[3]

Replied,—The signature of each page is a statutory requirement. The summons and condescendence are by the Court of Session Act one writ, and therefore failure to sign each page must have the effect of nullity, otherwise failure to sign several pages would be equally competent.[4] The statute was imperative. It had given no latitude to the Court to consider whether the departure was of magnitude or not. The universal practice was that each page should be signed. But the present question was not under the old statutes, but under the new statute, which required every page to be subscribed. The old writ was abolished, and a new writ introduced.[5] The statute said that it should be in the form to be adopted by the Court, and the Court have spoken authoritatively on the subject by the Act of Sederunt. The question was not whether there was sufficient authentication, but whether there was observance or non-observance of a statutory requirement.

Lord President.—I am of opinion that the objection is not fatal to the summons. I do not go upon a critical construction of the clause of the Act of Parliament as to which parts of it refer to the schedule, and which not. I think, on a fair reading of the clause and schedule, there is a direction that the summons should be signed on each page. But my opinion, shortly stated, is this. The signing of the summons under the old form was matter of practice, and did not rest on any statutory rule, and I think this objection would not have been fatal under the old system. Farther, I think that under the new system, unless there is something imperative in the statute, there would be still less ground for holding this objection to be fatal, because it refers to part of a writ which does not pass under the signet. Now, there is, under the statute, nothing imperative. The object of the statute was to change the shape of the summons from a detailed narrative into a division of the summons, whereby the facts should be collected in articulate statements, with pleas in law subjoined. It is not an enactment for greater or stricter identification than formerly existed. It is not a statute which introduces any solemnity, but I think it directs, for the sake of identification, such identification as formerly existed—that the summons should be signed on each page. I do not think that the statutes applicable to deeds have anything to do with this case. But I am not aware of any authority for holding at common law that a deed, which contains only three or four pages, is null by reason of the signature not being attached to all the pages. On that ground, I think that this objection is not fatal to this summons.

Lord Ivory.—I am of the same opinion; and I think the ground on which your Lordship proceeds is sufficient for the decision of the case. Reading the statute as a

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[1] A. S. 8th July 1691; statute 1695, c. 40; Ersk. 4, 1, 5.

[2] Cleland *v.* Clason, 15th February 1849, *ante*, vol. xi. p. 601, H. L. 7 Bell's Ap. 153.

[3] Home *v.* Harvey, 6th December 1842, *ante*, vol. v. p. 261.

[4] Dwarris on Statutes (2d Ed.), 611; see also the case of Peter, 19th February 1795, Dict. 16,957.

[5] Thomson *v.* M'Crummen's Trustees, *ante*, vol. xviii. p. 470, H. of L. 24th March 1859.

whole, it does not enact a new form of authentication which must be observed precisely in the letter of the statute. But it takes up the old practice, in which this matter of signing was matter of practice, and in regard to which I entirely agree that the omission to sign one page would not have been fatal. It is like, in this respect, the case of Peter, in regard to execution; and it is like another set of precedents in regard to a deed written page-ways upon a single sheet of paper. I do not think the statutes which authorised deeds to be written book-ways, where there are more sheets than one, apply to this case at all. They left the rule with regard to the identification of a deed written page-ways upon one sheet of paper just as before, and at common law therefore, and according to practice, the non-signing of one or more pages out of the four is not fatal to the deed, if the last page be signed. That is held to be sufficient authentication of a deed written on a single sheet of paper—which shews that the signing of each page is not matter of solemnity. In all such cases the deed has been sustained.

Then, perhaps, this general observation is not without its weight, that the con-
[184] -descendence is not within the writ which passes the signet, and which passing the signet, is authenticated by the writer to the signet as having been written by his clerk. It is to be annexed to the writ, which must be so authenticated, and is not within those necessities which might otherwise have been implied, because that appendix is not necessarily the ultimate condescendence in the case. It may be affected by amendment of the libel, or by revisal. It may be completely altered. That is a circumstance which points very directly to the statute being intended to be purely directory in the matter. Further, defences do not require any authentication, and yet as the condescendence is the ground of defence, it is *in pari casu* with the summons as to authentication. This is merely a corroborative circumstance, which I think it is well to notice. But I am quite content to rest my judgment on the ground stated by your Lordship.

Lord Curriehill.—I come to the same result. The question is attended with difficulty, and I have given it careful consideration; but it is impossible to refrain from coming to the result suggested by your Lordship. There is no doubt that in construing the rules applicable to signing, a distinction is to be taken between what is essential and what is directory. The difficulty is to distinguish the one from the other; and if the rule here is only directory, there is unquestionably sufficient to identify this unsigned page as part of the condescendence. But the question is, whether the statute is directory or imperative. Now there is nothing in the enacting clause of the statute upon this subject at all. The enactment regulates what the pursuer is to do, and requires him to insert in the summons certain things—the name and designation of the party, and what he asks for, but no statement of facts or pleas in law. I confess that even if the omission had occurred in the proper summons, I would have had great difficulty in holding it to be anything more than an omission of what was directed; and whether or not under the old practice, when the summons was made fuller than it is now, an omission of this kind might have been fatal, it is to be observed that the writ in which that omission occurs does not pass the signet at all. For what purpose, therefore, is a writer to the signet required to sign each page of this condescendence? It is not as a warrant to the keeper of the signet to attach the signet to it. It is not to authenticate it as part of the record, because there is a separate provision made in regard to that. That is to be done by the Lord Ordinary, and it may undergo very great alteration and modification. It does not require that this writ shall be the record, and it may happen that the unsigned page may never be part of the record at all. I think that the only purpose for which this signature is required by a writer to the signet is to identify this appendix to the summons, and looking upon it in that light, I think that the direction to the officer who is to sign it for the purpose of authentication is in the circumstances of this case quite sufficiently complied with. There is only one page left unsigned by him, and the other side of that page contains his signature.

Lord Deas.—In this case the summons, inclusive of the condescendence, consists of fifteen written pages, upon four sheets of paper, each page being signed by the writer to the signet, with the exception of the ninth page,—that is to say, with the exception of the first page of the third sheet. The unsigned page is not part of the summons, strictly so called, to which the signet is attached, and which consists of six pages, bearing, in the usual way, to be written by the writer to the signet's clerk, but

is part of the condescendence. The omission to sign the page alluded to is the only defect alleged against the summons. In all other respects the writ is admittedly formal and complete.

The Lord Ordinary has sustained the defender's third plea in law, which bears that the omission constitutes a statutory nullity under the Act 13 & 14 Vict. c. 36. The argument stated to us in support of the Lord Ordinary's interlocutor was rested upon that statute. It is, however, necessary, to the proper construction of the statute, to inquire how the law on the subject stood anterior to the statute; and to consider that law in connection with the object and purposes contemplated by the statute. These are material elements in every question, whether a statute is to be held imperative or directory.

Now, anterior to the statute, it cannot be pretended, and it was not maintained to us, that the omission to sign one page, in the middle of a summons written on several sheets, would have constituted a nullity in the writ. The exclusive privi- **[185]** -lege claimed by writers to the signet, and recognised in Acts of Parliament and Acts of Sederunt, from the institution of the College of Justice downwards, to prepare and charge for certain writs passing the signet, gave rise to the necessity of some sort of *imprimatur*, or authentication, of that writ by the writer to the signet, for the double purpose of showing the keeper of the signet whether he was bound and entitled to adhibit the signet to the particular writ, and of showing the Court and the parties who the writer to the signet was who became responsible for the writ. Accordingly the statute 1585, c. 13, enacted, that "the secretar admonish all his deputes and writers to the signet, that nane of them take upon hand to write, or put in forme ony maner of signatour or letter, to be past his Majesties hand, that conteinis novaltie or informalitie, contrair the lovable and accustomed stile and forme, notwithstanding the desire of ony partie, under the paine of deprivation. And that everie writer subscribe his name on the back of the signatour, or letter, as allowed to him, That it is written according to the ordinar stile and forme: And that no signatour or letter passe unallowed or subscribed be the writer, as said is, as they will answer thereupon, at their highest charge and perrel." Then came the statute 1695, c. 40, which is in these terms:—"Our sovereign lord, with advice and consent of the estates of parliament, for reviving and preserving the good order that ought to be kept in passing of writs under the signet, statutes and ordains that all writs passing under the signet, called the Signet of the Lords of Session, be subscribed by a writer as clerk to the said signet: Excepting allenarly herefrom letters of diligence in processes before the session, and letters of citation before the parliament, which are to be subscribed by the clerks of session. And his majesty, with advice foresaid, prohibits the keeper of the signet to affix the same to any letters not subscribed as above, any custom or practice in the contrary notwithstanding, and that as he will be answerable upon his peril."

The object of these statutes is plain enough, and it would be difficult to say that, under them, even the total omission of the signature of the writer to the signet, however it might, on other grounds, have affected the validity of the writ, would have constituted a statutory nullity of the writ. These statutes contain no express sanction of nullity. The only express sanction they contain is directed towards the keeper of the signet,—that he shall not allow the signet to be adhibited to writs which have not the signature of the writer to the signet, "as he will be answerable upon his peril." The signet was what gave royal authority to the writ. The signature or subscription of the writer to the signet was, in its origin at least, a mere passport for obtaining that authority.

It was stated at the bar, on behalf of the defender, that the statute 1695, c. 40, is the only statute which requires the subscription of the writer to the signet. The earlier statute 1585, c. 13, requiring subscription on the back, was not noticed. But it will be observed that both of these statutes are prior to the Act 1696, c. 15, as to deeds written book-ways, and were passed at a time when the practice was to write on rolls of paper, so that these statutes probably did not contemplate, and could not, therefore, be intended to provide for the case of letters under the signet written book-ways. This will be still more apparent from attending to the terms of the Act of Sederunt, 8th July 1691, which ordains "that in time coming all letters consisting of more sheets than one which pass the signet, as well suspensiones as others (excepting only summons), be subscrived by the wryters to the signet upon the margine, at the juncture of the sheets, in the same manner as is done by the clerks of session in extracts passing

their offices." The practice of writing book-ways had, therefore, not begun in 1691.

The Act 1696, c. 15, applies exclusively to deeds, and has clearly no application either to writs passing the signet, or to the executions of messengers, which formed the subject of the decision, to which I referred the parties, in Peter v. Ross, 19th February 1795, M. 16,957, and in which it was found that, in an execution of poinding, the omission of the messenger to sign one page, and of the appraisers to sign another, did not constitute a nullity. That decision is important, because it shows that, without any statute on the subject, practice had, by that time, established the legality of writing documents of this class book-ways, and that, when so written, all that was required was authentication equivalent to what had been in use before the introduction of the practice of writing book-ways, and that authentication by [186] signing each page was not matter of solemnity. The decision is still more important, for this reason, that the statute 1694, c. 4, enacts that "all executions of letters of horning, inhibition, and others whatsoever, be subscribed by the executors thereof, and the witnesses, otherwise to be null and void." If this statutory sanction of nullity was held not to be incurred, in regard to an execution, by the omission to sign one of several pages, it could not well have been held to be incurred by the omission of the writer to sign one of several pages of a summons, under the statute 1695, c. 40, which contains no such sanction of nullity.

No doubt, prior to the Act of Victoria, it had come to be the practice, as Mr. Erskine states (4, 1, 5), that summonses should be fully libelled, "and every page signed by a clerk to the signet, before they pass the signet." If the keeper of the signet were to notice that there had been an omission to sign a particular page, it would be his right and his duty to refuse to signet the writ till the omission had been supplied. But it does not follow from this that, apart from statutory enactment, the omission, if it happened to have escaped notice, would infer a nullity.

This brings us to the statute 13 & 14 Vict. c. 36. But here, it is right to observe, that the exclusive privilege of writers to the signet to prepare and sign writs passing the signet, had not been allowed to be exercised without attempts, on the part of other classes of practitioners, to limit or infringe upon that privilege. In particular, the nature and extent of the privilege had been strongly contested in the well known case at the instance of the Society of Solicitors in the Supreme Courts against the Writers to the Signet, 25th February 1800, M. Ap. (M. of Inst. No. 1), in which the judgments of this Court were affirmed in the House of Lords (4 Paton's Ap. p. 326). The judgment of 31st January 1799 "found the respondents have the exclusive right and privilege of preparing and signing all signet letters, and of signing all summonses passing the signet, but that they have no exclusive privilege to sign or prepare bills of advocation or suspension. Found that, as they are answerable for the form and style of libelled summonses passing the signet, they are entitled either to prepare or revise them; but found that they have no right to prohibit the members of their society from signing libelled summonses which may have been written or drawn by others, upon such members receiving the full fees by law exigible by them, and being satisfied that such summonses are properly framed." The partial modifications made on this judgment, as to the extent of the privilege by the two subsequent judgments, need not be here noticed, as they do not affect the purpose for which I refer to the case—viz. as showing how necessary it was, in altering the old form of summons, and dividing it into two parts (viz. the writ to be signeted, and the condescendence to be annexed), to indicate, in some way, that the privilege of the writers to the signet was to attach to the document in its altered form, and that the usual authentication, securing the responsibility of the individual writer to the signet, was not meant to be dispensed with. This, however, is a very different thing from introducing as matter of solemnity that which had never been solemnity before. As Lord Chancellor Brougham observed in Maxwell and Company v. Stevenson, 4th April 1831, 5 W. & S. 276-7, "unless the statute is imperative, and provides expressly, or by plain implication, for the invalidity of an instrument, if the requisites be not complied with, it is merely directory."

Here the statute does not contain even a direction to observe the forms in the schedules, except in so far as such direction is to be inferred from the following enactment:—"That the pursuer of any summons before the Court of Session shall set forth in such summons, in such way and manner as the Court, having regard to the forms set forth in schedule A, hereunto annexed, may, from time to time, prescribe by Act of

Sederunt, as applicable to the various forms of action now in use, the name and designation of each pursuer, and the name and designation of the defender, and the conclusions of the action, without any statement whatever of the grounds of action," which are to form the subject of a separate condescendence and note of pleas in law. The object of this enactment was to separate into two portions the summons, which had formerly been in one,—to confine the first part to the conclusions, and to embrace in the second the facts and pleas in law. In making Acts of Sederunt, to carry into effect this separation, the Court are to have regard to the forms in schedule A. It is impossible to conceive an enactment more in a directory form than this, and I see no reason to think that, while merely **[187]** directory as to the form of the writ, it was meant to be imperative as to the mode of subscription by the writer to the signet, who had the privilege and the duty of preparing the writ.

The Court pronounced the following interlocutor:—"Alter the interlocutor of the Lord Ordinary reclaimed against: Repel the third plea in law for the defender, and remit to the Lord Ordinary to proceed with the cause: Find neither party entitled to expenses relative to the discussion on the defender's third plea, either in the Outer or Inner-House."

No. 35. **XXIII. Dunlop 187.** 20 Dec. 1860. 1st Div.—Lord Ardmillan.

SHAW STEWART, Pursuer.—*Fraser—J. Burnet.*

JAMES ANDERSON SNODGRASS, Defender.—*Young—W. Ivory.*

Minor—Quadriennium utile—Reduction.—Held (altering judgment of Lord Ardmillan), that in order to make the *quadriennium utile* available, a reduction on the ground of minority and lesion must be brought within the four years. It is not enough that the plea shall have been stated within the four years in defence to an action on a document granted during minority.

Shaw Stewart, formerly residing in Stewarton, now in Illinois, in the United States, brought an action of reduction of a pretended promissory-note for L.68, 18s. 6d. sterling, bearing to be dated Kirkford, Stewarton, 11th November 1849, and to be granted by Mary Stewart to the pursuer, Shaw Stewart, payable four months after date, and to be blank indorsed in the name of the said Shaw Stewart. He stated that he had no recollection of adhibiting his signature to the said note, but had been informed, and now averred, that he did adhibit his signature thereto during his minority, but he neither indorsed, nor intended to indorse, the same for value. He owed the defender nothing, and neither he nor his mother received any value whatever therefor. The indorsation was therefore made on the note to the great lesion of the pursuer. In the course of the year 1855, the defender, on the allegation that he was a *bona fide* onerous indorsee, raised an action against the pursuer and his mother, Mrs. Bowie, and her husband, for his interest, for payment of the said promissory-note. To this action the pursuer, on 1855, lodged defences, in which he judicially challenged the said indorsation as having been executed during his minority, and to his great lesion. After the record was closed and parties heard, Lord Ardmillan, Ordinary, on 4th March 1857, sisted procedure, "in order that the defender, Shaw Stewart, may bring an action of reduction of the bill libelled on, if so advised."[1]

This action was accordingly brought on 30th May 1857. The pursuer was born on 3d July 1831.

The defender pleaded;—1. The pursuer is bound to sist a mandatory; 2. Has no title or interest to sue; 3. Has not set forth any relevant or sufficient reasons of reduction; 4. The bill and indorsation now sought to be reduced not having been competently challenged within the *quadriennium utile*, the present action is incompetent.

On 7th December 1858, the Lord Ordinary "finds that the first plea in law for the defender has been obviated; repels the second and third pleas in law for the defender,

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[1] This action was raised, and the defence of minority and lesion was stated before the expiry of the *quadriennium utile*, and, accordingly, the plea is open to the defender, but it must be established in a reduction.

in so far as preliminary, and repels the fourth plea: Appoints the cause to be enrolled for farther procedure."[1]

[188] The defender reclaimed, and on 15th December 1859 the Court pronounced the following interlocutor:—"Recal the interlocutor of the Lord Ordinary submitted to review: Find the first plea in law for the defender obviated: Reserve the other pleas in defence to be discussed with the merits, and reserve all questions of expenses; and remit to the Lord Ordinary to appoint the production to be satisfied, and to proceed further in the cause as to his Lordship shall seem just."

The production was thereafter satisfied, and a record made up, in which the defender stated he had advanced to the pursuer, through his mother, the sum in the bill, to enable the pursuer to pay a debt due by his father, whom he represented, and that the pursuer and his mother had granted the bill as a security, and the mother had paid interest up to Martinmas 1851. His fourth plea remained as before; and he

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[1] "NOTE.—The defender's plea, urged *in limine*, to exclude this action, has been well argued, and raises a question of some delicacy.

"The pursuer alleges that he was born on 3d July 1831, and that he was of course a minor in 1849. A bill, bearing apparently the indorsation of the pursuer, and dated 11th November 1849, was founded on by the defender as a document of debt, and an action raised to enforce payment in 1855. The present pursuer, in defending himself against that action, pleaded that the transaction and bill ought to be set aside on the ground of minority and lesion. When he stated that plea, and judicially challenged the document and the transaction, four years had not elapsed from the date when he had attained majority. Procedure in that action was sisted, to enable 'the defender, Shaw Stewart,' now the pursuer, to bring an action of reduction. He has now done so. If the action is not too late, he seems entitled to have the facts ascertained. But the defender pleads that the *quadriennium utile*, which had not expired when the defence or exception of minority and lesion was stated, has now expired when the action of reduction is brought.

"The Lord Ordinary, on considering the authorities as applicable to these peculiar circumstances, is of opinion that the objection now taken by the defender is not well founded. An action of reduction might have been held as repeated in the former action, and this was suggested, but of course the pursuer (present defender) would not consent. It does not appear that any attempt was made by the creditor to enforce this bill till the action in 1855, and the plea of minority and lesion was immediately stated; there was no homologation, no acquiescence after knowledge of the demand, and there was instant challenge when payment was demanded.

"The circumstances of the case, as alleged by the pursuer, are peculiar. This indorsation is apparently on this bill by his mother. He says he has no recollection of signing it; and that if he did, he was only eighteen years of age, and that the transaction was to his lesion. Reduction by him, before the action against him was raised, could scarcely have been expected; and whenever called on, he pleaded his minority and lesion.

"There is no authority directly in point. On the one hand, the cases of Thomson *v.* Pagan, 3d July 1781, M. 8985, and Manuel *v.* Manuel, 15th January 1853, 15 D. 284, are not in point; because these decisions turned on the specialty, that the document was, *ipso jure*, null and void; so that the *quadriennium utile* was not applicable. On the other hand, the case of Waddell *v.* Gibson, 18th January 1812, F. Coll., is not in point, as it related to an attempt to suspend diligence where the facts were disputed. But the question here is, whether, holding the *quadriennium utile* to be applicable, the minor, having within the four years, and as soon as the matter came to his knowledge, stated judicially the plea of minority and lesion, has not so kept the plea open as to sustain his action of reduction.—(See the cases of Baron *v.* Harvie, 20th July 1626, M. 8038; MacDougall *v.* Arbuthnot, 16th November 1681, M. 9044.) It has not been the practice to hold an action of reduction as repeated where the opposite party objects; but where the cause is sisted, to allow the reduction to be brought, and it is brought accordingly, it does seem hard, and no express authority has been adduced to support such a rule, that the minor should be excluded from pursuing the reduction by the intermediate lapse of time. (See Telfer *v.* Barron, 30th November 1844, 7 D., 170.)"

pleaded, 5th, that the pursuer having received value, was not entitled to decree of reduction.

[189] On 24th November 1860 the Lord Ordinary pronounced the following interlocutor:—"Repels the first, second, third, and fourth pleas stated for the defender, and appoints the cause to be enrolled, in order that parties may state how they propose to ascertain the matters of fact on which the fifth plea for the defender depends, and reserves the question of expenses."[1]

The defender reclaimed, and pleaded;—That the only competent way in which a challenge can be brought, on the ground of minority and lesion, was by raising and executing a summons of reduction within the *quadriennium utile*,[2] which the pursuer had not done.

Replied.—It is not disputed that reduction is necessary to set aside this indorsation, but a challenge might be competently made without reduction,[3] and had been here made before the expiry of the *quadriennium utile*, and so soon as any claim on the bill was made against the pursuer.

LORD PRESIDENT.—I think that the note of the Lord Ordinary, and the argument we have heard in support of it, proceed upon a fallacy or misapprehension of what is the substance of this 4th plea. It is a privilege that is given to a minor to be restored *ad integrum;* and I think all the authorities go to this, that he is to be restored by reducing and setting aside the act complained of, but it is given only if exercised within four years. It is not a question of right of action. It is a privilege, if certain steps are taken for rendering that privilege effectual, and it is rather a misapplication of terms to call what was done in the first action a challenge. There is no challenge except that which is done in competent form. It may be there was a statement that there was ground for challenge. But that is not a challenge. Bringing an action of reduction is the only thing that the law recognises as sufficient to restore him, and therefore, although the Lord Ordinary sisted procedure to enable him to bring an action of reduction, that of itself does not give effect to the plea of minority, and, indeed, the four years had elapsed before that interlocutor was pronounced. If the doctrine of the Lord Ordinary be sound, there is no limit to the period within which an action of reduction may be brought; and in this case, it having been stated in defence that this indorsation was made in minority, and that the party wished to avail himself of that privilege, there would be nothing to prevent him challenging it by reduction at any time within forty years. This may be said to depend on the Lord Ordinary allowing a reasonable time within which to bring the action; but that would make it depend on the discretion of the Lord Ordinary. I cannot think that that is sound. It is argued, that any private act will suffice for a challenge which brings to the knowledge of the other party what is the alleged vice of the document.

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[1] "NOTE.—On the fourth plea the Lord Ordinary retains the opinion which he expressed in the interlocutor and note of 17th December 1858. The production has been satisfied, the record has now been made up and closed, and on reconsideration of the defender's plea on the *quadriennium utile*, the Lord Ordinary has seen no reason for changing his opinion.

"On the other pleas, it is not necessary to make any remark. The objection that it was incompetent for the pursuer in his revised paper to admit the defender's averment of his subscription to the indorsation of the promissory-note libelled on, and to make his own averment of the same as a fact not recollected by him, but ascertained on inquiry, appears to the Lord Ordinary to be not well founded. The date of the note is 11th November 1849, when, as now admitted, the pursuer was eighteen years of age, and this action was raised in May 1857; and it may well be, looking to the averments, that the pursuer's personal recollection did not enable him to make a positive statement. But the subscription is now admitted and alleged, and the defender gets the benefit of that fact. The pursuer cannot now dispute his indorsation, and he does not."

[2] Bell's Prin. (4th ed.), sect. 2099, and authorities cited; Stair (More's Notes), 1, 6, 44.

[3] Marquis of Montrose, Dec. 28, 1697, Dict. 9046; Murray, 16th Nov. 1630, Dict. 9041; A *v.* B, Jan. 1865, Dict. 9045; Bankton, 1, 7, 75.

But if [190] that were so, a notarial intimation, or anything of that sort, would be as good as a reduction. Nothing short of that which, by force of law, will cut down the deed or act complained of, and restore the party against it, will suffice. No step in that direction was here taken within the *quadriennium utile*, and, therefore, I am not disposed to give effect to this action. None of the cases referred to by the Lord Ordinary appear to me to support the doctrine now contended for, and it is a question with me, whether it be competent for the party to repeat a summons without the consent of the other party? But, at any rate, that was not done, and I am clearly of opinion that this interlocutor must be altered.

Lord Ivory.—I am of the same opinion. The privilege of the *quadriennium utile* can only be made available by means of an action of reduction. No equipollents are suggested. Reduction is the only habile mode recognised by the institutional authorities, or in the decisions. But it is equally established that reduction must be brought within the *quadriennium utile*, and Erskine uses words to shew that that is an indulgence granted to a minor for the purpose of enabling him to deliberate. But it is never set forth in any shape that there is a possibility of this privilege being extended beyond the four years. There is no forty years privilege of this sort. As to repeating a reduction, I do not know very well what the effect of that is. But it cannot have a greater effect than a reduction itself, and here there was nothing of the kind attempted till after the lapse of the statutory period. As to the cases, suspension may be competent, and yet reduction necessary too. None of the cases give the least countenance to the doctrine sustained by the Lord Ordinary, which would render it difficult to know when a minor has this privilege, and when not.

Lord Curriehill.—I am of the same opinion. When this case was before us on 15th December 1859, I formed an opinion, which I see no reason to change, in conformity with the views expressed by your Lordship.

Lord Deas.—I am clearly of the same opinion. The party loses sight of the effect which the law gives to a bill until it is reduced. The law presumes that it was granted for value, and, therefore, it has effect until set aside. Just in the same way there are various other classes of writings, in favour of which there are certain presumptions until you overcome them by reduction. For example, a notarial instrument, the execution of a messenger, a probative deed, and so on. The presumptions may be different in these cases, but they agree in this, that you can only overcome them by reduction. In support of the view that reduction is here necessary, we have the authority of all the institutional writers—Bankton, Stair, Erskine, and Bell—in express terms; and these are confirmed by the decision of the Court in the case of Waddell and Gibson, 18th January 1812. It is perfectly plain, that if the plea now sustained by the Lord Ordinary be good, that decision could not have been arrived at. The report bears—"A majority of the Judges were of a different opinion. Several of them admitted that there were strong grounds to presume lesion; but they were clear that reduction alone was the competent mode of proceeding, and that they could not, in such a case, sanction a stay of diligence by suspension."

Now that is consistent with the doctrine of all the institutional writers, and could not have been so laid down if the view of the Lord Ordinary be correct. I agree with Lord Ivory that, to raise any question as to the effect of repeating a reduction in the original action, this must have been done within the *quadriennium utile*. But there was nothing of the kind here. A plea was stated, to the effect that the bill might be set aside on the ground of minority and lesion. But a plea that it was competent to do it cannot stand for the thing itself. There is a good deal of fallacy in likening this to the ordinary case of prescription. It is more like that other class of cases I have referred to, where there is a presumption which you can only get over by reduction. Be this as it may, however, where the rule has been laid down by all our institutional writers, and confirmed by decisions, it would certainly be extraordinary for us now to go back on it, and to hold that a mere statement of the kind here referred to is sufficient to get over the rule.

The Court pronounced the following interlocutor:—"The Lords having advised the reclaiming note for James Anderson Snodgrass, No. 19 of process, and heard the

counsel for parties thereon, on the [191] closed record and whole process, Recal the interlocutor of the Lord Ordinary of 24th November 1860; sustain the fourth plea in law for the defender, dismiss the action, and decern: Find the pursuer and his mandatory liable to the defender in expenses of process; allow an account thereof to be given in, and remit to the Auditor to tax the same, and to report."

No. 36. **XXIII. Dunlop 191.** 20 Dec. 1860. 1st Div.—Lord Ardmillan.

ANDREW WAUCHOPE, Esq. of Niddrie, Pursuer.—*Dundas—A. B. Shand.*

THE NORTH BRITISH RAILWAY COMPANY, Defenders.—*Young—Lee.*

[4 Macq. 348, 352; 10 S.R.R. (H.L.) 523, 524.]

No. 37. **XXIII. Dunlop 212.** 21 Dec. 1860. 1st Div.—Lord Ardmillan.

Mrs. MAGDALEN JULIA MACGILLIVRAY or BRACKENBURY and HUSBAND, Pursuers.—*Cook—Lee.*

Mrs. ANN MACARTHUR or SOUTER and Others, Defenders.—*Sol.-Gen. Maitland—Logan—Millar.*

Process—Issues—Record—Succession—Competition.—In a reduction of a service as heir, on the ground of nearer relationship, *held* that the propinquity of the pursuer, as stated on record, ought—so long as there exists doubt whether issues are controllable by reference to the record—to be set forth in the issues, and especially where there is ground for apprehending that the pursuer may attempt to prove at the trial a different pedigree from that set forth on record.

Question, Whether a general issue is controlled by the record. *Observations*, per Lord President, as to the application to Scotch procedure of the rule that it is not so controlled, reported to have been laid down by the House of Lords in Morgan *v.* Morris.

See *ante*, vol. xxi. pp. 836 and 1053.

This was an action of reduction of a verdict in favour of the defenders, Mrs. Souter and John Macgillivray Noble, as nearest and lawful heirs-portioners of the deceased John Lachlan Macgillivray of Dunmaglass, and of certain interlocutors or decrees pronounced by the Court of Session thereupon; and also of a decree of service and charter of confirmation in favour of the defenders as such heirs-portioners. The ground of action was, that the pursuer, Mrs. Brackenbury, was the nearest and lawful heir, both in special and in general, of John Lachlan Macgillivray.

In the revised condescendence, Mrs. Brackenbury's pedigree and relationship to the said John Lachlan Macgillivray were set forth, as follows:—"The pursuer, Mrs. Magdalen Julia Macgillivray or Brackenbury, is the daughter and sole surviving descendant of the late Honourable William Macgillivray of Montreal, in Canada, who died in or about the year 1825. He was the eldest son of Donald Macgillivray, tacksman of the farm of Dalscoilt, *anglice* Clovendale, on the said estate of Dunmaglass, and a [213] justice of the peace for the county of Inverness. He died in or about the year 1803. The said Donald Macgillivray was son of William Macgillivray, tacksman of the farm of Balnagaick, also part of the said estate of Dunmaglass, who died in or about the year , and the said William Macgillivray was the son of Benjamin Macgillivray, immediate younger brother of the said Farquhar Macgillivray of Dunmaglass, grandfather of the said late John Lachlan Macgillivray, whose succession is now in dispute. The pursuer is thus first cousin thrice removed of the said John Lachlan Macgillivray, the said Captain Macgillivray, father of the said late John Lachlan Macgillivray, and the said William Macgillivray in Balnagaick, the pursuer's great-grandfather, having been cousins-german, and the pursuer being third in descent from

the said William Macgillivray of Balnagaick. The pursuer is the nearest and lawful heir in special and general of the said John Lachlan Macgillivray, and, as such, presented a petition of service to the Sheriff of Chancery, claiming to be served in these characters, on the 7th day of June 1859, which petition is herein referred to, and held as repeated."

The issues proposed by the pursuers were;—It being admitted that the now deceased John Lachlan Macgillivray, last of Dunmaglass, died last vest and seised as of fee in the lands and others described in the schedules A, B, and C, hereunto annexed;—1. Whether the pursuer, Mrs. Magdalen Julia Macgillivray or Brackenbury, is the nearest and lawful heir in special of the said John Lachlan Macgillivray in the lands and others described in the said schedules? 2. Whether the said pursuer is the nearest and lawful heir in general of the said John Lachlan Macgillivray?"

The defenders objected to these issues as too general, and proposed the following:—It being admitted, &c. (as before);—"1. Whether the pursuer, Mrs. Magdalen Julia Macgillivray or Brackenbury, is the great-great-grandchild of Benjamin Macgillivray, immediate younger brother of Farquhar Macgillivray of Dunmaglass, the grandfather of the said John Lachlan Macgillivray, and is nearest and lawful heir in special of the said John Lachlan Macgillivray in the lands and others described in the said schedules? 2. Whether the claimant, being great-great-grandchild of the said Benjamin Macgillivray, as aforesaid, is nearest and lawful heir in general of the said John Lachlan Macgillivray?"

The Lord Ordinary, on 27th June 1860, reported the cause with the proposed issues and the subjoined note.[1]

Argued for the pursuers;—It had been repeatedly settled that the general form of issue proposed by them was the proper form of issue for the trial of such causes.[2] Several of the cases in which this had been decided were actions of reduction similar to the present. The opinion said to have been indicated or expressed in the House of Lords as to issues not being controllable by reference to the record, was founded obviously on a misunderstanding of the forms of process in the Court of Session, [214] and had been repudiated by the highest authority.[3] The dictum had also been disregarded in practice by both Divisions of the Court.[4] The pursuers were perfectly willing to be controlled and limited in the usual way by the record; but it was unreasonable, and was not at all necessary in order to confine them to the case set forth on record, that the pursuers should be compelled to put in issue, word for word, their whole allegations of propinquity.

Argued for the defenders;—After the observations in the House of Lords in the case of Morgan *v.* Morris,[5] it would be dangerous and unjust to the defenders to send the case to trial upon such general issues as those proposed by the pursuers. In this case there was the more necessity for putting the propinquity in the issue, that there was reason to apprehend that the pursuers might attempt to prove a different case from that set forth on record.

Lord President.—This case is before us now as to the terms of the issue to be

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[1] "Note.—This is an action of reduction—not of mere competition. The pursuers' case ought to be so put as to bring out clearly and precisely the true questions on which the case must turn.

"This, it is contended by the defenders, is not done by the form of issue proposed by the pursuers; and the Lord Ordinary is disposed to think that the defenders are entitled to have the question more definitely and precisely put.

"By the issues proposed by the pursuers the matter would go to the jury on a footing so wide and indefinite, that misapprehension or miscarriage might ensue."

[2] Maclean *v.* Officers of State, 5 Bell's App. 60; Wood or Willox *v.* Young or Farrell, 8 D. 1226, 6 Bell's App. 80; Maclean *v.* Maclean, 11 D. 880; Morgan *v.* Morris, H.L. 1855, per Lord Chancellor, 2 M'Q. p. 346.

[3] *Household* Co. *v.* Neilson, H.L., March 6, 1843, per Lord Campbell, 2 Bell's App. p. 24.

[4] Kerr *v.* Mags. of Stirling, Dec. 18, 1858, *ante*, vol. xxi. p. 169; Tulloch *v.* Davidson's Executors, July 17, 1858, *ante*, vol. xx. p. 1319.

[5] 3 M'Q. App. p. 339.

granted. The action is brought by Mrs. Brackenbury for the purpose of reducing the verdict obtained by the defenders in regard to their pedigree, and to reduce certain interlocutors which followed upon that, and a decree and service and charter of confirmation and precept of *clare constat*, and infeftment following thereupon; and also for the purpose of having it declared that Mrs. Brackenbury herself is the nearest and lawful heir of John Lachlan Macgillivray, now deceased, and has the only good right and title to certain lands which are set forth here. The condescendence contains a pedigree of Mrs. Brackenbury, and pleas in law, in which she states that the defenders not being the legal heirs, and she herself being the legal heir, she is entitled to have these proceedings reduced, and the right of the pursuer to the said lands declared as concluded for.

The issue proposed by Mrs. Brackenbury contains an admission that John Lachlan Macgillivray died last vest and seised in the lands, and the question put is, whether the pursuer is nearest and lawful heir—(1), in special, and (2), in general, of the said John Lachlan Macgillivray.

Your Lordships will therefore see that this is not merely an action for reducing the title which had been obtained by the defenders, but is an action for having it declared that Mrs. Brackenbury herself is the party who is entitled to these lands as the nearest heir in general of the deceased—as also nearest heir in special in the lands. It involves, therefore, not merely a reduction of the title of these other parties, but a setting forth of the claim of this party herself, in respect of her pedigree—her claim to these lands as heir in special; and the question that has been raised before us is, whether the issue proposed by the pursuer in the general terms I have read, or whether an issue of a more special kind, which shall set forth the particular pedigree on which Mrs. Brackenbury claims, shall be held as the proper issue to try this case. The right which Mrs. Brackenbury sets forth is a right which she says belongs to her in virtue of her being a party standing in the relationship to the deceased, that is stated in article 4 of the condescendence. It is by reason of that descent that she is nearest heir of the deceased John Lachlan Macgillivray, and by reason of her establishing that pedigree that she claims to have her right to these lands declared. The point which we have to determine is, What is the matter that is the true question here in issue between the parties, and what it is that we are to send to trial? Now, we are to send to trial the claim of Mrs. Brackenbury to be nearest heir in special in these lands of John Lachlan Macgillivray. In that respect she stands in the same position as a party under the old system of service; or, I suppose, under the present system, under which she requires to set forth the claim, and the particular circumstances under which she claims to be the nearest **[215]** heir of the deceased, and under which she requires to set forth the pedigree which she thinks entitles her to that character, and under which she, in order to sustain that claim, must establish that pedigree. It was stated to us that the reason why the general mode of putting the issue was objected to was, that under it the party might endeavour to establish, and might perhaps be permitted or entitled to establish, a pedigree not identical with that set forth. If, under all circumstances, it were disclosed—if it should appear that that other pedigree excluded all other persons and made her nearest heir, the pursuer did not say that it might not be part of her object, in the course of the trial, to take advantage of that state of matters. On the contrary, I understand the argument to be that the pursuer did not wish to be excluded from that event, and from trying that question. We are here, therefore, dealing with a case where a general form of issue is asked, under an express avowal that the party so asking it has in contemplation to try a different pedigree from that which she has set forth on record. Now, then, that being so, if it were quite certain, under the views that have been taken elsewhere, that a general form of issue would limit the party to the pedigree set forth on the record,—would not be a liberation of the party from the restraints of the record,—I would have had no doubt of the sufficiency of that general form of issue, which has been adopted in many cases. But this much is very clear, that a party coming into Court with a particular pedigree —on which the record is closed—and seeking, not only to reduce another party's title, but with her own claim to be heir in special—would not be entitled to go into another pedigree in order to establish her right in some other way, else what is the use of a record? That I think is perfectly clear. Therefore, if we wish to determine the true question at the trial, we must put the issue in such a way as would exclude that

attempt. And I think that such an issue as the present would be sufficient, were it not for what passed elsewhere in the case of Morgan. I have looked into that case; and certainly the expressions of the Lord Chancellor in that case are very broad and general; and appear, on the reading of them, as reported—I go no farther than that—to go to this, that when once an issue is adjusted, the record is no longer to be looked at as limiting that issue. It is to be thrown aside; and that appears to be supported by reference to the observations of Lord Brougham in the case of Leys, Masson, and Company, which was a different kind of case altogether, and where the issue was different in regard to its terms, and which, I would say, is not an authority for that broad proposition. Perhaps it has been reported in broader terms than was the intention of Lord Brougham; and I should be very glad if, on a future occasion, it is clearly announced that it was not the meaning of the House of Lords to lay down the doctrine, that the record being closed, and although it is the object of our record, and of the statutory rules in regard to it, to compel parties to state in it, and set forth specifically what they intend to prove, and the special facts, or, as in this case, the special pedigree on which the claim is founded, that then the form of the issue is to be a general issue; and that when all that is done, all the previous proceedings are to be thrown aside and set loose, and parties are to go to trial as if there were no record at all. I should be very glad to learn that such was not the meaning of the House of Lords in using the expressions reported to have been made use of by them in the case of Morgan, for I do not see that the statutory rules in regard to records were stated, or explained, or referred to at the bar in the House of Lords on that occasion. But while that ambiguity of expression exists, and seeing that this is a case such as I have described, I think it would not be safe to send the case to trial on that general issue proposed by the pursuer.

Another reason is this: that in this case, with the parties that are here, and the number of statements, the pedigree is a good deal confused, and the jury might have difficulty in following it, and it is therefore desirable that they should have before them, in a brief form, the precise point which they are going to try. Now the pedigree which Mrs. Brackenbury sets forth is in accordance with that stated by the pursuer in article 4 of the condescendence. I think it right that the pursuer's pedigree should, in a short form, be stated in the issue, and I also think that the issue proposed by the defender does so state it, and therefore that the issue so proposed by the defender is the proper issue for trying this case.

[216] The Court pronounced the following interlocutor:—"Approve of the issues No. 270 of process, and appoint the same to be the issues for the trial of the cause: Remit to the Lord Ordinary to proceed with the cause: Find the pursuers liable to the defenders in the expenses incurred by them since 27th June 1860, in reference to the settlement of issues in the cause: Allow an account thereof to be given in," &c.

Nos. 38 and 39. **XXIII. Dunlop 216.** 21 Dec. 1860. 1st Div.—Lord Kinloch.

I. PATRICK MAITLAND, Pursuer.—*Sol.-Gen. Maitland—Napier—Patton.*

JOHN M'CLELLAND, Defender.—*Ld.-Adv. Moncreiff—Park.*

II. THE COMMISSIONERS OF HER MAJESTY'S WOODS AND FORESTS, Pursuers.—*Ld.-Adv. Moncreiff—Boyle.*

PATRICK MAITLAND, Defender.—*Patton—Mark Napier.*

I. *Crown—Fishing—Oyster Fishing—Property—Declarator—Interdict.*—A crown charter conveyed certain lands "una cum piscationibus ostreorum albis piscationibus et halecum piscationibus, in mari dict. terris, adjacen. et infra Lacum de Luce iisd. adjacen. aut ullis, aliis terrarum supra script." A proprietor having become feudally vested in certain of the lands mentioned in the charter, with the right of oyster fishing, brought an action for declarator of his exclusive right to oyster fishing in the Bay of Luce, and interdict against fishermen interfering with his exclusive right thereto;—*Held* (*aff.* judgment of Lord Kinloch) that the charter did not give the fishings in the whole bay, but only in those parts adjacent to the lands

therein mentioned, and there being no averment or proof of possession of the right, or of the geographical limits within which it was claimed, action (altering judgment) dismissed.

II. *Crown—Oyster Fishings—Declarator.*—In a declarator by the Crown, concluding that, by the titles above quoted, the grantee was not entitled to any oyster fishings, except *ex adverso* of lands in the charter; and it should be found that all other fishings in the bay belong to the Crown;—*Held* that, as the defender's right depended on admitting the Crown's right to oyster fishings, he was not a proper contradictor on the general question raised, and that the statements were not sufficient to enable the question, as to the defender's right, to be determined.

Question, Whether oyster fishings form part of the hereditary revenue of the Crown?

III. *Title to Sue—King.—Held* (by Lord Handyside, and acquiesced in) that, in an action of declarator of oyster fishing, founded on alleged crown grant, the Crown was entitled to appear, though not called.

IV. *Held* (by Lord Kinloch) that it is not essential to the sufficiency of the instance of an action by "Our Advocate, as acting under the statute 20 & 21 Vict., c. 44, on our behalf, and on behalf of" a public department, that special authority by the Crown should be averred.

I. Reported, *ante,* February 18, 1854, xvi. p. 612; July 2, 1857, xix. p. 944.

This was a declarator at the instance of Patrick Maitland, Esq. of Freugh, against John M'Clelland, a fisherman, and related to oyster fishings in the Bay of Luce. The question was first raised in a process of interdict brought in 1852 in the Sheriff-court of Wigtonshire (incidentally reported February 18, 1854). That process having been advocated to the Inner-House, was allowed to stand over till a declarator was brought; and when this was done in 1854, and was reported to the Inner-House *ob contingentiam,* procedure in the advocation was sisted, and the declarator remitted to the Lord Ordinary. After the record was closed, and parties were appointed to debate, [217] Her Majesty's Advocate, though not called, was, after opposition, allowed to appear on behalf of the Woods and Forests, and was sisted as a party to the action,[1] but lodged no defences, and made no farther appearance; but a new action was brought in name of the Woods and Forests against Mr. Maitland, claiming for the Crown the right of oyster fishing in the Bay of Luce, except *ex adverso* of Maitland's own lands. In the statements made on behalf of the Crown, certain objections were taken to the sufficiency of Maitland's title to some of the lands mentioned in the charters he founded on, and those statements were allowed to be added by M'Clelland to the record in the declarator against him at Maitland's instance (2d July 1857, *ante,* vol. xix. p. 944).

The record having been closed of new, parties renounced probation.

In the action at the instance of Maitland, the conclusions were, that it should be found that he "has the sole and exclusive right and privilege of fishing, dragging, or dredging oysters in the sea adjoining the pursuer's said lands, and in the whole bay called the Bay of Luce,[2] and more particularly in that part of the said bay which is

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[1] "NOTE.—If those who represent the interests of the Crown would have been entitled at an earlier stage of the cause to have intervened, the Lord Ordinary does not see that the neglect (which is to be assumed) of those charged with the interests of her Majesty's property or rights to attend sooner to the matter, can affect the right of the Crown now to appear, notwithstanding the record has been closed. This objection, though deserving of notice, is conceived to be too narrow to bar the Crown's appearance. It would not have disentitled the Court *proprio motu* (an instance of which was cited) to have ordered intimation of the action to her Majesty's Advocate if the nature of it had appeared to require that step. Making merely a general reference to the subject-matter of contention in this cause, the Lord Ordinary thinks there is enough disclosed to shew a presumptive interest in the Crown to be made a party, whatever may be the mode by which its advisers are to raise the contention in which it is to insist. Beyond appearance being allowed to be made for the Crown, nothing is at present determined."

[2] His statement on record as to the limits of the bay was, that it "extends to the northward of a line from the Mull of Galloway to Burrowhead."

ex adverso of the lands of Tyrawley, and of the village of Drummore; and also of the lands of Caliness or Killiness; and also of the lands of Greenan, Kilstay, Low Curghie, and hamlet of Clashwhannan, or in any part of the sea within the Bay of Luce, opposite to the eastern shores of the parishes of Stoneykirk and Kirkmaiden, in the said shire of Wigton, and that neither the said John M'Clelland, defender, nor any other person or persons whatever, have any right or title to drag or dredge, or in any other manner to fish oysters within the said Bay of Luce, or in any part of the said bay as aforesaid, but that the said right and privilege pertains solely and exclusively to the said Patrick Maitland, Esquire of Freugh, by virtue of his rights and titles produced and founded on in this action;" and that M'Clelland should be interdicted from interfering with his (Maitland's) exclusive right.

The leading title founded on by Mr. Maitland was a charter of *novodamus*, under the Great Seal of Scotland, in favour of the pursuer's author, Patrick Macdowall, Esquire of Freugh:—"Totas et integras terras de Galdenochs, nunc vocat. Freugh . . . infra parochiam de Stoneykirk et vicecomitatum de Wigtown. Totas et integras. sex mercat. terrarum antiqui extentus de Balgreggan . . . Totas et integras triginta tres solidat. et quatuor denariat. terrarum antiqui extentus de Calins cum domibus ædificiis et pertinen. earundem jacen. infra parochiam de Kirkmaiden dominium et vicecomit. predict. Et Totas et integras quinque mercat. terrarum antiqui extentus de Flott . . . de Kirkmagill . . . de Culmoir . . . de Clashant . . . de Over et Nether Mys antiqui extentus cum pertinen. Et totas et integras duas mercat. et quadraginta denariat. terrarum de **[218]** Knockencrosh et quadraginta denariat. terrarum de Drummarrow . . . omnes jacen. infra parochiam de Stanykirk et vict. de Wigtown prædict. Et totas et integras, terras. de Ardenmore Urle, Kilquhockadaill et Carsriggen extenden. ad decem. librat. terrarum antiqui extentus cum pertinen. jacen. infra parochiam de Kirkcowan et vict. de Wigtown prædict. et totas et integras decem. librat. terrarum antiqui extentus de Lochronald . . . de Aries . . . jacen. infra parochiam de Kirkcowan . . . Et totam et integram illam croftam seu acram terræ vocat St. Catherine's Croft jacen. prope cemeterium de Kirkmaiden in Rins et vicecomitatum prædict., una cum portubus marinis stationibus et ostiis de Allan Bay et M'Dowgal's Bay infra bondas dictarum terrarum de Balgreggan et Flott. Quos nos declaramus esse liberi marini portus . . . una cum piscationibus ostreorum albis piscationibus et halecum piscationibus in mari dict. terris adjacen. et infra Lacum de Luce iisd. adjacen. aut ullis aliis terrarum supra script." "Et fideliter promittimus in verbo principis hanc pntem Cartam et Sasinam desuper subsequen. in pnti seu subsequen parliāti nro ratificare requiren. status nostri parliāti eandem similiter ratificare." No such ratification as this ever followed. By this charter the lands and others described in it were erected into a barony. There was also produced a crown charter of resignation in 1778, conveying to Captain Maitland all the lands above mentioned, excepting certain lands in the parish of Kirkcowan, which did not adjoin the Bay of Luce:—"Una cum piscationibus ostreorum albis piscationibus et halecum piscationibus in maribus dict. terris adjacen. et infra Lacum de Luce iisdem adjacen. aut ullas alias terrarum supra script."

The oyster fishings, in the same terms as granted in 1707, are contained in the subsequent titles made up by the pursuer's father, and by the pursuer himself.

The pursuer averred that he, "his ancestors and authors, have, from time immemorial, exercised the said right to fish oysters in the said bay or sea, and *ex adverso* of the said lands, in conformity with the said royal grant, by themselves, their servants or tenants, and have thus been in actual possession of the said privilege for greatly more than forty years."

With regard to the defender, he averred (Cond. 7), "The defender John M'Clelland, fisherman at Tyrawley, has recently made a practice of fishing for and taking oysters in and from the sea opposite to or *ex adverso* of the said lands of Calliness or Killiness, and adjoining to the pursuer's lands. He also fished for oysters opposite to the lands of Tyrawley, and to the village of Drumore, in the parish of Kirkmaiden, and shire of Wigton. The places where he has so fished are part of the sea wherein the right of oyster fishings by royal grant has been vested in the person of the pursuer by virtue of the said feudal titles, and are adjacent to the lands in the charter, and within the Bay of Luce. The defender has fished for oysters in various portions of the bay, both opposite to the lands in question and adjacent to the said lands, and also in various

other places in the bay, without permission or authority from the pursuer. In particular, on or about the 22d September 1852, the defender was found fishing with a boat in the sea opposite to the said lands of Tyrawley, or opposite to the said village of Drumore, for oysters, without permission or authority from the pursuer, and did there and then, by dredging or otherwise, take a large quantity of oysters, amounting to one thousand in number or thereby, which he disposed of for his own behoof, to the injury and damage of the pursuer, and the invasion of his heritable rights and privileges. The sea opposite to the said lands of Tyrawley and to the said village of Drumore, where the defender was found fishing as aforesaid, is part of the sea within the Bay of Luce, and adjoining and *ex adverso* of the lands mentioned in the said titles, whereby the pursuer has and holds the royal right of fishing oysters in the foresaid sea, and in the said Bay of Luce. Further, the defender has **[219]** generally been in the habit of fishing and taking oysters, without permission or authority, from within the said bounds opposite to the lands of Greenan, Kilstay, Low Curghie, and hamlet of Clashwhannan, in all which parts of the said sea and Bay of Luce the right of oyster fishings belongs of right by royal grant to the pursuer alone, by virtue of his said titles produced. He has fished for oysters at or near the places mentioned at various distances from the shore. He has not limited his fishings to within three miles of the shore."

M'Clelland did not allege any title. He denied that the pursuer or his predecessors had ever exercised any exclusive right of fishing in the sea, at whatever distance from the shore. He averred that the public, including fishermen from a distance, had always been in use to fish in all parts of the sea-coast at their pleasure, and he admitted that he had fished for oysters in the open sea to the east of the parish of Kirkmaiden, at a distance of three miles from land, or greater distances, and opposite the estate of Logan, on which he resides, and the lands of the Earl of Stair, for his own behoof, and without authority from the pursuer. But denied that he had fished oysters in the sea adjacent or even opposite to any lands belonging to the pursuer. He alleged, and it was admitted, Tyrawley, Drumore, Killiness, Greenan, Kilstay, Curghie, and Clashwhannan, mentioned in the summons, and all lying in the parish of Kirkmaiden, were the property either of M'Dowall of Logan, or of the Earl of Stair; and it ultimately appeared that, even at the date of the charter of *novodamus* of 1707, the lands of Killiness were not the property of the pursuer's authors.

The pursuer pleaded as follows:—The right of fishing oysters, as an exclusive right and privilege, might be competently granted by the Crown to a subject, within such seas and bays as those described in the pursuer's titles; and having been so granted to the pursuer's author, and become vested in the pursuer under the titles produced, he was entitled to vindicate the right; and no acts of possession without a title could be pleaded against his feudal title, even to the effect of claiming a possessory judgment against the pursuer's constantly enduring right to exercise the said exclusive royal grant *quandocunque;* and it was competent to the pursuer to exclude and interdict the defender, and all such naked possessors, accordingly. It was not necessary, in order to the preservation of a right of oyster fishings, that the grantee should have exercised the right, such exercise being *res meræ facultatis;* but the ancestors of the pursuer having *de facto* fished for oysters in virtue of their grant, the pretext of the loss of the right was inadmissible. The defender having denied the validity of the crown grant, and the right of the pursuer under it, and acted in violation of the right, was properly called as a contradictor in the present action. The allegations touching the right of property or superiority of the lands of Caliness or Killiness were irrelevant, the right of fishing conferred on the pursuer being separate from, and wholly independent of the right of property or superiority.

The defender pleaded;—The summons was defective in not specifying the fishings claimed by indubitable marks or bounds; the phrases used in the conclusions being themselves in need of ascertainment, in order to convey exact or certain knowledge of the limits intended. Fishings in the sea were not capable of being held or dealt with as property; and by common law and usage, as well as according to the enactments and language of statutes, were open to all the lieges. By public law and usage, such fishings, when in open sea and three miles from any shore, were not within the dominion of the Sovereign, but open to all persons whomsoever. The right claimed, whether viewed as an exclusive privilege or as a right of property, was out of the

range of the legitimate administration of the Crown, and would have required an Act of Parliament to give it force, even against the lieges. Feudal usages never were applied to the sea, except in the particulars [220] pertinent to the land, such as harbours. The right claimed proceeded on a misconception in the pursuer as to his alleged title. The terms of the alleged grant in the writing of 1707 imported a right merely to fishings in the sea adjacent to the lands of Balgreggan and Float, and within the Loch of Luce adjacent to the same lands, or to any others of the lands conveyed; besides that, the alleged charter not having been ratified by the Sovereign and Estates of the Kingdom, in terms of its own conception, was never in a position to be operative or effectual in the matter of the new or original grant thereby made. It was also null in the clause of fishings, as being directly in the face of the Act 1705, c. 2. No series of titles by progress, unsupported by actual possession, could avail towards founding a right by prescription. The positive prescription did not apply to the matters in question under this action; but if it did, the possession relevant would be nothing less than actual, exclusive, uninterrupted, and continual assertion and exercise of the alleged right during at least forty years. Farther, the pursuer and his predecessors having had no actual exclusive possession upon their title during the century and a half which has nearly elapsed, it would be abrogated by the negative prescription; the case being, in respect of the character of the subject claimed, completely distinguishable in principle from cases of a title to land. In any view, the intention in the charter of 1707 was to confer the right of fishing only in water adjacent to the lands belonging to the grantee; and the inadvertency or error of including in the alleged grant of *novodamus* the lands of Caliness or Killiness, as belonging to the grantee, when they had long ceased to belong to him or his predecessors, and when they truly belonged exclusively to others, could give no right to fishing in water adjacent to these lands.[1]

The cause having come to depend before Lord Kinloch in room of Lord Handyside, his Lordship, on 15th June 1858, pronounced the following interlocutor:—"Finds that the title of the pursuer libelled does not convey to him a right to the whole oyster fishings in the Bay of Luce, but only to such oyster fishings as might be *ex adverso* of and adjacent to certain lands specifically set forth: Farther, finds that the said title does not convey any right to oyster fishings as a separate estate, but only in connection with, and as attached to lands stated to be conveyed by the same deed: Finds that the pursuer is not now, and that his predecessor was not, at the date of the crown charter of *novodamus* in 1707, proprietor of the lands of Caliness or Killiness; and finds that the pursuer has no right to any oyster fishings *ex adverso* of or adjacent to the said lands of Caliness or Killiness; but, with this exception, finds and declares that the pursuer has sole and exclusive right to the oyster fishings in the sea and in the Bay of Luce, *ex adverso* of and adjacent to any of the lands contained in the instrument of sasine in his favour, dated 25th March 1823, and recorded in the General Register of [221] Sasines the 15th April following, proceeding on a precept from Chancery, bearing date the 15th of the said month of March; interdicts and prohibits the defender from disturbing or interfering with the pursuer in the exercise of the sole

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[1] *Authorities for the Defender.*—Grant *v.* Rose, 1764, Dict., 12801; Reports by Kaimes, Fol. Dict., 4, 177; and Select Decisions, No. 218, p. 282; Ramsay *v.* Kellie, 22d Nov. 1776, Judges' speeches, Hailes, 722; Report, Brown's Suppt., v., 445; Agnew *v.* Magistrates of Stranraer, 27th Nov. 1822, 2 Sh., 42; Duke of Portland *v.* Gray and others, 15th Nov. 1832, 11 Sh., 14; Duke of Buccleuch, 7th March 1843, 5 D., 846; Commissioners of Woods and Forests *v.* Gammell, House of Lords, 28th March 1859, 21 Dunlop, 4, also M'Queen's Report; Campbell's Trustees *v.* the Marquis of Breadalbane, 5 Dunlop, 1389; Earl of Leven *v.* Countess of Wemyss, 25th May 1694, Dict., 7870; Act 1672 (Chas. II., 2d Parl., 3d ses.), chap. 7; Act 1705, c. 2; Act (Local) 44 Geo. III., c. 45, sec. 23; Act 49 Geo. III., c. 42, sects. 15 and 16; Act 8 and 9 Vict., c. 95; Institutes, B. 2, t. 1, De Rer. Nat.; Books of Feus, B. 2, t. 56; Stair, 2, 1, 5, and 2, 3, 69; Erskine, 2, 6, 6 *ad fin.*, and 15 *et seq.*, and 3, 7, 8; Treaty between Great Britain and United States of America as to Fishings in Bay of Fundy; Foreign Fishings on East Coast of Scotland and England; Chitty's Game Laws and Fishing.

and exclusive right aforesaid: *Quoad ultra*, assoilzies the defender from the conclusions of the action, and decerns: Finds no expenses due to either party."[1]

Both parties reclaimed.

Along with this action of declarator there was taken up the advocation already referred to, and the action at the instance of the Crown, noticed more at length (*infra*, p. 224).

At advising, the Lord President delivered the judgment of the Court.

LORD PRESIDENT.—Both parties have reclaimed against the Lord Ordinary's interlocutor in this case. The pursuer, Mr. Maitland, was dissatisfied with the interlocutor, for it negatived his pretensions of right to the whole oyster fishings in the Bay of Luce; and further, it negatived his claim of right to fishing opposite to the lands of Caliness; but it found him entitled, with that exception, to fish in the Bay of Luce *ex adverso* or adjacent to the lands contained in **[222]** the instrument of sasine in his favour. The defender was also dissatisfied, and he reclaimed against the interlocutor, and specially desired that, besides excluding the pursuer's right of fishing opposite Caliness, there should be an exclusion of it opposite those other lands that are specially mentioned in the summons, but which are not in the pursuer's titles,—viz.,

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[1] "NOTE.—The defender does not found on any grant of oyster fishings, or on any other right, than belongs to him as one of the public.

"The pursuer, on the other hand, shows a formal infeftment, following on a regular warrant, and supported at least *prima facie*, by antecedent rights from the Crown, and not challenged by the Crown. It appears to the Lord Ordinary that, in a question with the defender, this is a sufficient title to be construed and enforced according to its true terms, and that the defender is not entitled to enter into a critical examination of the progress, such as might be open to a party holding a rival grant from the Crown.

"On the construction of the title, the Lord Ordinary is very clearly of opinion that it does not import a general and indiscriminate grant of all the oyster fishings in the Bay of Luce. It purports to convey certain lands, 'una cum piscationibus ostreorum, albis piscationibus et halecum piscationibus, in mari dict. terris, adjacen. et infra Lacum de Luce, iisd adjacen, aut ullis, aliis terrarum supra script.' The pursuer reads the deed as if it stopped with the words, 'infra Lacum de Luce.' But the succeeding words, 'iisdem adjacen aut ullis aliis terrarum supra script,' clearly infer, in the Lord Ordinary's view, that adjacency to one or other of the previously mentioned lands is an essential element of the right.

"It further appears to the Lord Ordinary that there is here no conveyance of fishings as a separate estate, but only in connection with the lands set forth as conveyed in the same deed. When, therefore, it appears that the pursuer is not now, and that his predecessor was not, at the date of the crown charter of *novodamus* in 1707, proprietor of the lands of Caliness or Killiness, and that the inclusion of these lands in the charter must have arisen from some mistake, the Lord Ordinary considers it the legitimate inference that the pursuer has no right to oyster fishings *ex adverso* of these lands. He cannot read the charter as conveying the fishings *ex adverso* of Killiness, whilst the lands of Killiness are themselves not conveyed. On the contrary, viewing the right to the fishings contained in the very general clause, by which it is given, as a mere collateral right to that given to the previously mentioned lands, he considers a failure in the right to the lands entirely to take away the foundation of the mere coincident right in that particular case.

"The Lord Ordinary has no doubt of the power of the Crown to grant an exclusive right to oyster fishings. And he has given effect to the grant to the full extent which he thinks its terms, fairly construed, warrant.

"Probation having been renounced on both sides, there are no materials for fixing the geographical limits of the pursuer's right, or deciding whether the defender has fished within these limits. Nevertheless, the Lord Ordinary considers the pursuer entitled to have his right generally declared to the limited extent to which the Lord Ordinary has found it to exist, and the defender placed under a corresponding interdict.

"Expenses have been found due to neither party, as each maintained various pleas, going beyond the due scope of his case."

the lands of Tyrawley, Greenan, Kilstay, and so forth. I scarcely think the Lord Ordinary's interlocutor gave that to the pursuer, because it sustained the right only *ex adverso* of the lands in the sasine, and I do not understand that the lands now referred to were in the sasine. But the defender wished to have it made more clear how the matter stood.

In that position of matters, the question which we are to pronounce upon is substantially the pretensions of Mr. Maitland to the oyster fishings,—in the *first* place, whether his title, properly read, professes to give him right to the oyster fishings in the whole Bay of Luce; and if so, then, *secondly*, what are the boundaries or limits of the Bay of Luce, as that expression is used in the title. If Mr. Maitland has a right, on the face of his title, to the whole fishings in the Bay of Luce, it is necessary to inquire what is the Bay of Luce as expressed in that title,—where are the limits of that bay? If Mr. Maitland has not a right to the fishings in the whole Bay of Luce, that inquiry may be unnecessary. The question, whether the title professes to give him the whole of the fishing in the Bay of Luce, is a matter to be disposed of by the reading of the title which has been read very often and commented upon and construed, and contractions supplied, and expressions transposed, in every possible way, in the course of the argument. The import of the reading which I am disposed to adopt, and which all your Lordships, I believe, are disposed to adopt, is in accordance with that of the Lord Ordinary,—viz., that it does not give the fishings in the whole Bay of Luce. It does not profess to give the fishings in the whole Bay of Luce, but professes to give the fishings in those parts of the Bay of Luce adjacent to the lands that are there mentioned. There is a separate question as to fishings on the opposite side of the promontory; but I am not talking of that at present. Such being the reading of the deed, it is not so necessary to imagine what were the limits described in the charter as the Bay of Luce. It might have been that, if the pursuer had the whole fishings in what the charter calls the Bay of Luce, the contention of the defender would have arisen, that the Bay of Luce means a much smaller space than the pursuer alleges; that there is a particular portion of that indentation of the coast—a particular inlet of the sea there—that is specially known as the Bay of Luce, while the rest of the indentation is not any part of the Bay of Luce proper. But, as we read the charter, that inquiry appears not to be necessary. The next question that arises is, What lands does the charter comprehend as the lands opposite to which the fishings are given. Now, the contention of the pursuer there is, that, although his fishings may not be held to be a general grant of all the oyster fishings in the Bay of Luce, yet it is a grant of all the fishings in the Bay of Luce that are adjacent to his lands. And there has been a good deal of contention as to the meaning of the word "adjacent," and whether, in this charter, it means *ex adverso* or means something else. Mr. Napier rather seemed to upbraid the defender, and also the Lord Ordinary, with having ultroneously introduced into the case that expression *ex adverso*. But I trace it throughout the pursuer's own pleadings, and therefore the defender is not to be blamed, and the Lord Ordinary is not to be blamed, for using it. It appears in the very beginning of the pursuer's case, and goes on to the end. But what are the limits with reference to the lands? The pursuer, Mr. Maitland, has contended that albeit he may not be entitled to the whole fishings in the Bay of Luce, yet that he is entitled to the fishings in all those parts of the waters of the Bay of Luce which he says are adjacent to him; and he had a contention that he was, under that, entitled to go, not merely straight out, opposite to his lands or to his sea frontage, which would be *ex adverso*, but also to go right and left. Every part of the bay, he said, became "adjacent," right and left as well as directly opposite to his lands, and the 7th article of his condescendence appears to be framed upon that notion, because, in that article, he says that the defender, M'Clelland, "has recently made a practice of fishing for and taking oysters in and from the sea opposite to or *ex adverso* of the said lands of Caliness or Killiness, and adjoining to the pursuer's lands. He has also fished for oysters opposite to the lands of Tyrawley, and to the village of Drumore, in the parish of Kirkmaiden and shire of Wigton. **[223]** The places where he has so fished are part of the sea wherein the right of oyster-fishings by royal grant has been vested in the person of the pursuer by virtue of the said feudal titles, and are adjacent to the lands in the charter, and within the Bay of Luce."

He says, in that way, that he is entitled to the fishings not only immediately opposite to his own lands or thereabouts, but to the fishings in the waters adjacent to all

the lands that are adjacent to his lands. So that fishings in the waters of Luce adjacent to certain lands are to be construed as fishings adjacent not only to those lands, but to all the other lands on the Bay of Luce. And, in like manner, if any other proprietor had a grant of the fishings in the waters adjacent to his own lands, he might contend that he was entitled to come down and fish opposite to Mr. Maitland's lands. That plainly follows, if his contention is maintained on the assumption even that he has not the whole fishings in the Bay of Luce, but only a limited portion of the fishings. Now, that really is extravagant, and cannot be the meaning of this charter. In no view can it be so read. It professes to give only a limited right; and the next question comes to be, Where are the limits of that right which, upon the face of the charter, is professedly limited? This is an action of declarator and of interdict. Its object is to have the pursuer's title made more clear—to have it made clear what are the limits of his right of fishing. He tells us that the charter gives him a right of the fishings adjacent to his lands, and that, therefore, he is entitled to declarator that the fishings adjacent to his lands were so given. That does not seem to me to be clearing the title, or explaining the title, or advancing the title in any degree whatever. He must define what those limits are which he says are within the title. A declarator is a very important process, because by it any right may be declared, but it must be declared for the purpose of making it plain and clear. It must be declared in reference to something that is doubtful and questionable, or that has been doubted and questioned. It must be declared for the purpose of following out some specific object by the declarator. But an action bare and limited as this is, is truly no action at all. Further, this is an action of declarator for the purpose avowedly of sustaining an interdict, and that is what we have as the advocation process. Now an interdict is a matter the grounds of which ought to be very specifically set forth. An interdict against a party transgressing certain geographical limits ought to state quite precisely what are the geographical limits which he is to be prohibited from transgressing. If these parties themselves do not know the limits of their fishings, it is perhaps an excuse for not having defined them in the record, but it is not a ground for asking an interdict. If such a vague and indefinite interdict was to be granted, the party interdicted would not know when he was committing a breach of interdict, or when he was not. Now, it is most important not to grant an interdict which will not make it quite plain to the party what it is that he is prohibited from doing. To interdict a party from going to some indefinite place is to put him in a position in which the Court are not entitled to put him, and never will put him. Therefore, whether we look to the declaratory conclusions, or to the conclusions of interdict to which the declarator is intended to lead, I do not see that we have before us any case. Mr. Maitland does not say that he has possessed these fishings in any particular locality. He avoids that: whether it be that he has not possessed them, or whether it be that his possession, if condescended on, would not sustain the broad demand which he makes in this summons, and therefore had better not be stated, I do not know. But I have no doubt he is rightly enough advised. And therefore, while he does not state possession, nor anything that can define or point out the limits, and does not state that this defender has been fishing in the immediate neighbourhood of his lands, but only at Tyrawley and other places at a distance, I think it is quite clear that we cannot grant either the declaratory conclusions or the conclusions for interdict, and that the actions must be dismissed. There is no proof of possession, and no proof of limits. Probation is renounced. We are here in a concluded cause, and we have no evidence but what we see in these deeds. This would dispose of both these actions—the declarator and the advocation. In the one case we would require to recal the interlocutor, and dismiss the application for interdict, and in the other case also to dismiss the action. I understand that to be the opinion of the whole Court.

His Lordship added,—I have gone over the charter of 1707, and these lands of **[224]** Tyrawley, &c., are not mentioned there; but I do not say that the charter of 1707 is to be relied on. That is a different question, into which it is not necessary to enter.

The Court recalled the interlocutor of the Lord Ordinary, and dismissed both actions, with expenses.

II. In this action the Crown concluded for declarator, that the defender "has no

right of oyster fishing in the Bay of Luce, in the county of Wigton, except in such parts of said bay as are *ex adverso* of or adjoin lands, the property of the defender, and which were the property of Patrick Macdowall of Freugh, the author of the defender, at the date of the crown charter in favour of the said Patrick Macdowall, dated 5th March 1707, and were included in said charter: At least" "that he has no right of oyster fishing in said Bay of Luce, excepting *ex adverso* of or adjoining the lands mentioned in said charter, as conveyed to the said Patrick Macdowall of Freugh: And" "that the oyster fishing of the said bay, excepting as aforesaid, belong to us and our royal successors, and form part of the property and patrimony of our Crown, and of the hereditary revenues thereof in Scotland, and, as such, fall under the management of the said Commissioners of our Woods, Forests," &c., "by virtue and in terms of the Acts of Parliament," &c., "passed thereanent: And the defender ought and should be interdicted," &c.

It was stated that the lands of Caliness or Killiness had passed out of the possession of the Macdowalls of Freugh long before the charter of 1707; but it was admitted that, except these lands and certain others in the parish of Kirkcowan, not adjacent to the sea, Mr. Maitland possessed all the lands mentioned in that charter. No allegations were made of possession by the Crown, or as to the limits of the Bay of Luce.

The contentions of the Crown were;—1. All the oyster beds and scalps around the coast of Scotland, and in the navigable estuaries, bays, and rivers thereof, so far as the same have not been acquired by any of the lieges, are *inter regalia*, belong to her Majesty *jure coronæ*, and form part of the hereditary revenue of the Crown in Scotland. 2. Whatever may be the precise nature of the Crown's right to the oyster fishings on the coasts of Scotland, the pursuer is entitled to have the extent of the grant of oyster fishing in the crown charter of 1707 ascertained, and its limits defined. 3. Under that charter Mr. Maitland has no right of oyster fishing in the Bay of Luce, except in such parts of said bay as are *ex adverso* of or adjoin lands the property of the defender, and which were the property of Patrick Macdowall of Freugh at the date of the said charter, and were included in said charter. 4. At least, under said charter, the defender has no right of oyster fishing in the Bay of Luce, excepting in such parts of said bay as are *ex adverso* of or adjoin lands mentioned in said charter, as conveyed to the said Patrick Macdowall of Freugh. 5. No possession of the right of oyster fishing granted to the said Patrick Macdowall having followed on said charter, the extent of said grant falls to be determined by the legal construction of the terms of the charter.

The defender pleaded;—Even if the instance were not otherwise defective, the action would fall to be dismissed, because the Crown has not set forth, and does not possess, a sufficient title or interest to follow out its conclusions. The action cannot be maintained, at least it cannot be maintained to the effect of supporting the leading conclusions of the action, without a reduction, and more particularly as respects Caliness or Killiness, the grant of fishings in the Bay of Luce, adjacent to the lands of Caliness or Killiness, being granted expressly, that grant cannot be made null or ineffectual without a reduction. Although oyster fishings may be conveyed to a subject, and appropriated by virtue of grants from the Crown, the Crown itself has **[225]** no right, no such grant having been made, to interfere with the possession of a subject, especially to interfere with possession founded on a grant from the Crown itself. The possession of any portion of a barony is possession of the whole of that barony, and of all the rights and privileges incorporated therewith; but the question of actual use or possession of an heritable subject or right is immaterial and irrelevant where there is no competing right, the exercise of such right being *meræ facultatis* in the proprietor.

The action bore to be at the instance of "our lovite Charles Baillie, Esq., our advocate, as acting under the statute 20 & 21 Vict., c. 44, on our behalf, and on behalf of the Commissioners of our Woods, Forests, and Land Revenues, pursuer;" but it was not alleged on record that the authority of her Majesty had been obtained, and Mr. Maitland objected to the competency of the action, "in respect that it is only raised at the instance of the Woods and Forests, and of the Lord-Advocate as their statutory representative, and in respect that the summons does not set forth the state of the facts necessary to give a good title to the Lord-Advocate to sue the action under the Act 20 & 21 Vict., cap. 44."

These objections were disposed of by the Lord Ordinary in a note to his

interlocutor of 29th November 1860, reporting the case on its merits to the Inner-House.[1]

[226] Of this date the case was advised.

LORD PRESIDENT.—We have here another contest, which is between the Lord-Advocate and Mr. Maitland. The Lord-Advocate, on behalf of the Crown, has brought an action of declarator against Mr. Maitland, to have it declared that the defender "has no right of oyster fishing in the Bay of Luce, in the county of Wigton, except in such parts of said bay as are *ex adverso* of, or adjoin lands the property of the defender, and which were the property of Patrick Macdowall of Freugh, the author of the defender, at the date of the crown charter in favour of the said Patrick Macdowall, dated 5th March 1707," &c. In this case the position of Mr. Maitland has been a little shifted from what it was in the former case, but he still contended that he had right to the whole fishings in the Bay of Luce. The Crown demand a general declarator that Patrick Maitland is not entitled to any fishings except certain oyster fishings; and then that, that being so found, it shall be found that all other fishings belong to the Crown, as part of the hereditary revenues thereof. In this case, as in the previous case, there

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[1] "NOTE.—The question raised by the present summons is, in substance, the same with that decided by the Lord Ordinary in the proceedings between the original defenders and John M'Clelland mentioned in the record. The judgment of the Lord Ordinary, pronounced betwixt these parties, is at present under review of their Lordships of the First Division; and it appears to the Lord Ordinary to be the fittest course to send the present case at once to their Lordships.

"The only point which, at the joint request of the parties, the Lord Ordinary has heard discussed, is the objection to the instance. If the Lord Ordinary had considered this objection to be valid, he must at once have dismissed the action. He is of opinion that it is not well-founded.

"The action is laid in the precise form prescribed by the Act 20 & 21 Vict., c. 44, which declares, in its first section, that every action on behalf of her Majesty 'may be lawfully raised in the name and at the instance of her Majesty's advocate for the time being, as acting under this Act.' The summons in the present case sets forth the instance in the exact words of the statute.

"The objection is, that by the second section of the Act, it is made necessary to the prosecution of any suit on behalf of the Crown, that the authority of her Majesty should be had. But the third section declares, in immediate sequence, 'that it shall not be competent to any private party in any action, suit, or proceeding instituted as aforesaid, to challenge or impugn the instance of, or the title to defend such action, suit, or proceeding, or the right or title of her Majesty's advocate to raise or prosecute, or to defend the same, upon any allegation that such authority as aforesaid has not been granted, or that evidence of such authority is not produced.'

"The defenders admit that they cannot inquire whether the action was raised under authority or not; but they maintain that the fact of authority having been had, ought to have been set forth as a fact essential to the validity of the prosecution.

"The Lord Ordinary cannot adopt this view. He considers the second section to be exclusively applicable as between the Crown and the Lord-Advocate; and to regulate, as it were, the internal administration of the Crown property. With such administration the private party has no concern; and the provision of the third section appears to the Lord Ordinary to be simply the expression of this fact. It would be a great anomaly in judicial proceedings to require from the pursuer a statement, into the truth or falsehood of which the defender had no right to inquire. In the view of the Lord Ordinary, her Majesty's advocate now sues on behalf of the Crown, as the Officers of State were accustomed to do under the old form of procedure; the authority being assumed, and not requiring to be expressly set forth.

"If the action is well laid as an action at the instance of the Crown, it is unnecessary to inquire whether it would have lain at the instance of the Commissioners of Woods and Forests, had they been exclusively pursuers.

"Being of this opinion in regard to the objection to the instance, the Lord Ordinary perceives no reason to refrain from reporting the case. It will of course be open to the defenders to renew the objection before the Court if they shall be advised to do so."

is a want of definition of the limits to which the pursuers extend their claim. Indeed, they seem uncertain themselves, and leave it on the construction of the titles that are before us, as to whether Mr. Maitland's right extends to the fishings adjoining or *ex adverso* of his own lands; or whether it is a more extensive right, and extends to lands adjoining or *ex adverso* of lands formerly belonging to Macdowall of Freugh, and now to Lord Stair. In this case also, there has been a renunciation of probation, and we have nothing before us but these titles. We have no evidence of possession; we have no evidence as to the limits of any of these fishings, either those adjoining to the defender's lands, or *ex adverso* of his lands; nor has it been clearly made out to us what is the distinction between these two expressions. Neither have we any limits pointed out to us of these fishings, which would be *ex adverso* of those other lands which do not belong to the defender. Farther still, we have no evidence of what are the proper limits of the Bay of Luce. And then we have a demand for a general declarator on the part of the Crown, and an assertion of a right on the footing that all oyster fishings around the coast of Scotland belong to the Crown, not as holding them for behoof of the interests of the public, but as forming part of the hereditary revenue of the Crown. Now that is a matter of very great and general importance, if it were before us in proper form. But I think it is not here. A declarator is a very important process, as I have stated already, for clearing rights, but the thing to be cleared, and the thing to be arrived at, must be distinctly and specifically put forth. A general declarator such as this, of the rights of the Crown, as in reference to what is said to form part of its hereditary revenue, and in fact being a declarator against the public as to their rights of fishing, is a matter which is not to be determined without some proper contradictor in the field. The only contradictor here is Mr. Maitland of Freugh, a party who cannot dispute the general pretension of the Crown that all oyster fishings belong to it as part of its hereditary revenue, because his own right depends on admitting that proposition. It is under that aspect of matters that the present attempt is made to obtain a general declarator of the right of the Crown to all these fishings as part of the hereditary revenue of the Crown, without any contradictor at all, and without specifying limits in the way I have described. That is quite out of the question, and cannot be sustained. We have here no evidence of possession by the Crown,—nothing to guide us except a general statement,—and nobody here as a proper party to resist the action. We have not even M'Clelland,—no fisherman who pretends to have right to fish,—nobody except Mr. Maitland, whose right is identical with the right of the Crown in the main question. So that between these two parties there is to be a declarator against the interests of the public, without a contradictor. Now, that **[227]** is a kind of action which it is impossible to sustain; and therefore I think that this action also must be dismissed.

The Court pronounced the following interlocutor:—"Dismiss the action, and decern: Find the defender entitled to expenses: Appoint an account thereof to be given in, and remit," &c.

No. 40. **XXIII. Dunlop 227.** 21 Dec. 1860. 2nd Div.—Lord Kinloch.

ALEXANDER EDWARD and Others (JOHN SANDERSON'S Trustees), Pursuers and Real Raisers.

JOHN SIMPSON PATTERSON (HELEN SANDERSON'S Executor), Defender, Claimant.—*Lord-Adv. Moncreiff—Horn.*

PETER KERR and Others (JOHN SANDERSON'S Residuary Legatees), Defenders, Claimants.—*Young—Gifford.*

Testament—Legacy—Vesting—Trust—Construction.—A testator directed his executors to "set apart and invest, as they shall think fit, L.2000;" he then gave directions as to "the half thereof," and directed his executors to "pay the interest of the other half thereof, or apply it for the use" of the testator's natural daughter, leaving it to the discretion of the executors how to apply "these sums;"—*Held* (*aff.* judgment of Lord Ordinary, *abs.* Lord Wood), that on a construction of the whole settlement, the bequest was a legacy of the capital sum of L.1000.

Observed, there is no rule that a bequest of the interest of a sum of money carries the principal, when not specially destined.

John Sanderson, merchant and flax-spinner in Dundee, died unmarried in September 1844, leaving heritable and moveable property of the value of about L.65,000. By a testamentary deed, executed on 25th August previous, he disposed of his whole moveable property, which, after payment of debts and expenses, amounted to about L.50,000. Alexander Edward and others were appointed trustees and executors under the will. They were directed, *first*, to pay the testator's debts; *second*, to set apart and invest L.6000 for payment of the interest thereof to Margaret Sanderson, daughter of a deceased cousin of the testator, the principal sum to be divided among her children on her death, should she leave any, whom failing, among her next of kin, provided she did not destine it differently. The *third* direction was in the following terms:—"My said executors shall set apart and invest as they shall think fit L.2000, and shall pay the interest of the half thereof or apply it for the use of my natural son John, son of the late Elizabeth Thomson, Perth Road, Dundee, and shall pay the interest of the other half or apply it to the use of Helen Porter or Sanderson, my natural daughter. Declaring that I leave it to my executors entirely in what manner to apply these sums, whether to pay the same directly, or apply it and pay it to others for behoof of my son and daughter. And if my trustees shall ever think fit to give them more, I authorise them so to do, to the extent of L.250 to each of them." Under the *fourth* direction, the testator bequeathed various legacies to charitable institutions, servants, and others, all strangers in blood to him, or at the most distantly related. The *fifth* direction contained a bequest to each of the executors named who should accept, and also contained this direction:—"I appoint all the legacies above mentioned to be paid by my said trustees as soon as convenient. But they are to be the sole judges of when to pay the same, or any of them." By the *sixth* direction the residue was disposed of, and directed to be divided among the children of certain relations of the testator.

The executors set apart and invested L.2000 for payment of the interest to the testator's illegitimate son and daughter, in terms of the direc- [228] -tion in his settlement; and they acted upon the latter part of the same direction by paying L.250 to each.

Miss Sanderson, the testator's daughter, died on 5th October 1858, leaving a settlement, by which she made various bequests, and appointed Mr. Patterson her executor. On her death he claimed payment of the principal sum of L.1000, ordered to be set apart for her by the testator.

The testator's executors then raised this multiplepoinding, in order to have it determined whether, under the bequest in favour of Miss Sanderson, she was entitled to the fee of the L.1000, of which the interest had been paid to her.

Mr. Patterson pleaded;—Miss Sanderson was entitled to the interest of the sum of L.1000, not merely during her lifetime, but in perpetuity, and consequently to the principal sum itself; and he, as in her right, was entitled to be preferred to the fund *in medio*.

Kerr and others, as representing the residuary legatees, claimed the fee of the sum of L.1000 liferented by Miss Sanderson, as bequeathed to them as residue; or, supposing it was not, then as belonging to them as the testator's next of kin. They pleaded;—In no view could it be held that the testator had bequeathed the principal sum to Miss Sanderson. Under the settlement the interest only had been bequeathed to her, and neither she nor her executors were entitled to the principal; but, *esto* that the executors had a discretionary power to pay to her the principal sum—they having never done so, it never vested in her so as to be carried to her representatives.

On 27th January 1860 the Lord Ordinary pronounced this interlocutor:—"Finds that according to the just construction of the deed of settlement of the late John Sanderson founded on, the deceased Helen Porter or Sanderson had bestowed on her, by way of legacy, the capital sum of L.1000, subject to the control of the executors therein appointed as to the mode in which the sum should be paid or applied for her behoof: Repels the claim of Peter Kerr and others, the residuary legatees, or representing residuary legatees, of the said John Sanderson: Sustains the claim of John Simpson Patterson, as executor and residuary legatee of the said deceased Helen Porter or Sanderson; and decerns against the raisers in the preference, and for payment

accordingly: Finds the said residuary legatees, and representatives of residuary legatees, liable in the expenses of process, whether incurred by the pursuers or by the said John Simpson Patterson: Allows accounts of these expenses to be lodged; and remits," &c.[1]

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[1] "NOTE.—In pronouncing the prefixed interlocutor, the Lord Ordinary has proceeded exclusively on the principle of giving effect to the testator's intentions, as fairly deducible from the words employed by him.

"It was urged on the Lord Ordinary that it was a fixed rule in English law that a gift of interest in a will, made absolutely and indefinitely, is a gift of principal. The Lord Ordinary cannot discover that any such abstract rule has been laid down in the Scottish Courts. Even in the English authorities the rule is found to suffer so many qualifications, as almost to lose the character of a general principle, and to assume the place of a mere element of intention. The Lord Ordinary thinks it more consonant with the principles of our law to treat the question as an open question of intention, rather than to attempt applying to it any abstract technical criterion.

"The following are his grounds for holding that the legacy to Helen Porter or Sanderson was of a capital sum of L.1000:—

"In the first place, he thinks it fairly capable of being inferred, from the terms of the settlement, that the sum of L.1000 to be set apart for Helen Sanderson's use (as well as the other sum of like amount to be set apart for John Sanderson, another natural child) was not to form part of the residue of the trust-estate. After instructing these sums, and another of L.6000 of which the fee is clearly disposed of, to be set apart and invested, and certain legacies to be paid, the truster directs 'the residue and remainder' of his estate to be divided amongst the residuary legatees 'as soon after my death as the executors find it convenient.' The payment thus provided for, of the residue left after deduction of these sums, is fairly argued to import, *prima facie*, that these sums were not intended to fall into the residue. It is true that the investment of a sum for a temporary purpose will not exclude it from the residuary estate; but to hold the purpose temporary in the present case is to beg the question; and the words of the settlement are, *prima facie*, favourable to such exclusion. So the residuary legatees appear at one time to have thought; for, on receiving payment of the residue, excluding the sums in question, they gave to the trustees a discharge, not merely of their intromissions to that date, but of their own entire claims against the estate, as on a final distribution. The circumstance cannot be held conclusive in the question of legal construction; but it tends to confirm the Lord Ordinary in his impression of the natural reading of the deed.

"In this condition of things the executors are found instructed to invest these two sums of L.1000 each; and, as to one of them, 'to pay the interest, or apply it for the use' of Helen Porter or Sanderson. The application here directed is indefinite as to time: and, so far at least as the words go, there is no limitation to a liferent, or express bequest of an annuity merely. There then follow the words of controversy—'Declaring, that I leave it to my executors entirely in what manner to apply these sums, whether to pay the same directly, or apply it and pay it to others for behoof of my son and daughter; and if my trustees shall ever think fit to give them more, I authorise them to do so to the extent of L.250 to each of them.'

"The whole question on this clause is, What is to be held the reference of the words 'these sums?' whether, as the residuary legatees contend, it is to the sums of interest before alluded to; or whether, as Miss Sanderson's executor maintains, the reference is to the capital sums? The Lord Ordinary has come to the conclusion that the latter is the sound construction. He thinks that the clause would be comparatively unmeaning and superfluous, if read as doing nothing but expressing more amply the discretion of the trustees as to paying or applying the interest; and it cannot be easily strained so as to make the supplemental bequest of L.250 a partial payment of the capital, over and above the interest otherwise due. The more natural construction, as the Lord Ordinary thinks, is to hold the clause as containing a direction to the trustees to pay or apply the capital sums in the manner they should think best, and to add, in their option, to the capital of the legacy, a sum not exceeding L.250 in the case of either child. This construction tallies with the presumable intention on the part of the testator so to provide for his offspring, though illegitimate, as that their children, if they had any, might enjoy at least a possible participation in the

[229] The residuary legatees reclaimed, and argued;—The only question was one of construction. This was not a case of intestacy *quoad* the fee of this bequest, for there was a bequest of the whole residue. There was in England a principle on which it was held that a bequest of interest was a bequest of principal; but that was always stated under this limitation, that it was so held only where that construction was consistent with what ap- **[230]** -peared to be the intent of the testator.[1] The argument that the clause in the settlement gave power to the executors to apply the half of the principal for behoof of each of the testator's children, was inconsistent with the plea on record, in which the interest only was claimed; but assuming that the trustees had power to bestow the fee on Miss Sanderson during her life, they not having done so, it was not carried by her settlement.[2] It was not to be assumed that the testator desired to make a bequest of the liferent and fee to Miss Sanderson, and the attempt had miscarried, because in the immediately preceding direction he had made such a bequest in habile terms.

It was answered for Miss Sanderson's executor;—This settlement was to be construed as that of a man who left ample means, and desired to benefit every one who had a claim upon him; in such a case it was fair to hold that he intended to benefit the children of the legatees, should the legatees be survived by any; if so, the fee would belong to the legatee. The will was to be construed according to the ordinary grammatical construction,[3] by which it appeared the trustees were directed to pay the interest of the half, or apply the half of the bequest of L.2000 for behoof of the testator's son, and pay the interest of the other half, or apply the other half for behoof of the testator's daughter. When interest was bequeathed, it was always assumed to be a bequest of principal.[4] On the construction of the settlement it was not to be assumed that the testator intended the interest only to be paid to the legatees; they were in pupillarity when the will was executed, and there was no machinery provided for maintaining the trust beyond the payment of the legacies which the executors were directed to pay, the time of payment only being left to their discretion.

Lord Cowan.—This settlement was executed on the 25th August 1844. The testator died in September following. The deed was framed by a well known practitioner in Dundee; and I must take it as a settlement prepared by a man of business.

The question is one entirely of intention, and my opinion is founded on the terms of the deed itself. There are some things on which, no doubt, it would have been desirable to have been informed,—such as the previous conduct of the testator to the two natural children for whom he professes to provide, and what the testator did for them in his lifetime as regards education or outfit in life. All such considerations, however, I put aside, as the parties have not thought fit to give us any light on the subject; and I think, in construing the deed, we must confine ourselves to the information afforded by its terms, and the evidence it gives of the testator's intention.

The testator was possessed of large means, for he disposes of about L.15,000 in special legacies, and there was a large reversion besides. The two legatees whose

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benefit of the bequest, from which the construction of the residuary legatees absolutely excludes them.

"The Lord Ordinary is not insensible to the difficulties in the way of his conclusion, chiefly arising from the contrast between the clear settlement of liferent and fee in the case of the bequest to Margaret Sanderson, and the ambiguous terms of this subsequent clause; but he is on the whole quite satisfied that what he has found by his interlocutor must be held to have been the true intention of the testator; and that the words of the deed, though obscure, are sufficient to express this intention.

"Expenses of process are given against the residuary legatees, because it appears to the Lord Ordinary that if they raised such a question as the present, they must do it at their own risk, more particularly after the terms of their discharge."

[1] 2 Roper on Legacies, p. 1475; Blane *v.* Bell, 25th June 1852, 5 De Gex and Small, p. 658.

[2] Burnside *v.* Smith, 10th June 1829, 7 S. & D., p. 735.

[3] Broom's Legal Maxims, p. 606.

[4] 2 Williams on Executors (5th edit., 1856), p. 1074.

interests are in question are stated to have been his natural children, and to some extent that implied an obligation on him to provide for their support and settlement in life. And he appears to have had no relatives nearer than the children of his cousin, to whom the residue is bequeathed.

The deed conveys to the trustees the truster's whole estate, declaring that the executors and trustees shall, from the estate conveyed, in the first place, pay the truster's debts; and then, farther, in the second place, a provision, the nature and terms of which are alleged to throw light on the bequest more immediately for construction,—"My said trustees and executors shall pay to Margaret Sanderson, Dundee, daughter of the late John Sanderson, Dundee (who was my cousin), the yearly interest of a sum of L.6000 sterling," and so forth; and "at her death the said sum shall be divided equally among her children if she leave any, whom failing, among her nearest of kin equally, provided she shall not destine it differently, but [231] she is hereby empowered to destine it by any testamentary deed as she shall see cause." Without inquiring what was the exact nature of this legatee's right and interest in the fee of this sum, we have here first an express provision to her of the yearly interest of it; and, secondly, a declaration with reference to the fee, and disposing of it.

Then comes the provision with which we have now to deal—"Third, my said executors shall set apart and invest as they shall think fit L.2000, and shall pay the interest of the half thereof, or apply it for the use of my natural son John, son of the late Elizabeth Thomson, Perth Road, Dundee, and shall pay the interest of the other half, or apply it to the use of Helen Porter or Sanderson, my natural daughter." Were we to construe the nature of this bequest, and dispose of the argument of the executor by the terms of this part of the clause exclusively, I would have had great difficulty in recognising his claim to the capital sum. For I cannot go into a view pressed on us in the discussion as to the meaning and effect of the word "it." I think it plain that the word "it" refers to the interest. It is that alone the testator is dealing with in this part of the clause. This is simply a bequest of interest. But then it is contended that by a conveyance of interest the capital sum is necessarily carried. I do not know any authority for that proposition in the law of Scotland. There may be ground for contending that a bequest of interest indicates the intention of the testator that the legatee shall have the capital sum. This may, in many cases, form an important element in the construction of the deed. Regarding, however, the first part of this clause as dealing with the matter of the interest only of the L.2000, what follows? "Declaring that I leave it to my executors entirely in what manner to apply these sums, whether to pay the same directly, or to apply it and pay it to others, for behoof of my son and daughter." What are "these sums" to which the testator here refers? Does he refer exclusively to sums of interest, or to the sums from which interest was to be derived,—*i.e.*, the two halves of the L.2000, the interest of one of which he gives to each of his natural children? I take the latter construction. What is given to each of the legatees by the first clause is "the interest of the one-half of the L.2000," declaring that he leaves it to his executors to apply the two sums, the interest of which he had given to his son and daughter for their behoof. And what is it that he leaves to the executors? Does he leave the gift of the capital of these sums to their discretion? No. He leaves it to them to determine in what manner to apply each of these sums, whether to pay the same directly, or apply it and pay it to others, for behoof of his son and daughter. Therefore what is left to the discretion of the trustees only regards the manner in which the sums are to be paid for behoof of his son and daughter. And then the deed goes on to say,—"And if my trustees shall ever think fit to give them more, I authorise them so to do to the extent of L.250 to each of them." To give them L.250 more than what? Not more than the interest, but, plainly enough, L.250 more than the principal sum before given. But in this clause it is left entirely to the option of the executors to give the sums of L.250 or not, as they might think fit.

I think, then, that these principal sums were given to the legatees; and this construction is in accordance with the provision in the second purpose of the deed, which disposes of the capital sum of the legacy thereby given, as well as of the interest. And there certainly is nothing in the rest of the deed inconsistent with this construction. On the contrary, it is supported by the general direction as to payment of

the legacies, including this bequest: "I appoint all the legacies above mentioned to be paid by my said trustees as soon as convenient."

I have only now to notice that part of the argument based on the case of Burnside. I think that case was well decided, but the terms of the legacy and the powers of the trustees are in contrast with the terms of the bequest of the L.2000, and the powers of the trustees here. In that case the words of the bequest were: "But I appoint my said trustees, in the event of their considering it proper, to pay to the said Miss Robina Burnside, on her own receipt, and for her own behoof absolutely, the sum of L.1000 sterling, at such times and in such payments as they, in their discretion, may think expedient." Unfortunately the trustees had not declared that the legatee should get the L.1000 before she died, and the gift of L.1000 was held to have fallen. But the difference between that case and this is all-material in the present question. Because the only discretion here given is as **[232]** to the manner in which the sums are to be paid, but there is no discretion affecting the gift to the parties to whom it is to be paid. In the one case the legacy is made dependent on the will of the trustees. In the other it is absolutely given, and the only discretion regards the manner of its application for behoof of the legatees. It is quite otherwise with regard to the L.250, which is not here in question. Had that additional sum not been paid in the lifetime of the legatee, and had a question been raised about it such as that in the case of Burnside, I fear the executors of the legatee would have been in the same position as the claimants were in the case of Burnside. But we have here to deal only with the L.2000, or rather with one-half of that legacy.

LORD BENHOLME.—The point that has been argued here depends mainly on the construction of the third purpose of the trust; and the first question which I find it necessary to solve is, What is the meaning of the words "these sums," occurring about the middle of the clause? whether they apply to sums of interest, or must be held applicable to the two capital sums of L.1000 each, into which the whole sum of L.2000 is divisible. As to this question, I cannot arrive at any other opinion than that which Lord Cowan and the Lord Ordinary have formed, viz., that these words relate to the capital sums.

If that be so, the second question is, whether there be such a disposal of these sums as to confer a right to them on these legatees? Now, I think that the executors were bound by the alternative direction here given either to pay the L.2000, or to apply it for the use of the two legatees. They had, in my opinion, no option but to apply these sums for the benefit of the legatees. They were empowered either to pay the money to the legatees, or to invest it, and to employ the interests; and probably they had the power to say when the payment of interests should cease, and the payment of the capital be made.

With regard to the interests, there is an alternative direction given to the trustees. They are either to pay them, or to apply them for behoof of the legatees, and I cannot help thinking that when we find a similar direction afterwards given with reference to "these sums," we must hold that the latter direction applies to something different from the interests, because otherwise it would be mere tautology. There is a distinction made between the interest and the capital; and when I find that the interest is certainly given to the legatees, whether it be paid or applied, it seems to follow that the capital is to be paid or applied in the same way for their behoof, and that therefore no discretion is left to the trustees in regard to the ultimate disposal and payment of these sums. Now this is all that is necessary in order to ascertain that the legatees took a vested interest in these sums.

Their right to the additional L.250 was very different; that depended on the discretion of the trustees. The trustees, in point of fact, have paid this sum; had they not done so, the case might have been different. But that being a capital sum, which they might advance or not as they thought proper, I cannot suppose that, if advanced, it was to be given as additional to the annual interests, but rather as additional to the capital sums. The Lord Ordinary, in his note, has satisfactorily disposed of that part of the case.

LORD JUSTICE-CLERK.—I concur.

LORD WOOD absent.

The Court adhered.

No. 41. **XXIII. Dunlop 232.** 21 Dec. 1860. 2nd Div.—Lord Kinloch.

ROBERT MORRISON, Pursuer.—*Macfarlane—Millar—M'Lean.*

Rev. GEORGE SOMERVILLE and Others, Defenders.—*Fraser—Scott—Mair.*

Jury Trial—Bill of Exceptions—Fraud—Agent and Client.—In a reduction of a disposition of heritable subjects by A to B, directed against A, B, and C, on the ground that by a minute of agreement A had been under a pre-existing obligation to convey to the pursuer, an issue was sent to a jury, which, after putting to the jury whether the disposition by A to B was in trust for C, put also (1) whether it was in violation of the previous minute; (2) whether it was granted fraudulently **[233]** by A; (3) whether it was taken fraudulently by C, in the knowledge of the previous agreement, and in defraud of the pursuer's rights under the same.

The pursuer and A had stood in the relation of agent and client, and it appeared on the face of the minute that there had been transactions between them, but it contained no express statement of consideration.

The presiding Judge directed the jury—(1.) That the minute of agreement must be held by them to be a valid deed, and that its terms legally imported an obligation on A to convey to the pursuer on payment of certain sums mentioned in it; (2.) That it was unlawful and fraudulent in the obligant under such an obligation, so long as it remained in force, to convey to any other, and in such other to accept a conveyance in the knowledge of the previous obligation, and with the purpose of defrauding the right under the same; (3.) That if the jury were satisfied that the conveyance to B was in trust for C, that the obligation in the minute remained in force, and that the conveyance was taken by C in the knowledge of the agreement, and to defraud the pursuer's right under it, the pursuer was entitled to a verdict.

Exception to the above directions sustained, on the ground that, as the minute was not a contract of sale for a price set forth and acknowledged to be paid, the conveyance by A was not necessarily fraudulent, and there was nothing to exclude inquiry whether the obligation was gratuitous or onerous, and one which, in the whole circumstances, the obligant was bound to perform; and that in the concluding direction the jury were not told that they must be satisfied that the conveyance was fraudulently granted, but only that it was fraudulently taken.

Proof—Agent and Client—Confidential Communication—Secondary Evidence.—The pursuer tendered in evidence a "case" which one of the witnesses deponed that he had prepared as agent for the defender (C), with a view to an action which he subsequently raised, and that it consisted of statements made by C to him (the witness) —*Objections* that the "case" was inadmissible—because, (1.) it was a confidential communication between agent and client; and (2.) it was secondary evidence, and C was alive,—*repelled*, on the grounds that the action was based on fraud, and that it was competent to adduce secondary evidence to prove the statements of a party as against himself.

Proof—Writ—Agent and Client—Reduction.—The agreement in defraud of which the disposition under reduction was alleged to have been granted was duly tested, but was alleged to be null as a deed by a client in favour of his agent without onerous consideration—Questions put to an instrumentary witness, whether he saw one of the parties to the agreement sign his name, or heard the deed read over to him, *disallowed*, there being no question as to the validity of the execution of the deed.

Expenses—Process—Jury Trial—Bill of Exceptions—Verdict.—When a verdict is set aside on a bill of exceptions, the general practice is to reserve the question of expenses.—Expenses reserved accordingly.

Bill of Exceptions—Act of Sederunt, 14th February 1841, *sect.* 38—*Process.*—Per Lord Justice-Clerk,—When a party insisting in a bill of exceptions is *in mora* in adjusting the bill, the Judge should refuse to sign it, if the days allowed in the Act of Sederunt have elapsed.

Sequel of case reported *ante*, vol. xxii. p. 1082.

This cause went to trial before Lord Kinloch on 28th June 1860 on the following issue:—"Whether the disposition, dated on or about 6th November 1851, by the defender George Somerville to the defender Thomas Strachan, was a conveyance in

trust for behoof of the other defender John Craig Waddell; and whether, in violation of a previous minute of agreement, dated 7th October 1850, No. 8 of process, the said disposition was granted fraudulently by the said George Somerville, and was taken fraudulently by the said John Craig Waddell, in the knowledge of the said previous agreement, and in defraud of the pursuer's rights under the same?"

At the trial the pursuer put in evidence, *inter alia*, the agreement referred to, which was as follows:—"The first party, the Reverend George Somerville, considering that a decree for the sum of L.14, 1s. 7d. sterling, besides the dues of extract, has passed against him in a process raised at his instance against John Twaddle and James Twaddle, grocers at Whiflat, hereby agrees that **[234]** the second party, Robert Morrison, shall pay said sum, and also the pursuer's expenses connected with said action, out of the money in his hands belonging to the first party; and he farther agrees to subscribe a valid disposition, in the usual form, in favour of the second party, to the subjects at Whiflat, now held in his name, and that on receiving payment from the second party of the balance of said money; and the second party hereby agrees immediately to pay said expenses out of said money, and also to pay the balance thereof on receiving said disposition, the expense of which, it is agreed, shall be paid by the second party. In witness whereof, this agreement, written on stamped paper by John Kidd Peebles, writer in Airdrie, for John Mure Steel, writer there, is subscribed by the parties as follows, viz.—By the said Reverend George Somerville, at Rawyards, the 7th day of October 1850 years, before these witnesses," &c., "and by the said Robert Morrison, at Airdrie, the said 7th day of October, and year aforesaid, before these witnesses," &c.

He also put in various letters and documentary evidence, with the view of proving that Waddell had become the agent of Somerville; that the pursuer demanded from Somerville a conveyance of the subjects at Whiflat, in terms of the minute of agreement, and had corresponded with Waddell, as Somerville's agent, on the subject; that, in the knowledge of that agreement, Waddell induced Strachan to become nominally the purchaser of the subjects at Whiflat mentioned in the minute, and had induced Mr. Somerville to grant a disposition of them to Strachan; that this disposition was granted to and taken by Strachan in trust for the other defender, Waddell; and that, accordingly, Waddell had raised against Strachan a declarator that Strachan held the subjects merely in trust for him; and that on that summons Waddell had taken decree in absence. The condescendence appended contained averments that the purchase by Strachan was in trust for Waddell; and the process was put in by the pursuer as evidence in the present case.

The defender, on the other hand, led evidence with the view of showing that the subjects at Whiflat had been purchased with Somerville's own money; that the pursuer, Morrison, had acted as his agent in the purchase, and was his agent at the date of the minute of agreement; also, that after Morrison had ceased to be Somerville's agent, and when Somerville had employed Waddell instead, Waddell, in answer to Somerville's demand for a conveyance of the subjects at Whiflat, in terms of the agreement, had demanded from Morrison, and had not received, a detailed and correct statement of the balance in Morrison's hands of Mr. Somerville's money, and that Waddell had demanded that statement as a condition precedent to Somerville's granting the disposition. The defender also endeavoured to lead evidence tending to impugn the validity of the execution of the minute of agreement, but the questions he proposed to ask on that head were disallowed, as afterwards mentioned.

The jury having found for the pursuer, the case came on for discussion on a bill of exceptions. The exceptions were as follows:—First, After the pursuer in the course of his evidence had put in the process by Waddell against Strachan, he examined as a witness Mr. Robert Stewart, agent for Mr. Waddell in that process. Stewart deponed, that a document, entitled "Case for Mr. J. C. Waddell," had been prepared by him with a view to the action; that the case had been framed from information furnished by Waddell; and that it consisted of statements which Waddell had made to the witness; and counsel for the pursuer then tendered the case "as evidence of defender Waddell's statement."

The defenders' counsel objected,—"1st, That this is a confidential communication between agent and client. 2d, That secondary evidence, and **[235]** not the best—Waddell being alive. 3d, Not sufficiently proved that Waddell made the statements."

The presiding Judge (Kinloch) repelled the objections, and the defenders' counsel excepted to his Lordship's ruling.

The second and third exceptions were to rulings of the presiding Judge, disallowing questions proposed to be put in the course of the evidence for the defenders by the defenders' counsel. He proposed to ask one of the instrumentary witnesses to the minute of agreement, whether he saw Somerville sign the deed, and whether he heard the deed read over to Somerville. To these questions the pursuer objected, on the ground that no question was raised in the case as to the validity of the execution of the deed; and the Judge having sustained the objections, exception was taken by the defenders.

The fourth exception was to the charge of the presiding Judge, who directed the jury—"That the minute, dated 7th October 1850, No. 8 of process, must be held by the jury in the present question a probative and valid deed, and that being so held, its terms legally import an obligation on the defender, George Somerville, to convey to the pursuer the property therein mentioned, on payment of the sums therein referred to."

He further directed the jury—"That where any one comes under a written obligation to grant to a particular individual a conveyance of heritable property, it is, according to the law of Scotland, unlawful and fraudulent for the obligant in such obligation, so long as it remains in force, to convey the property to any other; and, according to the same law, it is unlawful and fraudulent in such other to accept such conveyance, if he do so in the knowledge of the previous obligation, and with the purpose of defrauding the right under the same."

And he directed the jury—"That if they were satisfied, on the evidence, that the conveyance by the defender George Somerville to the defender Thomas Strachan, mentioned in the issue, was in trust for the other defender, John Craig Waddell, and that, at the time of granting the same, the obligation in the minute of 7th October 1850, to convey the property to the pursuer, remained in force; and if they were further satisfied, on the evidence, that the said conveyance was taken by the said John Craig Waddell in the knowledge of the obligation under the said minute, and with the purpose of defrauding the pursuer's right under the same, the pursuer was entitled to a verdict."

Counsel for the defender objected to these directions, and further asked the Judge to give the jury the following directions:—"1. That if the jury are satisfied that, at the time when the minute of agreement referred to in the issue was entered into, the relation of agent and client subsisted between the pursuer and George Somerville, and that the minute of agreement was granted without consideration, it was not a fraud on the part of the said George Somerville to convey the property to Strachan or the defender. 2. That if the jury were satisfied that the relation of agent and client subsisted between George Somerville and the pursuer at the time of the minute of agreement referred to in the issue, then it was—(1.) incumbent upon the pursuer to prove that he gave full value for the property; and that if such value were not proved to have been given, then it was not a fraud in the sense of the issue for Somerville to convey the property to Strachan or to the defender Waddell, or a fraud on the part of the defender to take it; and (2.) the pursuer was not entitled to prove any other consideration granted by him to Somerville for the obligation undertaken by Somerville, than what is set forth in the agreement itself. 3. That, according to the agreement, no consideration was given by the pursuer to Somerville, except a payment from Somerville's own funds in the pursuer's hands, and that such payment was not value or onerous consideration for the property; and that, therefore, the [236] conveyance by Somerville to Strachan was not granted fraudulently, nor taken fraudulently, by the defender. 4. That supposing the jury were satisfied that the pursuer purchased the subjects from Somerville, and that the pursuer was Somerville's agent at the time, the pursuer must prove that the transaction was a fair one, and that he gave the best advice to his client as to the value of the property, and that the sum paid by him, or consideration given, was the value of the property; and that, unless these matters were proved, the defender was entitled to a verdict in his favour."

The defender further asked four corresponding directions from the Judge, on the supposition that the relation between Morrison and Somerville at the date of the minute was that of factor and constituent, instead of that of agent and client.

The defenders' counsel farther asked the Judge to direct the jury—"9. That it was not a fraud for Somerville to convey the subjects to Strachan or Waddell, nor in Strachan to take the conveyance, if the agreement was granted in favour of Morrison without valuable consideration. 10. That if the jury were satisfied that Morrison paid the full value for the property in return for the minute of agreement, it was not a fraud in the sense of the issue, on the part of the defender, to take the disposition, dated 6th November 1851, nor of Somerville to grant it."

The presiding Judge having refused to give any of these directions, the defender excepted. The jury found for the pursuer.

On 24th November 1860 the pursuer moved in the single bills to have the case put to the roll for hearing on the bill of exceptions.

LORD JUSTICE-CLERK.—The delays which take place in adjusting bills of exceptions are quite contrary to the provisions of the Act of Parliament and Act of Sederunt. The Act of Parliament requires the presiding Judge to present a bill of exceptions "forthwith." We have dispensed in practice with the formal presentation of the bill by the Judge; but the enactment remains otherwise in force. The Act of Sederunt, 14th February 1841, sect. 38, requires that the bill shall be lodged within six days after the commencement of the next Session, or of the meeting of the Court after the Christmas recess, if the cause has been tried after the end of session, at the sittings in March or July, or during the Christmas recess, or upon Circuit; or within ten days, if the case has been tried during session, or immediately before the sitting of the Court. There has been great laxity of procedure in preparing bills of exceptions. The bill is not lodged within the time required; and through the good nature of the Judge, the party gets his signature to it, very frequently long after the time for lodging it has expired. Now, I beg to say for myself, that I will take all means to discountenance this practice, and will refuse to sign any bill of exceptions that is not laid before me within the time appointed, or at least within a short period thereafter. A party has no *right* to demand the Judge's signature to the bill, unless he claim it within the legal period.

Argued for the defenders on the bill of exceptions;—The objections to the admissibility of the "case" as evidence were well founded.[1] The questions to the instrumentary witnesses were put with a view to show that Somerville knew nothing of the deed, and the defenders ought to have been allowed to prove that. The directions given by the Judge were erroneous in law. Those sought should have been given; but, even if the Judge were not bound to give all the directions asked, it was enough to support the bill of exceptions, if the defenders could show that the directions actually given were wrong, and removed from the jury matter proper for their consideration. The minute of agreement was a deed granted by a client in favour of his agent; and it narrated no onerous consideration at all. The consideration it did narrate, and which must be held that for which the deed **[237]** was granted, was that Morrison was to pay certain debts of Somerville with Somerville's own money. But that was truly no consideration at all. A deed by a client in favour of his agent without consideration was null, and no reduction was necessary. Therefore the first part of the charge excepted to was erroneous; but farther, and even supposing a reduction required in point of formality, that could not affect the question whether Somerville's deed, or Waddell's acceptance of it, were fraudulent. If it was null, there could be no fraud in the subsequent disposition. If it had been reduced, there could be no fraud. But it could only be reduced because it was illegal; and if so, a disposition granted in violation of it could not be fraudulent. The question of form as to the necessity of a reduction could not affect the question of fact as to the existence of fraud. Being a deed between agent and client, which narrated no consideration, it fell on the pursuer, the agent, to prove consideration. It should have been left to the jury to say whether, on the evidence as to the relation between the parties, it was an obligatory deed or no. But farther, the third part of the direction was wrong, and it took from the jury the question put in issue, whether Somerville acted fraudulently in granting

[1] Marianski, H.L., 1st July 1850, 1 M'Q., 212, 24 S.J., 579; M'Ghie *v.* M'Kirdy, 2d January 1850, *ante*, vol. xii. p. 442.

the disposition; but the third paragraph of the direction removed the question of Somerville's fraud from the jury altogether, and was a direction to them to return a verdict for the pursuer, whether Somerville had acted fraudulently or not. But if that were sound law, then the question of Somerville's fraud would not have been put in the issue.[1]

Argued for the pursuer;—The agreement was a probative deed, and must be dealt with as such, till challenged in a reduction. It was not stated on the face of the deed whether there was an onerous consideration or not; nor was it stated in the deed that the subjects at Whiflat were the property of Somerville. There was no proof led that it was gratuitous, neither did it appear on the face of the deed that Morrison and Somerville were agents. The deed *ex facie* was quite unobjectionable. It was not proved, and it was not the fact, that Morrison was Somerville's agent at the time. The *dicta* in the English cases as to the illegality of gifts and purchases between agent and client were a great deal too broad and absolute. According to them, the most trifling legacy or acknowledgment would be null.[2]

In any view it was fraud in Somerville to grant a conveyance in violation of his express obligation.[3] It was also fraud in the granter to take such a deed in knowledge of the prior agreement.[4]

Reading the whole direction together, the Judge had not withdrawn from the jury the question of Somerville's fraud, because he did not tell them to find for the jury unless they were satisfied that the obligation on Morrison by the minute of 1850, to convey the property to Somerville, was in force; and if it was legally in force, it was of course fraud to dispose of the subjects to any one else.[5]

[238] LORD JUSTICE-CLERK.—Your Lordships have now heard a full argument on this bill of exceptions.

The first exception was taken in the course of leading the pursuer's evidence, and it raises a point for consideration quite apart from the merits of the cause. A document was tendered in evidence which was called a "case," and which was offered as evidence of statements made at a certain time, regarding the subject-matter of this action, by the defender Waddell. If this document had been offered as evidence, merely on an allegation that it was a case prepared for the party by his agent, it would not have been admissible, because a statement made by a party's counsel or agent is not evidence against the party, even although it be a judicial statement in another cause. But the allegation here is, and the evidence tends to show, that the case in substance and effect embodied what was stated by Waddell himself. But when the document was proposed to be put in, three objections to its admissibility were stated. The first was, that it was a confidential communication between an agent and his client. There was no argument on that objection, and in such a case as this, where fraud is averred as to the subject-matter of the communication, that objection cannot be given effect to.

The second objection was, that the document was of the nature of secondary evidence, and was not the best evidence that could be adduced of Waddell's statements, he being still alive. I do not say that that would not have been a good objection, had

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[1] *Authorities referred to.*—Anstruther *v.* Wilkie, 31st January 1856, *ante*, vol. xviii. p. 405, 2 Shand's Practice, 615; Gresley *v.* Mousley, 29th April 1859, 28 L.J., N.S. (Ch.), 620; Tomson *v.* Judge, 25th June 1855, 3 Drewry's Chancery Rep. 306; Dent *v.* Bennet, Jan. 1839, 4 Mylne and Craig, 269; Huguenin *v.* Barclay, 14 Vesey, 273, 2 Tudor's Equity Cases, 484-493; Lang *v.* Magistrates of Dumbarton, 29th June 1813, F.C.; Marshall *v.* Hynd, 18th January 1828, 6 S.D. 384; Leslie *v.* M'Indoe's Trustees, 21st May 1824, 3 S.D. 31.

[2] 2 Tudor's Equity Cases, 495, per Lord Brougham.

[3] Bell's Prin., sect. 63; Ersk. iii. 3, 90, and iv. 1, 29.

[4] Digest 47, 20, 3; 4 E. 4, 79; 1 Stair, 16, 6.

[5] *Authorities referred to.*—Harris *v.* Tremenhere, March 1803, 15 Vesey, 34; Hunter *v.* Atkins (Lord Brougham), 1834, 3 Mylne and Keen, 135; Lauder, 13th February 1637, M. 1692; Bouack, 22d June 1748, M. 1695; Lang, 29th June 1813, F.C.; Marshall *v.* Hynd, *ut supra.*

Waddell been an ordinary witness, but this is a statement made by a party to the cause; and though a party may now be called as a witness, that does not alter the law that his extrajudicial statements may be received as evidence against him. As to the third objection, that it was not sufficiently proved that Waddell made the statements in the case, I think that the proof on that point is sufficient, and that that objection was rightly dealt with by the presiding Judge. I am therefore of opinion that we should disallow this exception.

The next exception is taken to a ruling in the course of the defenders' evidence, in the examination of William Scott, an instrumentary witness to the deed of 1850. It is necessary, in disposing of this objection, to advert to the terms of the issue sent to trial. The object of the action was to reduce a conveyance, as in fraud of a subsisting agreement, which was embodied in the form of a probative instrument. And, if the party who was the defender here wished to impugn that apparently probative instrument as not truly a probative instrument in point of execution, he would have required to do so by a reduction. This witness, William Scott, was one of the instrumentary witnesses to that agreement; and he was shown the agreement, and was asked whether he saw George Somerville sign that deed. The bearing and effect of that question, if it had any at all, was to impugn the deed as not duly executed; and therefore Lord Kinloch did right in refusing to allow it to be put, because a deed *ex facie* probative must be held to be so till challenged in a reduction.

The same principle applies to the next question, as to whether the witness heard the deed read over to George Somerville, which, I think, was also rightly disallowed. I am therefore for repelling the first, second, and third exceptions.

That brings us to the fourth exception which was taken to directions in point of law which the presiding Judge gave to the jury. In disposing of this exception it is necessary to keep in view the nature of the case, and the terms of the issue. The object of the action was to reduce a conveyance to the defender Strachan, which was in trust for Waddell, the other defender, on the ground that Somerville was under a pre-existing obligation, by a minute, to convey to the pursuer, Morrison, and that he fraudulently made this conveyance to Strachan in trust for Waddell, the other defender, in violation of the previous agreement in favour of Morrison.

If this agreement, said to have been violated, had been a minute setting forth an agreement to sell for a price, and bearing that the price had been advanced and the purchaser discharged, or if it had been an obligation to convey for a price acknowledged to be due, I think the case would have stood in a different position. Because, when an instrument of that kind, probative in itself, bears to be granted for a consideration which is acknowledged and discharged, it is impossible to allow that to be disproved without a reduction of the deed, which is proof of the consideration, unless alleged in a reduction to be false. But, as I read the minute of 1850, it bears no consideration at all. It sets forth, that a decree for a certain sum of **[239]** money had passed against Somerville, and he agreed that Morrison should pay that sum, and also the pursuer's expenses incurred in connection with the action, out of the money in Morrison's hands belonging to Somerville. So far that is nothing but a mandate or authority to Morrison to employ certain money in his hands in payment of a certain debt. But then the writing states further that Somerville agreed to grant a valid disposition of the subjects of Whiflat, then held in Somerville's name, and that on receiving payment from Morrison of the balance of the sum of money—that is, the money belonging to Somerville in the hands of Morrison—"and the second party" (Morrison) "hereby agrees immediately to pay said expenses out of said money, and also to pay the balance thereof on receiving the said disposition, the expense of which, it is agreed, shall be paid by the second party." Now there is here expressed in words an obligation to convey, but the instrument does not bear on its face any express statement of a consideration. An authority to the grantee to pay over the granter's own money cannot be held to be a consideration, and therefore this instrument contains no statement whatever of the consideration for which this disposition was to be granted. It is therefore quite an open question whether this deed was granted with or without consideration. It does not appear distinctly what is the relation between these parties, although, on the face of the instrument, there are pretty clear indications that they had previous transactions. It is said that they stood in the relation of agent and client, but that does not appear on the face of the agreement. It is somewhat singular

that the property is not described as the property of Somerville, but as property held in his name, showing that this had been, somehow or other, matter of dealing between the parties before. When the case went to trial, there was no reason for not trying whether this was gratuitous or onerous, or whether it was an obligation Somerville was bound to perform. This was a fair subject of inquiry, and the issue was framed so as to leave that question quite open. Let me ask your Lordships to attend to the precise terms of the issue—"Whether the disposition, dated on or about 6th November 1851, by the defender George Somerville, to the defender Thomas Strachan, was a conveyance in trust for behoof of the other defender, John Craig Waddell, and whether, in violation of a previous minute of agreement, dated 7th October 1850, No. 8 of process, the said disposition was granted fraudulently by the said George Somerville, and was taken fraudulently by the said John Craig Waddell, in the knowledge of the said previous agreement, and in defraud of the pursuer's rights under the same?" The first part of the issue which puts to the jury the question, whether the disposition sought to be reduced was a conveyance to Strachan in trust for Waddell, does not affect the question under this exception. The other points raised are—1*st*, whether the conveyance was in violation of the previous minute of agreement; 2*d*, whether it was granted fraudulently by George Somerville; and 3*d*, whether it was taken fraudulently by Waddell in the knowledge of the previous agreement, and in defraud of the pursuer's rights under the minute of agreement. These points are entirely apart from the question, whether it was a conveyance in trust for Waddell. Under that issue evidence was led for both parties. I cannot say that the evidence was so full as it should have been; but there was evidence to go to the jury on every one of the matters of fact raised in this issue. That being the state of the case, the presiding Judge gave certain directions to the jury, and his observations are made under three separate heads. I quite agree with what was said in the course of the argument—that a portion of a direction is not to be taken and considered by itself. I consider all these paragraphs as part of one direction.

The first direction was, that the minute of agreement must be held by the jury in the present question a probative and valid deed, and that being so held, its terms legally import an obligation on the defender Somerville to convey to the pursuer the property therein mentioned, on payment of the sums therein referred to. Now, had this direction stood alone, I cannot say that I should have thought it open to much objection. The fair meaning of it is this,—that this deed, being a probative instrument, must in this case be taken for what it bears to be, because there is no reduction of it. The jury are told what the deed is, and that it imports an obligation on Somerville to convey to Morrison; that as an obligation to that effect it is subsisting and in force.

[240] Then we come to the second direction, in which the jury were told that where any one comes under a written obligation to grant to a particular individual a conveyance of heritable property, it is, according to the law of Scotland, unlawful and fraudulent for the obligant in such obligation, so long as it remains in force, to convey the property to any other; and it is unlawful and fraudulent in such other to accept such conveyance, if he do so in the knowledge of the previous obligation, and with the purpose of defrauding the right under the same.

Now, my Lords, as an abstract proposition, I do not think the soundness of that direction can be disputed; but a proposition, which in the abstract is perfectly sound, may, when applied to a particular case, be quite unsound. It is perfectly applicable to the case I have supposed, of a contract of sale for a price set forth as the consideration, and acknowledged to be paid on the face of an instrument; but that is not the case we are dealing with. It is, as I have explained, a contract of a different kind; and I think the mere granting of a conveyance to defeat the right under that minute of 1850, accepted by the grantee in the knowledge of the previous obligation, is not in law necessarily fraud, but that it depends upon the circumstances of the case whether it is fraudulent or not. There was nothing on the face of that agreement to exclude an inquiry to show, not only that Somerville was not committing a fraud, but that he was justified in what he did. The parties to it had been in the relation of agent and client, or factor and constituent; and, on the face of the agreement, it appeared that there had been transactions between them. In these circumstances there was nothing to prevent inquiry into the relations between Somerville and Morrison at the date of the agreement, or an inquiry whether the obligation therein undertaken was gratuitous or

onerous, or whether, under the circumstances, it was an obligation which Somerville was at all events bound to perform.

Then we come to the last part of the direction, which is, perhaps, the most important part of it, because the presiding Judge told the jury what it was necessary they should find in order to entitle the pursuer to a verdict. He said that, if the jury were satisfied, on the evidence, that the conveyance by the defender George Somerville, to the defender Strachan, was in trust for the other defender, Waddell, and that, at the time of granting the same, the obligation in the minute of 7th October 1850 to convey the property to the pursuer remained in force; and if they were further satisfied on the evidence that the conveyance was taken by Waddell in the knowledge of the obligation under the said minute, and with the purpose of defrauding the pursuer's rights under the same, the pursuer was entitled to a verdict. Now, there are just three things here of which the jury were told that if they were satisfied the pursuer was entitled to a verdict—1. That the conveyance by Somerville to Strachan was in trust for Waddell; 2. That the obligation in the agreement of 1850 to convey to the pursuer remained in force; and 3. That the conveyance was taken by Waddell in the knowledge of the obligation under the said agreement, and with the purpose of defrauding the pursuer's right under the same.

With regard to the first of these there was no difficulty. It seems to have been clearly established that the conveyance was in trust for Waddell. Then, as to the second point, that the obligation remained in force, it is to be observed the jury had already been told that it did remain in force. They were told that it was a valid deed, and imported an obligation to convey; and that could mean nothing but that the deed was subsisting, or in force. I suppose his Lordship's meaning, in stating to the jury that they required to be satisfied of that was, that it was a necessary element for their consideration, although he had previously disposed of the point as a matter of law. Abstracting these two points, what did the jury require to be satisfied of in order to a verdict for the pursuer? Only that the conveyance was taken in the knowledge of the previous obligation; and with the purpose of defrauding the pursuer's right under it. That was not the case which was sent to trial. The case sent to trial was, whether, in granting the conveyance, there was a fraud, and whether it was fraudulently taken in the knowledge of the previous obligation, and in defraud of it? Under the issue sent, the jury had to try whether Somerville committed a fraud; and the presiding Judge in effect told the jury that they would be justified in finding a verdict for the pursuers, though there were no fraud on the part of Somerville, if they **[241]** were satisfied that the conveyance was *taken* in the knowledge of the previous obligation, and for the purpose of defrauding the pursuer's rights under it.

I have, therefore, arrived at the conclusion that we must sustain this exception, and appoint a new trial. I do not think it necessary to consider the law which the counsel for the defender asked the presiding Judge to lay down. I do not know that we could hold that any of the directions sought, ought to have been given; but I feel myself relieved from going into that part of the case.

LORD COWAN.—I concur, and only desire to make a single additional remark. The minute of 1850 has always appeared to me to import only a contingent obligation. The obligation to convey is made to depend on a certain contingency, namely, that a certain payment was made. It appears to me that unless it was made very clear to the jury that that condition was purified, the minute could not import an obligation to convey the property; and the terms of the direction are such as appear to have excluded from the jury the important question whether that condition was purified. There may have been evidence to that effect, or there may not; and what we have now to consider is, whether, by the direction of the Judge, that part of the case on the evidence was not excluded from the consideration of the jury. I fear it must be so held. I make this observation merely as supplementary to what has fallen from your Lordship, which I entirely adopt.

LORD BENHOLME.—As I concur entirely in what has been said by your Lordships, I do not wish to add any remarks, except with reference to the fourth exception. Taking the fourth exception as a whole, I agree in thinking that the directions which it impeaches, kept from the consideration of the jury evidence, not as to the execution of the deed, but as to matters appearing on the face of it, and having singular pertinency to the issues. The minute of 1850 is a very remarkable instrument. Its terms seem

to suggest that the parties did not express by it all that they meant. It appears to come to this. It is a mandate by Somerville to Morrison to pay certain expenses out of the granter's own money, and to pay the granter the balance of his own money in the mandatory's hands; and on that being done, the granter obliges himself to convey to the grantee a certain property. That is not an ordinary sale, nor an ordinary kind of document between man and man. On the face of it, it is a merely gratuitous engagement. As to the position of these parties, it seems that one of them had been acting as factor or agent for the other, and had in that character large intromissions with his funds. When I consider the duties which the law lays on an agent to his client, it seems to me that, so far as appears, this transaction stood in a very doubtful position from the beginning. It may be that, in arriving at the true relative position of the parties, there was another element to be considered; and that this minute imported merely a mixed or contingent obligation, the main features of which are suppressed. Judging from what is disclosed—from what is allowed to appear—the obligation seems at best questionable. This was a part of the case which by the issue it was intended the jury should judge of. Hence my objection to the learned Judge's absolute statement made to the jury, that this was a valid obligation. Was it intended that the jury should shut their eyes entirely to the nature of this instrument? I think, as I read the first direction here impeached, that all considerations as to the peculiar nature of this instrument were to be thrown out of view, and that the jury were simply to take it as a valid obligation. But I hold that although this were held to be a probative instrument, there was matter to go to the jury as to whether, under the whole circumstances, it inferred a valid obligation.

Had I been able to see an answer to this objection to the first directions, I am not sure that I might not have been able to agree with the directions in all other points. If this obligation was properly held to import a valid obligation to convey, I rather think that, *quoad ultra*, the directions may be well founded.

It may be difficult to say precisely where the defect in the charge lies. I have stated wherein I think the fault consists. But certainly there is a defect which lurks in the charge, and which has had the effect of withdrawing from the jury matter proper for their consideration. I am not prepared to say that, following the Judge's directions (as they were bound to do), the jury have gone wrong on the evidence. But that need not at present be determined.

Lord Wood absent.

Fraser, for the defender, asked expenses—Muir *v.* Muir, 11th Feb. 1837, **[242]** 15 S. & D. 540. The practice was now to give expenses to the successful party in discussions on separate points.

Macfarlane.—In Melrose and Co. *v.* Hastie and Co., 4th Feb. 1850, 12 D. 665; Neilson *v.* Leighton, 21st Feb. 1844, 6 D. 724; Muir *v.* Wallace and Co., 22d June 1855, 17 D. 982, expenses were reserved, and that is the practice.

Lord Justice-Clerk.—The practice at one time varied—the more recent practice has been to reserve expenses in cases of this kind. As a general rule, I think that the right and reasonable course. And the present case affords a good illustration of its propriety. The pursuer here is seeking to reduce a deed on the ground of fraud, and he has got a verdict which, in effect, affirms fraud on the part of the defender. But on account of a miscarriage by the learned Judge, there is to be a new trial. If the pursuer is ultimately successful in establishing fraud and reducing the deed, I think justice would demand that he should have all the expense incurred by him in establishing the fraud, and getting rid of the deed; and I should be sorry to do anything now which would prevent him getting these expenses. I am, therefore, of opinion that the general rule should be followed here, because this is a case to which it is peculiarly applicable.

Lords Cowan and Benholme concurred.

On the interlocutor proposed to be pronounced being read, *Fraser* for the defenders submitted that if the Court sustained one of the exceptions, that was enough for the decision of the case. There was no need to deal with the fifth exception. The defender might be prejudiced by the disallowance of the fifth exception. The judgment sustaining the fourth implied that there was much of the law in the directions which they asked, which the Judge ought to have stated to the jury.

The Court, holding that the presiding Judge was right in refusing to direct the jury in the words asked by the defenders, pronounced the following interlocutor:—"*December* 15, 1860.—Disallow the first, second, third, and fifth exceptions: Sustain the fourth exception; and, in respect thereof, set aside the verdict: Appoint a new trial of the cause—reserving the question of expenses of the bill of exceptions, and the discussion thereon, and remit the cause to the Lord Ordinary."

[Cf. *Petrie* v. *Forsyth*, 2 R. 222, 223.]

No. 42. **XXIII. Dunlop 242.** 21 Dec. 1860. 2nd Div.—Sheriff of Forfar.

Messieurs JAFFÉ BROTHERS, Pursuers and Advocators.—*Gordon*—*J. T. Anderson.*

JOHN RITCHIE, Defender and Respondent.—*Young*—*Fraser.*

Sale—Contract—Warranty—Mercantile Law Amendment Act, 19 & 20 *Vict. c.* 60, *sec.* 5.—Yarns were sold and bought as "3-lb flax yarns." Thereafter, in the course of bleaching them, it was discovered that some of the spindles contained an admixture of jute; whereupon the purchaser called upon the seller to replace the yarns with others conformable to the bargain, and on his failure to do so, returned the goods and bought others in the market at a higher price, and raised an action for the difference as damages for breach of contract;—*Held* (1.) That the provisions of the Mercantile Law Amendment Act as to goods sold in ignorance of defect or bad quality being with all faults at the risk of the purchaser, unless there was express warranty, or unless they were sold for a specified and particular purpose, did not apply, as the goods sent did not answer the description of "flax yarn;" and, (2.) That the purchaser was, in the circumstances, entitled to reject the yarns, and to claim damages as concluded for.

In March 1858, Ritchie, the defender, sold to Jaffé Brothers, the pursuers, 4120 spindles of three-pound flax yarn. The invoice was as follows:—

"To 206 bdls. 3-lb. flax yarn, 4120 sps., @ 1s. 7¼d. wg., 12,500 lb. .	L.330	9	2
Less 2½ % . . .	8	5	2
	L.322	4	0"

[243] The yarn was unbleached at the period of the sale, and was seen by one of the purchasers lying in that state in the seller's warehouse. The purchasers took delivery, and granted a bill at one month for payment of the price, which they duly retired. They sent the yarn to be bleached, and the bleachers having, in the process of bleaching, discovered that there was an admixture of jute, informed the purchasers that 305 spindles were so mixed, and the purchasers thereupon required the seller to deliver 305 spindles of pure flax yarn, in place of the spindles mixed with jute. After some abortive negotiation Jaffé Brothers returned the whole goods, and went into the market, and purchased yarn at a higher rate. They then raised, in the Sheriff-court of Forfarshire, the present action for payment of a sum, including the contract price and L.41, 16s. 6d., as the difference between their price and the sum which they paid in the market for the new yarn.

Ritchie having repaid the contract price, the contest between the parties was confined to the L.41, 16s. 6d.

In the course of the proof which was led, the whole correspondence between the parties and their agents was produced, and the parties themselves were examined as to their interviews. These will be found commented upon by the Lord Justice-Clerk, who delivered the judgment of the Court.

The pursuers also led evidence that it was difficult to detect the presence of jute in flax yarns until they were bleached; that the bleaching tested the presence of the jute, as the process of bleaching the one substance was destructive of the other, and that in 305 spindles there was an admixture of jute.

The defenders led evidence to prove that the admixture of jute must have happened in the spinning process, which was not done by them; that an accidental admixture in spinning was not uncommon, and that jute was present in only about four or five of the 305 spindles objected to.

The Sheriff of Forfar pronounced the following interlocutor:—"25th May, 1859.—Finds that, on 26th February 1858, the defender sold to the pursuers 4120 spindles of three-pound flax yarns, and that thereafter, as in implement of the sale, he delivered to them that quantity of yarns: Finds that the said yarns, after having been partially subjected to the process of bleaching, were objected to by the pursuers on the ground that they contained an intermixture of jute, which, on inquiry by the defender, was found to be the case: Finds that it was ultimately arranged between the parties that the defender should take back the said yarns, and repay the price, which accordingly was done: Finds that, previous to the said arrangement, the pursuers had demanded that the defender, besides taking back the said yarns, should procure for and deliver to them a like quantity of pure flax yarns, and that upon his declining to do so, they intimated that they would themselves purchase such yarns in the market, and charge him with any rise of price, should such occur: Finds that the pursuers subsequently did so; and that the object of this action is to recover from the defender all damage sustained by them by and through his alleged breach of contract, in having delivered to them, as in implement of their bargain, not pure flax yarns, but flax yarns in which there was an intermixture of jute: Finds that, at the time of the foresaid sale, the defender was without knowledge that the yarns were defective; that, on the contrary, he believed, and had good and reasonable grounds for believing, that they were pure flax yarns, without any intermixture of jute whatever; that he gave no express warranty of the quality or sufficiency of the yarns, and that they were not sold by him to the pursuers for any particular purpose specified by them or known to him: Finds that the yarns so delivered by the defender, as aforesaid, notwithstanding that in certain portions there existed, from purely accidental causes, and unknown to the defender, a certain intermixture of jute, were three-pound flax yarns: Therefore, sustains the **[244]** defences, assoilzies the defender from the conclusions of the summons, and decerns: Finds the defender entitled to expenses," &c.[1]

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[1] "NOTE.—The principles involved in this decision being of considerable importance, the Sheriff is desirous that they should be clearly stated, in order to their being thoroughly understood.

"First of all, then, in the transaction out of which the litigation arises, there was no imputation, nor even the slightest suspicion of fraud or unfairness on either side. The pursuers bought, and intended to buy, pure flax yarns; whilst the defender in making delivery, knowing well that what he had sent to the mill to be spun was all pure flax, believed that he gave the pursuers precisely what they had bought. It so happened, however, that from an accident at the mill, liable to occur, and quite impossible always or altogether to prevent, some jute in reeling had got intermixed with the flax. The quantity was described by some of the pursuers' witnesses as quite beyond what they had ever known before; but relatively to the entire quantity of yarns it was not very great. The entire quantity consisted of 4120 spindles, of which 305 spindles were rejected at the bleachfield as more or less tainted. But the taint in most of them must have been slight indeed, seeing that the manufacturer, who ultimately weaved them into cloth, declared that in his opinion there were not more than four or five spindles in which there was any jute. However, even taking the quantity of jute to have been as great as was represented by any one, there is no doubt that what was delivered by the defender to the pursuers was flax yarn. In particular, it was not mixed yarn, which consists partly of flax and partly of jute in varying proportions. Had it been so, then the transaction might have been set aside on the ground that delivery of mixed yarn, though made by the seller in *bona fide*, was not fulfilment of a sale of pure flax.

"There being thus no fraud on the part of the seller, and the pursuers having got delivery of the article for which they had bargained, the question comes to be, whether or not the accidental and unsuspected presence of a certain amount of jute in the yarns entitles them in law to get rid of the entire transaction. The Sheriff is clearly of opinion that it does not.

[245] The pursuers advocated to the Inner-House, and argued;—The Mercantile Amendment Act did not apply; what was contracted for was flax yarn, and, no doubt, if all that could be said was, that the purchaser had got flax yarn of a bad quality, the provision of the Mercantile Amendment Act would apply, and the purchasers would have no remedy. But here the purchasers bought one thing and got another quite different from that which formed the subject of the contract; they were therefore entitled to reject it, and rescind the transaction. They bought flax yarns, but got in part a substance which was a mixture of jute and flax. In England, it was held that when goods were sold by general description, as here, the seller came under an express warranty that the goods should answer the description.[1] The clause of the Mercantile Amendment Act did not apply to a case where the goods delivered were deficient in quantity, or were different from those bought.

For the respondent it was replied;—This was a sale of a specific article. The Sheriff had found that the goods delivered were flax yarns, which was the commodity purchased. If that finding were right, the case resolved into the case of delivery of flax yarns of a bad or faulty quality, and of that the risk was, by the Mercantile

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"Previous to the 21st of July 1856 it was a rule of the law of Scotland that payment of a full price implied a warranty; so that, were the law now as it was then, the pursuers, on the assumption that the presence of jute, in whatever quantity, rendered the yarns unmarketable as pure flax yarns, would have been entitled to insist that the sale should be rescinded. But on the date just referred to there was passed 'The Mercantile Law Amendment Act, Scotland, 1856,' the declared object of which was, with regard to various matters relating to trade, to assimilate the law of Scotland to the law of England. Now, in the latter country it had, since Lord Mansfield's times (*vide* Parkinson *v.* Lee, 30th May 1802, 2 East, 315), been completely settled that the law would not, from the fact of a fair price being paid, infer an implied warranty that the goods sold should be merchantable; and by the fifth section of the Mercantile Law Amendment Act (19 and 20 Vict. c. 60) it was enacted that 'where goods shall, after the passing of this Act, be sold, the seller, if at the time of the sale he was without knowledge that the same were defective or of bad quality, shall not be held to have warranted their quality or sufficiency; but the goods, with all faults, shall be at the risk of the purchaser, unless the seller shall have given an express warranty of the quality or sufficiency of such goods, or unless the goods have been expressly sold for a specified and particular purpose, in which case the seller shall be considered, without such warranty, to warrant that the same are fit for such purpose.

"Now, it was admitted on all hands that, in the present case, no express warranty was given by the seller; also, that no particular purpose was specified by the buyers in reference to which the yarns were sold. Consequently, the seller having been free from fraud, and the goods delivered in implement of the sale, whether defective or not, having been what they were sold as, there are no good grounds for the pursuers' demand.

"A practical matter of some importance was made to appear during the trial. The pursuer Mr. Luis was unable to recollect of the defender having offered to allow the tainted yarns to be picked out and replaced by sound yarns; but the defender was clear and distinct in swearing that such an offer had been made by him. If it was made, it certainly was rejected, and the rejection, if it occurred, was as certainly unreasonable. It was proved to be a common, and surely it is a reasonable, mode of settling all such disputes in practice. Notwithstanding every precaution, jute will occasionally be found where jute should not be; but any buyer who is met by the seller in the way just indicated, gets everything he can fairly ask. Indeed, to reject 4120 spindles, or any large quantity of yarn, because four or five of them are intermixed with jute, would be as unreasonable, and therefore ought to be as uncommon, as the rejection of a flock of a thousand sheep because one of them is found to be of an inferior breed."

[1] Bridge *v.* Wain, Dec. 1816, 1 Starkie, 504; Gardner *v.* Gray, 6th March 1815, 4 Campbell, 144; Gompertz *v.* Bartlett, 14th Nov. 1853, 2 Ellis & Blackburn, 849; Allan *v.* Lake, 25th May 1852, 18 Q.B., 560; Nicol *v.* Godts, 6th June 1854, 10 Hurl. & Gord. Exch., 191; Shepherd *v.* Kain, 5 B. & C., 240; Chitty on Contracts, p. 402.

Amendment Act, laid on the purchaser, when, as here, there was no special warranty. It was important that the goods were inspected before being bought; and it was not alleged that the respondent was aware of the defect. In such case, the question was, whether the amount of impure material was sufficient to change the nature of the substance. If goods sold were so much adulterated that the impure material became the principal characteristic of the goods, then it would be held that the subject delivered was a different substance from that sold; but if it were otherwise, it would be held to be the same substance adulterated, or of bad quality. But here the proved admixture of jute was far too inconsiderable to change the nature of the substance, or to make it possible to say that the substance delivered was not flax yarns.

At advising—

LORD JUSTICE-CLERK.—This is an action of damages for an alleged breach of contract of sale, brought against the seller by the purchaser, who alleges that the seller has failed to deliver the subject which the purchaser bought, and of which he paid the price; and he brings this action for L.500 of damages. Since the action was raised the price has been repaid, and, therefore, the amount of damage which, in any view, can be recovered, is comparatively small. But that does not deprive the case of interest or importance, because it is concerned with points of law of the greatest consequence, and it is, therefore, necessary to examine closely the facts of the case. The terms of the sale are sufficiently proved by the invoice. From that it appears that on 6th March 1858 the defender sold to the pursuer 206 bundles of 3-lb. flax yarn, being 4120 spindles, at 1s. 7¾d., the total **[246]** price, deducting discount, being L.322, 4s. This price was paid by a bill at one month, and the bill was retired by the acceptors, the pursuers of the action, but the price has since been repaid, and, therefore, it is not necessary to pursue farther any inquiry as to that matter of fact. The subject of the sale is very distinctly expressed on the face of the invoice. It is 3-lb. flax yarns, and that appears from the evidence to be an article well known in the trade, and distinct from other kinds of yarn. The defender states in his evidence,—"There is a well known kind of yarn called mixed yarn, in contradistinction to yarns of pure flax. The yarns sold by me to pursuers were bought and sold as pure flax yarns." We have, therefore, no difficulty in ascertaining what was the subject sold, in the understanding of both seller and buyer.

It appears, however, that one of the purchasers, a pursuer of the action, saw the yarn. Luis, a partner of the company of Jaffé Brothers, states in his examination, "As the defender was not well known to me, I went and saw the yarns in his warehouse. They were in several heaps 8 feet high, about 4 feet 6 inches in length, and the same deep. I took down a bundle of each heap, or two bundles, and looked at it. I observed nothing to lead me to believe or suspect that the yarn was not what the defender said it was; and I bought it in the belief that it was so—3-lb. flax yarn." It is not seriously maintained on the part of the seller, that this visit to his warehouse was meant to enable the purchasers fully to satisfy themselves that the yarn was pure flax yarn; and, therefore, it is not necessary to consider this visit specially as affecting the general merits or the law of the case. If it could have been alleged that the pursuers as purchasers undertook to satisfy themselves as to the character of the goods, so as to let in the doctrine of the maxim *caveat emptor*, the case might have been different. But it was not contended on the part of the seller, and I do not see any sufficient grounds for such a contention, that that maxim applies; and the fault in the yarns which is said to have been afterwards discovered seems to have been a fault that could hardly have been discovered, even if it had been looked for, at the time the yarn was lying in the seller's warehouse. The fair import of the evidence on that head is, that the presence of impure matter was very difficult to detect till the process of bleaching began; and the yarn was sold in an unbleached state, and of course was in an unbleached state when it lay in the defenders' warehouse.

When the sale was completed, the yarns were sent by direction of the pursuer to the East Mill Company, bleachers, Brechin, and they seem to have been some time there before the bleaching began. The sale was on the 8th, and the bleaching was not commenced till nearly the end of March; but when they began, the bleachers discovered something which led them to make a communication to Jaffé Brothers, the purchasers of the yarn. That communication was made by a letter on the 29th March,

in which they say—"We find in bleaching the 4120 spindles that there is a great deal of jute mixed amongst it, and the bands is apparently jute." There is a second letter bearing the same date, and to the same effect, upon which some remark has been made. It has been said that it is fabricated, because it was written in the office of the pursuer by a partner of the bleaching company, and bears a false date; but it has been sufficiently explained, that the reason why the other letter was not left, was, that it contained other matters that had nothing to do with this question. The proceeding was not very regular, but I do not think it touches the merits of this case, or infers bad faith on the part of the pursuer, or of the writer of the letter.

Now, if it be true, as stated in this letter, that there was a great deal of jute in the yarn, and therefore that it was not pure flax yarn, the question is, what was the right of the pursuer in the circumstances? Was he bound to take the yarn as the subject for which he had contracted, and which he had bought, or was he entitled to reject it, and if he was, what was his proper course of procedure? He took the risk certainly of the statement of the bleacher proving incorrect. For if he had rejected the yarn as not that for which he had bargained, and if it had turned out afterwards that the opinion of the bleacher was incorrect, and that the yarn was not so impure as to entitle the purchaser to reject it, he must have borne the consequences of that mistake. But assuming the bleacher's statement to be correct to such an extent as to justify the purchaser in rejecting the goods, what then were the purchaser's rights? It seems to me that he was entitled to have goods answering [247] to the description in the contract; and that he was entitled in any event (he having paid the price, or at least given a bill for it) to 4120 spindles of 3-lb. flax yarn.

It appears to me that that was the demand which he then made, and, as I read the correspondence, that demand was never met by the seller as he was bound to meet it.

On the 30th March, the day after the intimation from the bleachers, the purchasers wrote to the seller a letter in which they refer to a conversation between Luis, one of their partners, and Ritchie, and it is therefore desirable, in the first place, to have some account of the conversation. Luis says,—"Same day I got letter, saw defender, and told him what Ireland had written about the yarn. I asked him to replace these yarns with others conformable with our bargain, and the same evening I wrote him. Got no answer." Ritchie, the defender, on the other hand, says this,—"No objections made to me about yarns till 30th March. That same day I saw Ireland, bleacher, and Mr. Luis." "I asked to allow bleacher to pick and set aside what might be objectionable, or that I would take back the goods and return the money. Mr. Luis accepted neither offer. He demanded that I should either replace the entire lot, or consent to his going into the market and buying a like quantity, and debit me with the difference. There was a rise in price of yarn by that time."

The alternative offer which Ritchie says he made is this:—He offered to allow the bleacher to pick out and set aside what might be objectionable, or he offered to take back the goods and return the money. To offer the latter alternative, was not a position which he was entitled to take, because, when a merchant purchases goods, he is entitled to have the goods, and, if they are not delivered, to provide himself elsewhere at the seller's expense. But as to the other offer, that the bleacher should pick out and set aside whatever might be objectionable, the Sheriff construes this offer not very accurately. He says,—"A practical matter of some importance was made to appear during the trial. The pursuer, Mr. Luis, was unable to recollect of the defender having offered to allow the tainted yarns to be picked out and *replaced by sound yarns;* but the defender was clear and distinct in swearing that such an offer had been made by him." All I can say is, that if the defender was clear and distinct as to that offer, the notes of the learned Sheriff do not correctly exhibit his evidence; because, if he meant to say that he made an offer to replace the objectionable yarns with sound yarns, anything less clear or distinct than his evidence it is hardly possible to figure. I think he proposed to pick out and set aside the objectionable parts with a view to an abatement of the price; and that was not a position which he was entitled to take, because a buyer is entitled to delivery of the entire commodity he purchases.

But the letter written by the purchasers to the defender immediately afterwards

affords very fair means of construing the meaning of parties at that interview. They say—"We refer to our conversation with you of this day, but as you did not come to a decision whether you are to replace the yarns by good yarns, or whether we shall replace them, and charge you with the difference, and also what you wish us to do with the yarn sent to the field, we hereby would request you to let us know to-morrow, before twelve o'clock, of what your intentions are, as otherwise, and if your offer is not acceptable, we shall feel ourselves compelled to take legal steps in the matter." Now that is the recollection of Luis, not at the date of the trial, but on the same day on which the conversation took place, and it shows that his understanding of what took place was, that the defender did not come to a decision whether he or they should replace the bad yarns. It is rather unfortunate for the defender that he gives no written answer to this letter, because we are deprived in consequence of this best kind of evidence, namely, the writing of parties at the time, and are left to rely on loose recollections.

But afterwards, on 31st March, the parties met again, and, about their conversation then, Ritchie depones—"On 31st March, saw again Mr. Luis, and offered to take back goods and pay the money. They were willing I should take back the yarns, but they insisted that I should replace the yarns, or allow them to buy as above." If he made such an offer on the 30th, as the Sheriff supposes, it is odd that he did not repeat it on the 31st—that he omitted to propose the only arrangement he was entitled to propose, and offered what the pursuer was not bound to accept. That, however, is the state of the facts on the defender's own showing.

[248] The next piece of evidence is the letter by the pursuers' law agents of the same date, which confirms the impression I have received from the parole evidence. They say—"Messrs. Jaffé Brothers had sold all the yarns before it had been discovered that they were not of the kind purchased from you. They must, of course, implement the bargain with the purchaser from them, and we have, therefore, to intimate, that unless by twelve o'clock to-morrow you shall furnish them with the quantity of yarns purchased by them, they will purchase them on your account, and charge you not only with the difference of the price, but with all other loss sustained or to be sustained by them through your having failed to furnish them with proper goods."

But there is an answer to this letter by the agent for the defender, the seller, and does it appear from this first letter on the part of the defender that he was willing to allow the bad yarns to be replaced by good? There is nothing of that kind in the letter. The statement is this: "What our client under the circumstances would suggest, and which we think very reasonable, is, that an inspection of the yarns should be made, and, if necessary, an investigation gone into, and the matter thoroughly sifted, and perhaps the result of that inspection and investigation would render farther procedure unnecessary. Should your clients, however, not approve of such a course, then Mr. Ritchie has instructed us to say, that without in any way admitting his liability to take back the goods, he is quite prepared to do so, merely with a view to putting an end to farther trouble or litigation in the matter. If your clients will accede to neither of the above proposals, they can follow their own course, and any yarns they may be pleased to purchase will be upon their own responsibility, as our client denies that any liability attaches to him connected with the transaction."

They here propose an investigation, but with what purpose or for what ultimate object is not said. They say the result may be that farther procedure may be unnecessary. But another proposal is, to annul the contract, if the purchasers wished it, which is additional evidence that that was the meaning of what Ritchie said at the first interview, and that he never suggested that the portions of yarn of an impure kind should be replaced by good yarn. It is not necessary to peruse the correspondence farther. It is only desirable to see that the pursuers throughout continued to maintain the position which they took up at the outset, and which was their just position in point of law, for which purpose I may refer to a letter of 8th April 1858 by the pursuers' agents, after the pursuers had bought other yarn. They there say that the pursuers have purchased on account of Mr. Ritchie 4120 spindles of 3-lb. flax yarn, and they ask payment of L.41, 16s. 6d. as the difference between the price of that yarn and the price agreed upon for the yarn purchased by them from the defender; and they further ask the defender to retire the bill they had granted to him for the price of the yarn.

It is clear that the demand here made is a demand which the pursuers were entitled to make, if they were entitled to reject the goods. They were entitled to repayment of the price, and of the expense which they incurred in furnishing themselves with other goods of a similar description, and that was the difference between the contract price and what they were obliged to pay in the market. The correspondence proceeds farther, but no other proposal is made by the defender for a settlement, and there was no repayment of price; and the action is raised, concluding for a sum sufficient to include repayment of the price. Issue is joined between the parties; and the question comes to be, whether, under the ascertained circumstances, the pursuers had a right to reject the goods, or whether their reasons for doing so were insufficient.

The result of the evidence is, that out of 4120 spindles of yarn, there were 305 which were tainted with jute. In some cases there were distinct yarns of jute, and in others, yarns which had a mixture of jute and flax in the same yarn. But 305 spindles were goods not of the character and description which were contracted for; and if that could be said of the whole quantity, there could be no doubt that the purchaser would be entitled to reject. This is not a question of warranty, but a case in which a merchant sells as pure flax yarn that which turns out not to be so, but a different thing, namely, a mixture of flax and jute, and so the merchant does not furnish the commodity which he contracted to deliver; and therefore the purchaser is entitled to reject the goods offered. That right of a **[249]** purchaser is said to be founded on express warranty, according to the phraseology of the law of England, the description of the subject in the contract being held to amount to express warranty. The Scotch law holds that the right is not founded on the law of warranty, but on the fact that the seller has failed to deliver goods answering to the description in the contract, and so has failed to fulfil his contract. But the practical result is the same both in England and Scotland.

But then it is said that only a very small proportion of the subject of the contract was tainted with jute. That is a well founded observation in point of fact, and it gives rise to this reflection, that it would have been desirable if the parties had ascertained the precise quantity that was actually tainted with jute, which would have aided us in decision more than anything else. I am not disposed to say that it was the fault of the pursuer more than of the defender that this was not more exactly ascertained, but rather the reverse; because, when a third party who has no interest in a contract, employed to perform operations on the subject of the contract, announces that the subject is not what it should be, it is the duty of the seller to inform himself of the state of the fact. No doubt that was the interest and duty of the purchaser also. Both were wrong in not doing so, but I think the defender was most in the wrong. He took up a false position from the beginning, and a position which he was not entitled to assume, if the information of the bleacher was correct. His duty was to ascertain the amount of objectionable yarns, and to replace them by good yarns, and so to perform the whole contract. And the purchaser would have been bound, and I suppose willing, to have taken the balance along with 305 good spindles of yarn; and therefore I conclude, on clear principles of law, that the pursuers of this action must prevail, because there has been a breach of contract on the part of the seller, in failing to deliver the commodity bargained for, to its full extent.

I do not think the Mercantile Amendment Act has any bearing on this case at all. It was intended by the Mercantile Amendment Act to assimilate the law of Scotland to that of England in the matter of warranty of goods, in those cases in which the law of Scotland implied a warranty from the payment of a full price, and in which the law of England implied no warranty. Those cases are pretty clearly defined in the statute, although it might have been better expressed. It enacts that, "where goods shall, after the passing of this Act, be sold, the seller, if at the time of the sale he was without knowledge that the same were defective or of bad quality, shall not be held to have warranted their quality or sufficiency, but the goods, with all faults, shall be at the risk of the purchaser, unless the seller shall have given an express warranty of the quality or sufficiency of such goods, or unless the goods shall have been expressly sold for a specified and particular purpose, in which case the seller shall be considered, without such warranty, to warrant that

the same are fit for such purpose." The kind of sale contemplated in this clause is a sale in which, after the constitution of the contract, the goods are, at common law, at the risk of the purchaser. That is a sale of a definite quantity or *corpus*, for unless it were that, the goods could not be at the risk of the purchaser, and according to the Act they are to be at his risk, with all their faults as to quality or sufficiency. No warranty is implied that shall cover defects or bad quality. The terms "bad quality," "defect," "insufficiency," do not apply to a case in which the goods offered are of a different description from those about which parties contracted. There, there is a clear failure to perform the express words of the contract, and we do not need to imply anything. The object of this clause is to take away that constructive implication, which arose, according to the law of Scotland, from the payment of a full price. Here it is of no consequence whether the price was full or not. Disposing of this case on the result of the simple inquiry, whether the seller performed the exact terms of his contract, and being of opinion that he did not, I am for altering, and pronouncing judgment in favour of the pursuers of this action. As to the amount of the damage due on this footing, parties differ very slightly, and can, I suppose, easily agree.

LORD COWAN.—I come to the same conclusion, both on the facts and on the legal principles applicable to the case, and therefore I do not trouble your Lordships with any additional observations.

LORD BENHOLME concurred.

LORD WOOD absent.

[250] *Gordon*, for the pursuers, consented to the damage being valued at L.40.

The Court pronounced the following interlocutor:—"Advocate the cause: Recal the interlocutor of the Sheriff: Find in point of fact that the pursuers, on 8th March 1858, purchased from the defender 4120 spindles of flax yarn, and that both parties contracted for pure flax yarn: Find that, after the yarns had been delivered and sent to the bleacher, it was ascertained in the course of bleaching that the whole of the said yarns were not pure flax yarn, but that, to some extent, they were adulterated with jute: Find that yarn composed of flax mixed with jute is not flax yarn: Find that the pursuers rejected the said yarns, and that the defender refused to replace the adulterated yarn with pure flax yarn: Find that the pursuers in consequence were under the necessity of buying, and did buy, for their own use, another like quantity of flax yarn: Find that the difference between the contract price and the price paid by the pursuers for the second quantity of yarns is L.40, 1s. 6d.: Find, in point of law, that the pursuers are entitled to recover damages to the extent of the said sum; but the original contract price having been repaid by the defender to the pursuers, find no further damages due, and decern for the said sum of L.40, 1s. 6d., with interest since the date of purchase of the second yarn: Find the advocators entitled to expenses, both here and in the Inferior Court, and remit to the Auditor," &c.

[Cf. *Hutchison & Co.* v. *Henry*, 6 M. 59, 60; *Couston, Thomson & Co.* v. *Chapman*, 10 M. (H.L.) 80, 84; *Carter & Co.* v. *Campbell*, 12 R. 1078, 1080; *Sale of Goods Act*, 1893.]

No. 43. **XXIII. Dunlop 250.** 22 Dec. 1860. 1st Div.—Lord Kinloch.

ISABELLA RUSSELL or ANDERSON, Pursuer.—*Young—Andrew Mure.*

AGNES ANDERSON or GILL, Defender.—*Macfarlane—A. B. Shand.*

Res Judicata—Commissary Court.—A competition for the office of executor arose between next of kin and a party nominated "sole executor and universal legatory," in a document which he alleged to be a holograph testamentary writ, but which the next of kin alleged to be forged. It was found that the document was not the genuine writing of the deceased, and the next of kin were preferred. In an action by the representative of the same party against the next of kin as executors dative, founded on the same document, and concluding for payment to him as "universal

legatory" of the whole moveable estate of the deceased,—*Held* (*aff.* judgment of Lord Ardmillan), that the judgment in the prior litigation was *res judicata*.

See case reported, *ante*, vol. xx., p. 1327, and House of Lords cases, vol. xx., p. 7.

Peter Anderson claimed to be confirmed executor to the late Alexander Anderson, farmer at Auchmill, in virtue of a writing alleged to be holograph of the deceased, which was found in an open press in the deceased's house. The writing founded on was in the form of a letter. It bore to appoint Anderson to be "sole executor and universal legatory," and to leave and bequeath him his whole estate of every description.

Mrs. Gill and others, the next of kin of the deceased, appeared and objected to this claim, "in respect that the pretended testamentary letter produced by him, and alleged by him to be holograph of the deceased, was not the will of the deceased, but a gross forgery, by whomsoever perpetrated," and they raised an edict with the view to being themselves decerned executors dative.

After a long proof and variety of procedure before Commissary, Depute-Commissary, and Lord Ordinary, the Court found that the testamentary writing founded on by the claimant, Peter Anderson, is not the genuine **[251]** writ of the deceased, and therefore adhered to the interlocutor of the Commissary-Depute, decerning the office of executry to the said Agnes Anderson or Gill and others, *qua* nearest in kin, &c. The appeal to the House of Lords against this interlocutor was dismissed.

Peter Anderson had died during the dependence of the process, and Isabella Russell or Anderson, as his relict, had also been sisted as a party to the former suit in the House of Lords. She, on 26th May 1858, raised this action against the same parties as in the former suit "for their respective interests, executors dative *qua* next of kin decerned and confirmed, at least decerned to the deceased Alexander Anderson, farmer at Auchmill, in the parish of King Edward, Aberdeenshire, by the Commissary of the Commissariot of Aberdeen, dated the 27th day of October 1847," and concluded "that the pursuer is entitled, as representing the said deceased Peter Anderson, the universal legatory of the said deceased Alexander Anderson, to receive and demand payment from the defenders, of the whole moveable means and estate of every kind, with the farm-stocking which belonged to the said deceased Alexander Anderson, but under the burden of paying all his just and lawful debts," &c.

The action was founded on the same document as in the former suit.

The defender's first plea in law was—1. The subject of the present action is *res judicata*, having been fully and finally disposed of in the conjoined actions above mentioned.

On 22d February 1859 the Lord Ordinary pronounced the following interlocutor:—"Sustains the said plea, and, in respect thereof, assoilzies the defender from the conclusions of the action, and decerns: Finds the pursuer liable to the defender in the expenses of process; allows an account thereof," &c.[1]

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[1] "NOTE.—It is beyond all doubt, that the very question now proposed to be raised was tried and decided in the former proceedings. The question formerly raised was, Whether the testamentary letter, purporting to be by Alexander Anderson, and to appoint the pursuer's husband, the late Peter Anderson, 'sole executor and universal legatory,' was Alexander Anderson's genuine writing. It was found to be not so, by an express judgment on the matter of fact, first pronounced by the Commissary of Aberdeen, afterwards affirmed by the Court of Session and House of Lords. The pursuer, by the present process, avowedly seeks to bring this point, and no other, again into controversy.

"The pursuer does not dispute, at least cannot well do so, that two at least of the elements of *res judicata* here occur, namely, that the parties are the same, and that the *medium concludendi* is the same. The parties are identical, for the pursuer represents the late Peter Anderson, and was indeed sisted in the former process as his representative before judgment passed in the House of Lords. The *medium concludendi* is also identical, for it is simply the genuineness of the alleged testamentary writing, which, being established, the conclusion in either case necessarily follows. But the pursuer contends that the plea of *res judicata* is not valid, because of a difference in the subject-matter of the two actions; the proceedings formerly having for their object

[252] The pursuer reclaimed; and, on 30th May 1860, the Court ordered cases on the question of *res judicata*. The pursuer pleaded, that the Commissary **[253]** Court had a special and limited jurisdiction, merely to give the administration of estates,

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to obtain the office of executor, and now to enforce the beneficial interest in the succession. Correspondingly to these two different objects, as the pursuer states them, the former proceedings (she adds) were in the Commissary Court and in the superior tribunals, as consistorial courts of review; the present are taken under the ordinary jurisdiction of the Court of Session.

"It appears to the Lord Ordinary that the circumstance of the one process having been in the Commissary Court, and the other being in the Court of Session, will be of no moment if it be found that, in truth and substance, the same point was litigated and determined in both. Suppose, for instance, that a declarator of marriage had been brought in the Commissary Court as of old existing, and had been unsuccessful, it being expressly decided that the claimant was not the lawful wife of the party to whom she claimed such relation—suppose that she afterwards raised an action of aliment in the Court of Session, concluding for aliment as the lawful wife of the defender, and proposed, under this pecuniary claim, to try the question of marriage over again,—the Lord Ordinary cannot suppose it doubtful that this action would be excluded by the plea of *res judicata*. The obvious reason would be, that although the action was in a different court, and ostensibly to a different end, the point raised was necessarily involved in, and presupposed the point decided on; and the fate of the one case inevitably ruled that of the other.

"Cases may be figured more difficult to deal with than that just supposed. A person may be named trustee in a *mortis causa* deed, and also made a special legatee in the same deed; and circumstances may be supposed in which to fail in obtaining the office of trustee would by no means conclude the claim for the special legacy. Or, to bring the analogy as near as possible to the actual case under discussion, a person may be named executor, and also made a special legatee in a will, and it may not follow that the refusal of the office of executor will be fatal to a claim for the legacy. It is not unfairly asked, whether that which would follow in the case of a special legacy would not equally hold good in the case of a universal disposition.

"But such analogies may be found very fallacious, unless the *medium concludendi* in the respective cases is carefully regarded. It may be perfectly consistent in many ways that the same person shall not be trustee or executor, and yet shall be legatee, special or general. But if the ground of refusal of the office was nullity or forgery of the writ, fully tried and decided by a competent court, it may be very difficult to avoid the plea of *res judicata;* the conclusion in the one instance being, in that view, involved in that of the other, from the very nature of things.

"The present case appears to the Lord Ordinary to be free from the difficulties which may be speculatively attributed to others. In the truth and substance of the matter there are not two separate and independent claims conferred by the alleged testamentary letter. There is one undivided appointment as executor and universal legatory. 'I do hereby' (the letter bears) 'appoint you my sole executor and universal legatory.' There is no trust here created, as is often done by the appointment of executors. The party is executor for his own behoof. If the nomination is good for executor, it is equally good for universal legatory, *et vice versa*. The whole appointment must stand or fall. It cannot *pro parte* stand and *pro parte* fall The judgment in the former proceedings, when denying effect to the nomination as executor, in respect of the forgery of the writing necessarily and inevitably denied effect to the nomination as universal legatory. Suppose that there had been no express nomination as executor, but merely an appointment as universal legatory. According to the inveterate usage of the Commissary Court, the character of universal legatory gave a preferable right to the office of executor. If the former proceedings had assumed the shape of a competition for the office of executor between Peter Anderson, on the one hand, claiming by virtue of nomination as universal legatory (and nothing else), and the next of kin, on the other, and in that competition it was found that there was no valid appointment as universal legatory in respect of the forgery of the writ, could there afterwards be an action in the Court of Session anew laid on the nomination, and claiming an accounting for the succession? If such an action would

but without power to decide any question of property. There was no proper *lis* as to the character of the document, which was pronounced upon merely incidentally, but was not reduced or set aside, and indeed could not have been, for neither the Commissary nor any other inferior Court had direct cognisance of forgery, even *ad civilem effectum*.[1] Even Supreme Courts with different jurisdictions, as the Court of Session and Court of Justiciary, do not regard for all purposes the decisions of another court;[2] and it was contrary to all precedent to select one of a series of findings in fact, the import of a proof before the Commissary, a mere incidental proceeding, and found on it a plea of *res judicata* in a Court of Session action. Proof by witnesses was conclusive evidence only in the cause in which it was taken.[3] The parties to this suit litigate in this action in a different character from that in which they sued the former one. There they litigated in their individual and private capacity: now they are sued as executors decerned—that is, as trustees for the administration of the personal estate of the deceased. That distinction was important.[4] Farther, the *media concludendi* were different in the two actions,[5] and the conclusions were different. Upon this last the pursuer perilled her case.[6]

The defenders pleaded;—That it was *de facto judicatum* in the former conjoined actions,—1st, That the testamentary writing founded on was not the writ of the deceased; and 2dly, That Peter Anderson was not the universal legatory of the deceased.[7]

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be barred by the plea of *res judicata*, which the Lord Ordinary is of opinion it would, the present case stands in no different predicament.

"Or take the case of intestacy. The office of executor is claimed by certain parties, alleging that they are nearest in kin. The claim is resisted on the ground that they are not so; either because they are illegitimate, or because they are a degree further removed than their competitors, or on any other ground of fact. The objection is sustained by a judgment proceeding on full proof, and expressly embodying the fact. Could these same parties then raise an action in the Court of Session against their former competitors, alleging anew, in the face of the former judgment, that they were nearest in kin, and concluding for the succession; and could they avoid the plea of *res judicata* by contending that the former proceedings merely referred to the office of executor, and the new to the beneficial interest? that the former proceedings were in the Commissary Court, the new in the Court of ordinary civil jurisdiction? The Lord Ordinary conceives, that, in the case supposed, the plea of *res judicata* would be unanswerably opposed to them; for the plain reason, that the one claim was inextricably involved in the other, and that the judgment that they were not next of kin, finally and irrevocably settled that they had neither right to the office nor the estate.

"It appears to the Lord Ordinary that the case supposed is a proper type of the present."

[1] Kames' Elucidations, Art. Res Judicata, p. 179; Barclay's M'Glashan, pp. 56 to 59; Milligan *v.* Milligan, Jan. 17, 1827, 5 S. 206; Glasgow *v.* Cowan, 1677, Dict. 7486; Murray *v.* Howieson, 1611, Dict. 7482; Bell's Prin. sect. 1889; Ersk. 3, 9, 27.

[2] A *v.* B, July 19, 1622, Dict. 14,024; Walker *v.* Chatto, Dict. 14,064; Gordon, Craigie & Stewart, p. 60; Ker *v.* the Sun Fire Office, 1793, M. 14,078; Behrens *v.* Sieveking, 2 Mylne & Craig, 602; Barrs *v.* Jackson, 1 Phillips, p. 582; Hargrave's Law Tracts, p. 473; Duchess of Kingston, 2 Smith's Leading Cases, 4th Ed. p. 594.

[3] A. S. 1826, Barclay's M'Glashan, p. 296; Kames' Elucidations, Art. 28; Barrs *v.* Jackson, 1 Yo. & Coll., 1 Phillip's Rep. p. 582; Smith's Leading Cases, vol. ii. p. 628; Thompson *v.* Donaldson, 2 Espinasse's Rep. p. 63; The King *v.* Buttery, Russell & Ryan's Crown Cases Reserved, p. 342; Williams on Executors, p. 341.

[4] M'Nab *v.* Hamilton, 22d Dec. 1831, 10 S. p. 180.

[5] Gillespie *v.* Russell, 26th June 1857, *ante*, vol. xix. p. 897.

[6] Digest, lib. xliv. tit. ii. l. 14, sect. 3; *Ib.* Law 31; Pothier's Pandects, vol. xviii. p. 163, Ed. 1823; Dig. 44, 7, 25; Sandars, p. 518, 2d Ed.; Stair, iv. 40, 16; Elucidations, Ed. 1800, p. 180; Glendinning *v.* Neilson, 27th Dec. 1699, Brown's Sup. vol. iv. p. 470; Lindsay *v.* Sellers, 13th May 1825, 4 S. p. 8; Heddle *v.* Baikie, 14th Jan. 1846, 8 D. p. 376; Stair, book iv. tit. 40, sect. 16.

[7] Kames' Elucidations, p. 183; Paulus, Dig. xliv. t. 2, 14 Pr.; *Ib.* 2, 6; 4 Ersk. iii. 3; Campbell *v.* Grant, 30th Nov. 1827, 6 S. 188; Strathmore *v.* Strathmore's

[254] At advising, the opinion of the Court was delivered by the

LORD PRESIDENT.—This case has been the subject of a good deal of deliberation by the Court, and certainly there are points in it which require attention, and which have some degree of novelty in their aspect. The case arises in this way. In 1845, I think in November, a person of the name of Alexander Anderson died; and in December of that year an application was taken out by his next of kin to be decerned executors to the deceased. That application was opposed by Mr. Peter Anderson, who contended that he was executor-nominate and universal legatory of the deceased in virtue of a testament—a holograph will left by the deceased. He claimed the office of executor, and proposed to confirm as executor in virtue of that document; but objections were taken to its validity, and he then appeared as objector to the demand of the next of kin to have the office of executor conferred on them. There could be no doubt, that if the deceased had left a deed containing a nomination of executor, the party so nominated would be preferable to the next of kin. If the deceased had died without leaving a deed, there can be no doubt that the next of kin would be entitled to the office of executor. If the deceased had died leaving a deed, which, although it did not name Peter Anderson to be executor, named him as universal legatory, he, if he claimed the office of executor, would have been entitled to it in preference to the next of kin. Being named executor, he did not require to proceed to claim the office of executor in that form; but he proposed to be confirmed, as having in him a sort of double position, the nomination as executor and the nomination as universal legatory, which gave him a preferable right to the office over the next of kin. But the next of kin contended, that Peter Anderson's pretensions were groundless, inasmuch as the document on which he founded was not a genuine document. He, on the other hand, maintained the genuineness of the document; and he pleaded, that the document in question proved itself. This led to an investigation as to the genuineness of the document. The Commissary allowed a proof. He did not give effect to the pursuer's plea that the document proved itself, but allowed a proof of the genuineness of the document, and thereafter he pronounced a judgment against its genuineness in the conjoined cases, thus sustaining the demand of the next of kin to be decerned executors, and negativing the pretensions of Anderson to take up the office. That judgment of the Commissary-depute, to which a note of the grounds of judgment was appended, was appealed to the Commissary, who adhered; and his judgment having been taken to review, the Lord Ordinary before whom it came, Lord Cuningham, pronounced an interlocutor in which there were various findings on the validity or genuineness of these alleged documents, which was the real question discussed between the parties, and then his Lordship adhered to the judgment of the Commissary.

That interlocutor of the Lord Ordinary was taken to review, and the Court, upon 25th June 1850 (reported, *ante*, vol. xx. p. 1326) adhered;—that judgment was appealed to the House of Lords, who affirmed the judgment, and dismissed the appeal.

The unsuccessful party there, Peter Anderson, during the dependence of the action, had died, and it was revived at the instance of his widow and executrix, and after that judgment was pronounced she raised the action which is now before your Lordships, and in which the letter which was referred to in the previous proceedings is set forth, and is founded on as putting Peter Anderson in the position of universal legatory. That action is met by the plea of *res judicata*. The Lord Ordinary has sustained that plea. He has given effect to it, and upon that ground assoilzied the defender from the conclusions of the action; and against that interlocutor there is now this reclaiming note before us.

It is contended on the part of the defender that the question which was discussed in the Commissary Court, and afterwards in this Court and the House of Lords, involved

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Trustees, 24th March 1833, 11 S. 644; Megget *v.* Scoular, May 30, 1833, 11 S. 661—June 18, 1831, 9 S. 706; Heddle *v.* Baikie, Jan. 14, 1846, *ante*, vol. viii. p. 376; Anderson *v.* Gill, &c., 3 Macqueen, 180; Fraser *v.* Lord Lovat, 22d Feb. 1854, *ante*, vol. xvi. p. 24; Huntly *v.* Nicol, 9th Jan. 1858, *ante*, vol. xx. p. 375; Bouchier *v.* Taylor, 4 Brown's Parliamentary Cases, p. 708, and Hargreave's Law Tracts, p. 472; Erak. 4, 3, 4; Broom's Legal Maxims, p. 298.

substantially the same matter as forms the subject-matter of the present case, and that, therefore, the plea of *res judicata* is applicable. It is maintained on the part of the pursuer that the matter involved in the previous [255] discussion was not the same as the present,—that the question there was a competition for the office of executor,—that the question involved in the present discussion is a demand by a universal legatory against the executor confirmed, to account to that universal legatory for the proceeds of the estate. The one is a competition for office, the other is a demand for a sum of money,—that is, for the estate—the whole estate after satisfying debts; and it is contended that the question which was before the Commissary was a question which was suitable for the consideration of the Commissary, for the disposal of the office of executor, but that the matter of the genuineness of the writing was only a matter that came before him incidentally in the consideration of the disposal of the office of executor, and that his judgment could not be final and conclusive in the other question between the parties. We ordered cases, after hearing oral argument.

The question appears to me to be truly this, whether that was the same matter as is raised now. Peter Anderson put forward his pretensions as executor. He wished to be confirmed executor, and he put forward as an objection to the demands of the next of kin his double position as executor and universal legatory. Both of them were relevant matters to be stated, and although the position of universal legatory might not have entitled him to be confirmed without an edict, still it is a ground of objection to the demand of the other party, and which would have entitled Peter Anderson to resist them until he made his preferable claim to the office of executor clear by reason of being universal legatory. He put forward that double position as against the demand of the next of kin—either of them a title to exclude their claim.

In that state of matters the question came to be, whether these documents which named him as executor and universal legatory were genuine documents, yea or nay? A document might be valid as giving the office of executor, and not valid as giving the office of universal legatory, or it might be valid as giving the office of universal legatory, and not valid as giving the office of executor, in the matter of expression and mode of doing it. But the question here was, whether the nomination of executor and universal legatory was a nomination at all, or was a fabrication? and that question was considered. The validity of the document—the genuineness of the document—was examined into, and was decided; and the result of the decision, the one way or the other, was to give, on the one hand, a right to demand the office of executor, on the footing of the party having left no settlement at all which gave the next of kin right to the estate, or, on the other hand, to give the office to Anderson, as universal executor, in giving him the estate; and that was the contention between the parties, whether the one party, as next of kin, was entitled to have the estate through the office of executor, or whether the other party, as executor, was to have right to the management of the estate; and that turned entirely on the genuineness of the document. The Commissary, in these conjoined actions, repelled the objection to the demand of the next of kin, and sustained their pretensions, and gave effect to their demand.

That being so, the next step on the part of Anderson is this:—He says, Well, you have got the office of executor; founding on the same document, I require you to make over the estate to me. Now, I think that is precisely the same matter, as was previously discussed and decided on. If he had been universal legatory, he was entitled to get possession of the estate, and he formerly applied to the Commissary for that purpose, and now his demand is, that he is entitled to the estate in respect of that document, which, if genuine, would have given him the office of executor. I think that is truly and substantially the same matter; and I think it was raised relevantly and competently in the former litigation. In one sense, it may be a matter incidental to try the genuineness of the writing. But what is it here? He comes here demanding the other party to account to him for the estate, and that is incidental here just as before; but it is necessary for the explanation of the matter, for the purpose of getting the estate under the direct nomination in that document. Now, there are niceties—subtleties in the case, and I am far from saying that there is not room for argument, and that these matters do not require grave consideration. But I have arrived at a satisfactory opinion on the matter. My doubts were not so grave as those of another member of the Court. But that [256] is the result at which I have arrived, and I believe with very little hesitation on the part of the other members of the Court.

The *onus* of proof rests on the party pleading on the document, and therefore the interlocutor should be adhered to.

The Court pronounced the following interlocutor :—" Adhere to the interlocutor of the Lord Ordinary submitted to review, and refuse the reclaiming note: Find additional expenses due, and appoint an account to be given in," &c.

No. 44. **XXIII. Dunlop 256.** 9 Jan. 1861. 1st Div.—Lord Mackenzie.

Dame HELEN MARGARET CROW or CAMPBELL and Others (CAMPBELL'S Executors), Pursuers and Real Raisers.

Dame HELEN MARGARET CROW or CAMPBELL, Defender and Claimant.—*G. Graham Bell.*

CHARLES HUNTER and Others (Marriage Contract Trustees).—*Skelton.*

Sir ARCHIBALD AVA CAMPBELL, Defender and Claimant.—*Ross.*

JOHN JAMES AVA CAMPBELL and Others, younger Children.—*Cook—Lee.*

Domicile.—Circumstances in which *held* (*aff.* judgment of Lord Mackenzie) that a Scotsman, who was in the army, and was killed before Sebastopol, had not, by purchasing a house in Southampton and residing there, lost his domicile of origin—he having inherited from his father and remained proprietor of a family mansion in Edinburgh, which was let furnished to a tenant at the time of his death.

The only question disposed of by the present judgment in this case related to the domicile of Major-General Sir John Campbell, Bart., at the time of his death. The action was a multiplepoinding and exoneration by Sir John's trustees under a trust-disposition and settlement, and executors under an English testament, in which the claimants were his widow, his eldest son, Sir Archibald Ava Campbell, Bart., the younger children, and the trustees under his antenuptial contract of marriage. Parties were agreed as to the facts of the case, which were as follows :—

Sir John was born in Scotland, of Scotch parents, in 1806. His father, Sir Archibald, was, throughout his life, a domiciled Scotsman, and died at Edinburgh in 1843. Though his mother died at Southampton in October 1848, Sir John accompanied her remains to Edinburgh, where she was buried beside his father.

Sir John, when a boy, was sent to school in England. In 1821, when he was only about fifteen, he joined the 38th Regiment of Foot, with which he remained connected till the commencement of the Crimean War in March 1854, when he was Lieutenant-Colonel. From the time when he entered the army, it is admitted "Sir John was in active service at home or abroad, either with his regiment, or on the staff of his father."

Between 1837 and 1854, Sir John occasionally visited Scotland. During one of those visits, in July 1841, when his father lived at Garth, Sir John was married to a Scotchwoman at Blackness House, near Dundee, and on that occasion he entered into a marriage contract, which was drawn up in the Scotch form.

In May 1848 Sir John returned from abroad on a year's leave of absence, the greater part of which he spent at Southampton, where his mother then resided. He purchased a house there in that year, where he resided for some time when not in active service. In May 1849 he visited Scotland, and gave directions to his Edinburgh agents to prepare a trust-disposition and settlement, which was executed by him on the 16th June 1849. About that time he went to Halifax, Nova Scotia, to take the command of his regiment, and did not return to Britain till about the end of August 1851. [257] From the correspondence it is inferred that Lady Campbell was abroad with her husband during these two years. After his return to Britain in 1851, and down to the month of March 1854, most of Sir John's letters to his Edinburgh agent, Mr. Macdonald, bear to be written from Winchester, Rochester, Gosport, and Chatham, being probably the places where he was stationed with his regiment.

In April 1854 Sir John embarked for the East, having previously executed a will in the English form. He had let his house in Southampton in 1853, some time

before he went to the Crimea, and his family removed to Bath, where they resided till his death.

Sir John was killed in action before Sebastopol on 18th June 1855. Besides the house in Southampton, he had another house of greater value in Atholl Crescent, Edinburgh, which he had inherited from his father, and which was let furnished. At the time of his death Sir John was a member of the Highland Society and the New Club at Edinburgh. He had an account with the Royal Bank at Edinburgh, which was operated upon by Lady Campbell during his absence, and he corresponded regularly with Mr. Stodart Macdonald, who acted as his law-agent in Edinburgh, thus keeping up his connection with Scotland to the last.

On 10th January 1860 the Lord Ordinary pronounced the following interlocutor:—"Finds that the late Sir John Campbell at the time of his death, on 18th June 1855, was domiciled in Scotland: Appoints the case to be put to the roll with a view to farther procedure, and in the meantime reserves all questions of expenses."[1]

[258] Lady Campbell and Sir Archibald Campbell reclaimed, praying the Court to find that Sir John Campbell, at the time of his death, was domiciled in England.[2]

The respondents were not called on.

The Court pronounced the following interlocutor:—"Adhere to the Lord Ordinary's interlocutor submitted to review, and refuse the desire of the said reclaiming notes: Remit to the Lord Ordinary to proceed with the cause, and reserve all question as to expenses."

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[1] "NOTE.—The only point argued at the debate related to the domicile of Sir John Campbell at the time of his death. After carefully considering the facts of the case as admitted in the joint minute, and appearing from the correspondence, the Lord Ordinary is of opinion that Sir John died domiciled in Scotland.

"In the well-known case of Munro (1 Rob. App. p. 660), it was observed by the Lord Chancellor, that 'the domicile of origin must prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile, and acquiring another as his sole domicile.' Now here there is no evidence that Sir John intended to make England his sole or permanent place of residence, so as to abandon his domicile of origin in Scotland."—(His Lordship then narrated the facts as above quoted.)

"The circumstance that Sir John, when a boy, was sent to England for his education, could not change his Scotch domicile. In like manner, when he was absent either in England, or abroad on military service with his regiment, his original domicile could not thereby be affected. It may therefore be assumed as indisputable, that when Sir John visited Scotland, and was married to a Scotchwoman in 1841, he remained to all intents and purposes a domiciled Scotchman. If so, the question comes to be, whether Sir John lost his Scotch domicile at any subsequent period?

"That Sir John purchased a house in Southampton in 1848, and resided in it for some time when not on active service, has been much relied upon. But it has been shown that his residence in that house was of short continuance, and not by any means of a permanent character. In speaking of what is necessary to effect the abandonment of the domicile of origin, and substitute another in its place, Mr. Burge observes (vol. i. p. 54) in a passage quoted with approbation by the Lord Chancellor in Munro's case—'It is not by purchasing and occupying a house, or furnishing it, or vesting a part of his capital there, nor by residence alone, but it must be residence with the intention that it should be permanent.' Now here there is nothing to show that Sir John intended to adopt either Southampton or Bath as his permanent residence, and the purchase of the house at Southampton is of less consequence than it otherwise would be, seeing that he inherited from his father, and remained proprietor of the family mansion in Edinburgh, which was let furnished to a tenant at the time of his death.

"Taking all the circumstances into consideration, and particularly the constant connection which Sir John kept up with Scotland down to his death, the Lord Ordinary is of opinion that he never abandoned his domicile of origin by substituting another in its place."

[2] Ommaney *v.* Bingham, 3 Paton's App., p. 448; Forbes *v.* Forbes, 1 Kay's Ch. Ca., p. 341.

No. 45. **XXIII. Dunlop 258.** 9 Jan. 1861. 2nd Div.—Lord Mackenzie.

JAMES ANDERSON, Pursuer.—*Millar.*

Mrs. JEAN CALDER or DUNCAN and Others, Defenders.—*Young*—*A. Mure.*

Process—Summons—Title to Sue—Stat. 13 *&* 14 *Vict., cap.* 36, *sect.* 1.—A summons at the instance of "A B, writer in Elgin, pursuer," contained conclusions directed to obtaining, as trustee under the settlement of a party deceased, certain subjects in the possession of the defenders; there was also a conclusion for "payment to the pursuer" of damages for violent profits. His title was stated on record. On an objection that the title was not properly set forth in the summons, a minute of amendment was put in, proposing, before the word "pursuer," to insert his designation as trustee under the settlement.

The Lord Ordinary sustained the amendment, and repelled the objection, and the Court adhered,—it being observed ([*diss.*] Lord Benholme) that, as regarded the formal part of the summons, it was not now necessary that it should contain a statement of the pursuer's title.

In this action against Mrs. Jean Calder or Duncan and her husband John Duncan, and also against John Gordon Robertson, the pursuer was designed in the summons "James Anderson, writer in Elgin, pursuer." He concluded for declarator, that, "as sole accepting trustee nominated and appointed by the deceased Mrs. Jean Duncan or Calder, . . . conform to her trust-disposition and settlement, dated 12th September 1859," he had the sole and only good and sufficient right and title to certain heritable subjects, forming part of the truster's estate at her death, which had been taken possession of by the defenders Mr. and Mrs. Duncan; and that the same belonged to the pursuer, "but in trust always for the ends, uses, and purposes specified in the said trust-deed;" and that being so found, that the defender Robertson should be ordained to make and subscribe such deeds as should be necessary for vesting the fee of the subjects in the pursuer; or otherwise, for declarator, that the truster had validly exercised a power of administration regarding the subjects reserved to her in a disposition of the same, granted in 1848 by the defender Robertson, whereby he had disponed them to the truster in liferent, and to the defender Mrs. Duncan in fee, but reserving power to the truster, without consent of Mrs. Duncan, to sell, dispose of, burden, and exercise any other act of administration; as also for declarator, that, in respect of the valid and effectual exercise of the said power of administration and disposal, Mrs. Duncan had no right to the subjects, and she and her husband should be decerned to denude thereof in favour of the pursuer, as trustee foresaid; and failing their doing so, the summons concluded for adjudication and decree for removal of Mr. and Mrs. Duncan, in order that the pursuer might enter to and possess the subjects as trustee and for the purposes of the trust. "And, farther, that the said Mrs. Jean [259] Calder or Duncan and John Duncan should be decerned and ordained, by decree foresaid, to make payment to the pursuer of the sum of L.50 of damages, or of L.20 in name of violent profits for each year, or part of a year, during which they shall continue to possess the same after the term of Whitsunday next." The pursuer averred (Cond. 1), that he and other two persons, and the acceptor and survivor, had been appointed the sole trustees of the deceased Mrs. Calder by her trust-settlement, by which she conveyed to them all her heritable property; and (Cond. 5) the fee of the subjects described in the summons belonged to the truster, in virtue of the power of disposal reserved to her; and were conveyed, with all her right and title thereto, by the truster in her trust-disposition and settlement, and belonged to the pursuer as her sole general disponee, the other trustees having declined to accept.

The defenders pleaded;—(1.) The summons ought to be dismissed, in respect the pursuer has not set forth a sufficient instance, and that some of the conclusions ask decerniture in his character as an individual, and not *qua* trustee.

On 11th December 1860 the Lord Ordinary allowed the pursuer to put in a minute of amendment of the libel, to obviate the first plea in law of the defender. Accordingly, a minute was put in proposing to amend the summons, by adding to the pursuer's designation as writer in Elgin the words "sole accepting trustee under the

trust-disposition and settlement, particularly after mentioned, executed by the now deceased Mrs. Jean Duncan or Calder, sometime residing in Academy Street, Elgin, widow of William Calder, inn-keeper at Burghead, of date 12th September 1859."

By interlocutor, dated 14th December 1860, the Lord Ordinary sustained the amendment of the summons in terms of the minute, and repelled the first plea in law of the defenders.

The defenders reclaimed against both interlocutors, and contended;—The invariable practice was for the pursuer, when he sued as a trustee, an heir, or in any other particular character, to state that character,[1] which was really part of his designation as pursuer, which required to be in the summons.[2] As the summons stood, the last conclusion was for a decree for a sum of money in favour of the pursuer as an individual. The defect was of such a radical nature as did not admit of being amended.[3]

LORD JUSTICE-CLERK.—It may be doubted whether there was any need for this minute of amendment. It is not absolutely necessary that the pursuer's title should be set forth in the commencement of the summons. Under the old practice, and especially in reductions, the setting forth of the pursuer's title in the formal writ was a matter requiring strict accuracy. But I know of no rule under which it is now necessary to set forth the pursuer's title in the formal writ. This summons was framed under the Act of 1850, which requires the whole grounds of action to be set forth in a condescendence. It requires the pursuer's name and designation to be set forth in the formal writ; but the pursuer's title may require a long statement to set it forth, and in some instances it would obviously be inconvenient to insert it at length in the formal writ. In this view, and looking to the condescendence here, I cannot doubt that the summons is well libelled, because it is stated in the first article of the condescendence that the late Mrs. Duncan conveyed to the pursuer and others, as trustees, her whole heritable property; and in the fifth article, that in virtue of the conveyance in Mrs. Duncan's trust-deed, the property is now vested in the pursuer as sole accepting trustee. Now, I do not know how it could be more distinctly stated that the pursuer insists in this action as a trustee; and I think, therefore, the title is well libelled. But there may be a doubt whether the last conclusion is well libelled; the provision may no **[260]** doubt be entitled to decree for violent profits, but not as a writer in Elgin. The better course would have been to have made the last conclusion in the same shape as the previous conclusions, for decree in favour of the pursuer as trustee; but I think this difficulty was obviated by the minute of amendment.

LORD COWAN concurred.

LORD BENHOLME.—I do not agree with some of your Lordship's observations. I think the pursuer ought to have been correctly libelled in the character of trustee in the commencement of the summons. I think the want of this made the summons defective as to the pursuer's title, although the defect has been cured by the minute of amendment. It is true that the Rutherfurd Act requires only the name and designation of the pursuer to be stated; but in an action where he sues in a particular character, that character ought to be set forth, and such, I believe, has been the constant practice. My only doubt is, whether the expenses of the amendment ought not to have been given.

The Court refused the desire of the reclaiming note, adhered to the interlocutor of the Lord Ordinary, and found the reclaimer liable in expenses since the date of the Lord Ordinary's interlocutor of 14th December 1860, and remitted to the Auditor to tax and report, and to the Lord Ordinary to decern therefor.

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[1] Shand's Practice, p. 217; M'Indoe *v.* Lyon, 7th December 1826, 5 Sh. & D., p. 92.

[2] Stat. 13 & 14 Vict., c. 36, sect. 1, and schedule referred to.

[3] Smith *v.* Stoddart, 8th July 1850, *ante*, vol. xii., p. 1185.

No. 47. **XXIII. Dunlop 265.** 11 Jan. 1861. 2nd Div.

JOHN WHITEHEAD and CHARLES MORTON, Petitioners.—*Macfarlane—Gifford—Hunter.*

JOHN CULLEN, Respondent.—*Sol.-Gen. Maitland—Young.*

[4 Macq. 283; 10 S.R.R. (H.L.) 496.]

No. 50. **XXIII. Dunlop 322.** 17 Jan. 1861. 2nd Div.—Lord Justice-Clerk.

GOTTELIEB RICHARD BOETTCHER and MANDATORY, Pursuers.—*Macfarlane—Gifford.*

THE CARRON COMPANY, Defenders.—*Young—Clark.*

Proof—Admissibility of Evidence—Acts of Sederunt, 29th Nov. 1825, *11th July* 1828, *and 16th Feb.* 1841.—At a jury trial there was tendered in evidence the **[323]** deposition of a foreign seaman, taken under the Act of Sederunt, to lie *in retentis*, before the adjustment of issues. The other party objected to the evidence being admitted, but did not aver or prove that the witness could have been examined on interrogatories, or could have been adduced at the trial;—*Held*, in conformity with the ruling of the presiding Judge, that the deposition was admissible.

Ship—Collision—Reparation—Issues.—A jury found that certain damage to the pursuer's vessel had been caused by coming in collision with the defenders' vessel in the river Carron, owing to the fault of both vessels, and that the fault was the pursuer's to the extent of one-third, and the defenders' to the extent of two-thirds. The damage was apportioned in the same proportion, with leave to the defenders to move the Court to reduce the damages to one-half;—*Held*, that being a proper maritime cause, the rule of maritime law must apply, under which, where damage is the result of the fault of both parties, the loss is equally divided.

The barque "Camilla," of Memel, left the coal wharf at Grangemouth on 30th September 1859, in charge of a pilot, to take her down the river Carron into the Firth of Forth. When about two-thirds of the distance down the river the wind fell, and by orders of the pilot the anchor was let go. She had been sometime at anchor, when the steamer "Grange," coming up the river, struck the "Camilla," and did her considerable damage. The "Camilla" was taken back to Grangemouth to repair damages. This action was raised at the instance of Boettcher, the master and owner of the "Camilla," against the Carron Company, the owners of the "Grange," to recover the damages done to the "Camilla" by the collision. The summons was signeted on 11th October 1859. On 14th October the pursuer applied for a commission and diligence to examine as witnesses certain seamen on board of the "Camilla," and on the 20th of the same month their depositions were taken.

The case was tried before the Lord Justice-Clerk and a jury on the 24th July 1860, on the following issue:—

After an admission that the pursuer was owner of the barque "Camilla," and the defenders were owners of the steam-vessel "Grange," "Whether, on or about 30th September 1859, through the fault of the defenders, the steam-vessel 'Grange' ran into and came into collision with the 'Camilla,' whereby the 'Camilla' was injured and disabled, to the loss and damage of the pursuer. Damages claimed, for repairs, survey, and detention, L.311, 16s. 4d., with interest from October 1859."

The jury returned this verdict:—"Find that the collision and injury to the 'Camilla' took place through the fault of both parties, and that the fault was attributable to the defenders in the proportion of two-thirds, and to the pursuers in the proportion of one-third: Find that the whole loss sustained by the pursuers is L.265, 16s. 4d., whereof they find the pursuers entitled to two-thirds, or L.177, 4s. 2⅔d.: But with leave to the defenders to move the Court to reduce the damage to one-half of the

loss actually sustained, if the Court shall be of opinion, in point of law, that, according to the facts as above found, the loss ought to be borne by the parties equally."

The case came before the Court, 1st, on a bill of exceptions by the defenders to rulings as to the admissibility of certain evidence; and, 2d, on the defenders' motion, that the damages found due should be reduced to one-half the loss found to have been sustained by the pursuer.

I. The pursuer having tendered in evidence the deposition of Johann David Romeck, mate of the "Camilla," as taken on commission, the following witnesses were examined, to show that he had not been accessible since the deposition was taken.

Pillans Scarth, W.S., the pursuer's agent, deponed, "I have no reason to believe that witness has been in this country since deposition. Inquiries have been made for him and the other foreign seamen examined, but we **[324]** could hear nothing of them, and a look-out has been kept on the arrival of foreign vessels. Cross-examined—Salvesen, ship-broker in Grangemouth, looked out for them. I know nothing about it except what he stated to me to-day. I did not employ him. I have made no inquiries after these witnesses since examination till to-day."

John Salvesen deponed, "I was broker for 'Camilla.' The ship went to Memel after repair, and the whole crew sailed with her, including Romeck, the mate. They were, I understand, to be discharged on arrival there. I have heard nothing of any of the crew since. I have no idea where any of them are now. I don't know anybody who could give any information about them in this country. Cross-examined—They sailed in October last for Memel. I believe this was 'Camilla's' first voyage to this country, and I am not aware she has been in this country again."

There was also put in the following passage from the mate's evidence:—"I am twenty-eight years of age. I propose to return as soon as I can to Prussia, and to remain there until I get another ship."

The defenders objected to the admissibility of Romeck's deposition, on the ground that, since its date, no inquiry had been made after him by the pursuer; that no evidence had been led to show that Romeck was dead or was out of the country, or could not be present at the trial; or at least that the evidence did not show that he could not have been examined on interrogatories after the adjustment of the issue.

The Lord Justice-Clerk repelled the objection, and allowed the deposition to be read as evidence. To this ruling the defenders excepted.

The defenders took a second and third exception to rulings, 1st, That the evidence of the cook of the "Camilla," taken in the same circumstances, was inadmissible; and, 2d, That a minute, holding two other witnesses, the carpenter and a seaman on board the "Camilla," as concurring in the evidence of the cook, which formed part of the report of the commission, was admissible as evidence.

It was argued in support of the exceptions;—Parties might have the evidence of witnesses taken to lie *in retentis*, under the Act of Sederunt of 1828; but to have the benefit of such evidence, in the event of the case going before a jury, it was necessary, under the Act of Sederunt of 16th February 1841, that the evidence should be taken on adjusted interrogatories. There were three ways in which evidence might be laid before a jury, 1st, by examining witnesses on oath; 2d, on adjusted interrogatories,—and these two modes of procuring evidence being impossible,—3d, the evidence taken, to lie *in retentis*, before the adjustment of issues was admissible. The clear principle was, that a party is bound to produce the best evidence, and there was no ground on which, in this case, it was to be held that the pursuer was entitled to lay before the jury evidence taken in the way least favoured. It had been decided, that where it was possible to examine a witness on interrogatories, a deposition taken to lie *in retentis* was not admissible.[1] The pursuer having had the depositions of these witnesses taken, was not relieved from the obligation to produce them at the trial merely on the ground that they were foreign seamen. They were men whose homes were known, and, at any rate, if he could not produce them, he was bound to show that he could not have had their evidence taken on interrogatories. The pursuer might have used the depositions had he proved that the witnesses were dead, or that he had inquired after the witnesses and failed to find them; but, on the evidence of the pursuer's agent, it

[1] Watson *v.* Glass, 7th March 1837, 15 S. & D., p. 753.

was clear that no endeavour had been made to find them. To make the depositions taken admissible, it was necessary for the pursuer to show not only that the witnesses could not be present at the trial, but that they could not have been examined on adjusted inter-[325]-rogatories. There was no difference between the case of a foreign witness and a witness resident in Scotland, but unable to attend.[1]

LORD COWAN.—We have to dispose of three exceptions taken to rulings of the presiding Judge at the trial of this case; but, in effect, we have only to dispose of one matter of principle, for the second and third exceptions were taken on the same ground as the first. I, therefore, confine my attention to the first exception.

That exception was tendered to a ruling, by which the presiding Judge held that a deposition taken on commission from a foreign seaman before he left this country, and before issues were adjusted, was admissible as evidence. There were several witnesses examined relative to the matter of this objection; and the evidence given by them amounts to this, that the party whose deposition was tendered in evidence, was a foreign seaman, that his deposition was taken when he was on the point of leaving this country, and that since that time he has never returned. It is important to keep in view that there was no evidence led on the other side to show that he was accessible at the time of the trial.

The first objection taken to the admissibility of this deposition is, that it was not proved that the witness could not have been produced at the trial. It was argued that it was necessary to lead such evidence even in the case of a deposition by a foreign seaman. But, in conformity with the decision in the case of Ainslie *v.* Sutton (December 1851) in which the late Lord President (Boyle), whose *dicta* on such points are deserving of the greatest weight, states a clear opinion, I hold, that such depositions are admissible, without any previous proof being required by the party tendering them. That decision follows on a series of judgments in the Jury Court, and particularly by the Lord Chief Commissioner, in the case of Mackay *v.* Macleod (4 Murray, p. 278). I, therefore, hold it clear, that, for the first objection, there is no ground in law or in practice.

The second objection is, that it is not proved that the witness was incapable of being examined on adjusted interrogatories after approval of the issue. As regards this objection, it is of importance to see what was the rule prior to the institution of the Jury Court relative to depositions taken *in initio litis*. Such depositions might be procured to be taken on application, at any stage of a process, to the Court, and on cause shown by the party applying for them. The commissions under which they were taken were granted by virtue of the inherent power of the Court. The exercise of such a power to secure the preservation of evidence has ever been viewed as indispensable to the ends of justice in the case of witnesses, with the view of their deposition lying *in retentis*, who are in ill health or abroad, and has existed from the earliest times. It is referred to in cases in the Dictionary, decided in the beginning of the seventeenth century. It is noticed by Lord Stair, who specially refers to sick and valetudinary persons as the witnesses whose depositions might be so taken; but he might have referred to persons abroad as well, because there were decisions before his time, where the Court had granted commissions to examine such witnesses. I refer, for confirmation on this matter of historical interest, to Lord Bankton, who says,—"Witnesses regularly are only examined upon points admitted to proof; but sometimes, when they are old or infirm, or they are intending to go abroad, the Court allows their depositions to be taken to lie *in retentis*,—*i.e.*, to lie in the hands of the clerk till there be occasion for the same; which, in extraordinary cases, is even allowed before the days of compearance are run. But if the witnesses are still living when the cause comes regularly in, they ought to be re-examined, if the adverse party insist for it, which is conform to the custom of other countries, and this point of form is derived from the canon law"—

[1] Ainslie *v.* Sutton, 14th Dec. 1851, *ante*, vol. xiv., p. 184. The pursuer cited the following authorities:—Smith, 21st January 1802, Mor. Appx., *voce* Process, No. 5; Johnstone *v.* Keyden, 9th July 1824, 3 S. & D., p. 238; Blair *v.* Magistrates of Brechin, 16th June 1825, 4 S. & D., p. 98; Willox *v.* Farrell, 26th Feb. 1848, *ante*, vol. x., p. 807; Stone *v.* Marine Insurance Company, 14th March 1849, *ante*, vol. xi. p. 1041.

(l. iv. t. 30, sect. 27, 2d vol., p. 649). Here Lord Bankton states clearly that there is no need for a re-examination, unless it be insisted on by the opposite party. And it is the result of my own experience in practice, that where [326] a witness has emitted one deposition before a commissioner, there is no re-examination unless the opposite party insist for it. There is also the first decision of this Court in the case of Watson *v.* Glass (7th March 1837), which I take to be an illustration of the practice, and, as I think, the invariable practice on this point, down to the institution of the Jury Court. I may also refer to the work on Evidence of Mr. Dickson (p. 973), who states the matter in the same way.

Therefore, my Lords, we come to consider the effect of the Act of Sederunt of 1841, with this in view, that according to the practice of this Court, depositions taken at the commencement of a cause before a commissioner were admissible as evidence, without any renewed examination after proof was allowed, unless the other party wished the witness examined. Now let us see how the matter stands since the introduction of jury trial in 1815. There was certainly no innovation on the rules of common law as to the admissibility of depositions taken to lie *in retentis*, in reference to witnesses dead, or not accessible, at the time of the trial. But it is not necessary to go beyond the subsisting Act of Sederunt 1841, which superseded that of 1825. Neither the 46th section of that Act, nor any other provision in it, deals absolutely with all the evidence admissible at a trial. It does not declare that no evidence is to be admissible at the trial except what is taken after the adjustment of issues. In order to see the exact effect of it, consider this case: it cannot be doubted that if a witness, who had been examined before a commissioner, was to die, his deposition would be available, although not taken on interrogatories after the adjustment of the issue. Now, is not a witness who has gone abroad in just the same position as a witness who has died before the trial? Is he not also inaccessible? The Act deals with evidence to be taken after the adjustment of issues, and it is to be taken in the way there pointed out. It does not deal with evidence taken as this was. Such evidence is left to be dealt with according to the general rules and established principles in the law of evidence. I am aware of the decision in the case of Watson *v.* Glass, that where a witness is alive and in this country, but unable to be brought forward at the trial for examination in presence of the jury, it is necessary to take a new deposition on adjusted interrogatories. But the same reason does not apply in the case of a deposition obtained *in initio litis* from a foreigner not accessible at the time of a trial, from his never having returned to this country. The principle is clear, that the best evidence that is accessible must be produced at the trial. I take it as a fact here, that this witness has never been in this country since his deposition was taken. In the case of a foreigner, even though his residence is known, I would not think it necessary to apply for a commission to re-examine him; but when I consider that the case we have to deal with is that of a foreign seaman, there is the greatest force in the remark made from the bar, that the only result of taking a commission to examine him may be, that after following him from one port to another, at very great expense, there is only got a deposition that is somewhat worse than that already in the hands of the Court. I cannot take what is, I think, a perverse view of the Act of Sederunt, and *a fortiori* it is so in the case of a foreign seaman.

I am anxious that the case of Watson *v.* Glass should not be misunderstood. The Lord President, who was the presiding Judge, and whose ruling was excepted to, refused to admit a deposition emitted by a female witness in 1831, several years before the jury trial. She was unable to attend as a witness at the trial on account of age and personal infirmity; but at the date of the trial she was within the jurisdiction of the Court, her mental faculties were entire, and she was capable of being examined on adjusted interrogatories. The ruling of the Lord President was found not to be incorrect; for this reason, that the witness was at the door of the Court, and, though unable to appear in the witness-box, she was entire in all her faculties, and still the party chose to be satisfied with a deposition not taken in the way directed by the Act of Sederunt. There is no doubt that in the observations made by the Judges, when the Lord President's ruling was brought up for review, and particularly in the opinion of Lord Corehouse, there were some remarks, from which it may be inferred that no evidence was admissible unless taken in open Court, or by a commissioner under the 17th section of the Act of Sederunt, then in force, that of 1825. If that be the

correct construction of the opinion of Lord Corehouse, great as is my respect for the opinions expressed by his Lordship, I must dissent from that view; for I could never hold, that all evidence taken on deposition, even [327] of witnesses who have died, is to be thrown overboard. I do not think, however, that the Court went on that ground, but on the ground that the best evidence accessible was not produced. I am, therefore, of opinion, that that decision need not embarrass us in considering the present question.

On the whole, therefore, I am of opinion that the ruling, allowing the deposition of this foreign seaman taken to lie *in retentis* when he was in Scotland, and tendered in the circumstances in which it was, to go to the jury, was right, and that any other ruling would have been open to exception.

LORD BENHOLME concurred.

LORD JUSTICE-CLERK.—I also concur, and I think it right to add that the first regulation on this subject was an Act of Sederunt passed on 9th December 1815, of which, however, I cannot find a copy among the printed Acts of Sederunt. There is, however, an account of it in the Book of Forms of Process,[1] known to be the work of Lord Ivory, published in 1818, when that was the regulating Act on the subject. He gives this clause from the Act of Sederunt:—"When it shall be made out upon oath, to the satisfaction of the Jury Court, that a witness cannot attend on account of age or permanent infirmity, or is obliged to go into foreign parts, or shall be abroad, and not likely to return before the day of trial, it shall be competent to examine such witness by commission, on interrogatories to be settled, and to read the same in Court to the jury." And the author mentions that the interrogatories were settled either by the parties themselves, or under the control of one of the Commissioners of the Jury Court. Another clause is given of great importance, showing that not only might depositions be taken on interrogatories, but that the Court might also "grant commissions for the examination of witnesses as heretofore, to lie *in retentis*;" so that the old practice of taking evidence to lie *in retentis* is completely saved. But the Act further provided, that neither the examinations taken upon commission in the Jury Court, nor those taken to lie *in retentis*, shall be used before the jury, "provided the witness is capable of being examined in the Jury Court at the time of the trial," clearly showing that, if the witness could not be got at the time of the trial, it was competent to use the evidence taken to lie *in retentis*. That is the more material, because the same idea is followed out in the Act of Sederunt of 1825, the 59th section of which demonstrates the intention of saving the right of the Court to order depositions to be taken to lie *in retentis*, and to use them as formerly; for it provides that "such depositions shall not be used in evidence in the Jury Court, unless it is established at the trial on oath, to the satisfaction of the last-mentioned Court, that due inquiry has been made after such witness, and that the witness cannot be found within Scotland, or is disabled by permanent infirmity from attending the trial," clearly implying that, if it was found at the trial that the witness was not within Scotland, or disabled from attending the trial, it was competent to read his deposition, taken at an earlier stage of the case to lie *in retentis*. It would require a special enactment to deprive the Court of this power to order evidence to be taken on commission to lie *in retentis*, or to prevent a party from using it, on proof that the witness was not accessible. There is no such enactment in the Act of Sederunt of 1841. That Act no doubt repeals all the other Acts of Sederunt on Jury Court practice; but it does not enact that depositions to lie *in retentis* shall not be taken and used as formerly, and therefore the common law, rested on the ancient practice, and illustrated by these Acts of Sederunt, is the law which must rule this point, there being nothing in the Act of 1841 repugnant to that law and practice.

I will only say further, that this witness being a foreigner and a seaman, and it being, as I agree, presumable that he has not been within the jurisdiction of the Court after the issues were adjusted, I do not think that any duty was laid on the party proposing to use his deposition. No doubt he was bound to produce the best evidence accessible. But was it within the power of the party to obtain the deposition of the witness on interrogatories in the fair meaning of these words? No application to the Court could secure it, because the witness was not within the jurisdiction of the Court.

[1] Ivory's Forms of Process, v. 2, p. 339.

The party could only have asked a commission to examine the witness in a foreign country, and under that commission he could not be certain of examining him, because he had no legal compulsitor which he could bring to bear on the witness.

[328] LORD WOOD was absent.

The Court refused the exception, and found the defenders liable in expenses.

II. In support of the defenders' motion, that the damages to be found due by them should be reduced,—it was argued;—It was conclusively found by the verdict, that the fault of both parties contributed to cause damage to the pursuer's vessel. In these circumstances, the rule of law was, that the party injured was not entitled to recover damages.[1] Though not a rule of positive law, it was a rule founded on general principle, and of universal application in the law of Scotland. The same principle was held in England in the common law courts to apply to accidents to ships.[2] The accident to the "Camilla" occurred some distance from the mouth of a narrow river flowing through the county of Stirling. No ingenuity could suggest any ground on which one principle should be applied as the rule of law in awarding damage for loss by an accident to a ship on a river, and another where the accident occurred on a road alongside of it. Such a result would be against all sound doctrine and good policy. In the case of Hay *v.* Le Neve,[3] founded on by the pursuers, a rule of the English Admiralty Court was applied, which was inapplicable to all cases that were within the jurisdiction transferred to the Court of Session from the old Admiralty Court of Scotland. The jurisdiction of the English Court of Admiralty was only over vessels on the sea, and not over inland navigable waters, while the jurisdiction of the Scotch Court of Admiralty extended on the sea and on navigable rivers to the first bridge.[4] This was a case for the application of the well ascertained rule of Scotch law as laid down in the case of M'Naughton, the case of Hay *v.* Le Neve not being a sufficient authority on which to depart from the rule. On the facts, as found by the jury, the defenders should be assoilzied.

But, *esto* that the rule gifted to Scotch law from the Admiralty law of England in the case of Le Neve was to be held to apply, it must be applied in its integrity. The rule was, that both parties having been to blame, the loss was to be divided equally. No other rule of division, where both parties were to bear the loss, could be deduced from that case, or was reasonable. Had the fault of either party been subtracted, there would have been no loss. It was impossible to perform an arithmetical operation on the fault of each of the two ships, in order to make a corresponding one on the loss. If the principle of the common law was not to be adhered to, and the rule, as laid down in the case of Le Neve, was to be taken, it must be taken as it had been hitherto applied in Scotland to cases of loss at sea, that where there was blame on both sides, the loss was to be equally divided.[5]

The pursuers' counsel moved the Court to apply the verdict, and find the defenders liable in expenses, and that the defenders' motion be repelled. It was argued;—The defenders having allowed the case to go to the jury on a direction, that the law, as settled by the case of Hay *v.* Le Neve, was here applicable, without excepting to that direction, could not now maintain that **[329]** the verdict on such a direction was bad. All that was reserved to them was to have the damage reduced to one-half. This was a proper maritime case,[6] and having been so dealt with without exception, there was

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[1] M'Naughton *v.* Caledonian Railway Company, 17th December 1858, *ante*, vol. xxi. p. 160.

[2] Morrison *v.* the General Steam Navigation Company, 23d April 1853, 8 Exchequer Reports, p. 733; Dowell *v.* the General Steam Navigation Company, 1st June 1855, 5 Ellis & Blackburn, p. 195; Tuff *v.* Warman, 9th June 1857 (Common Pleas), 26 Law Journal (N.S.) p. 263.

[3] 15th June 1824, H.L. 2 Shaw's Apps. p. 395.

[4] Stat. 1681.

[5] Innes *v.* Glass & Company, 26th February 1827, 4 Murray, p. 168; Clyde Shipping Company *v.* Glasgow & Londonderry Steam-Packet Company, 3d June 1859, *ante*, vol. xxi. pp. 898, 1131.

[6] Ersk. Inst. l. i. t. iii. sects. 33, 34; 1 Gul. iv. c. 69, sect. 21.

no ground for saying that the rule of the common law applicable to accidents on land should apply. The difficulty endeavoured to be raised on the English cases decided in the common law courts was easily solved. The Court of Session, as coming in place of the Scotch Court of Admiralty, had jurisdiction as an Admiralty Court on navigable rivers.

There was no doubt that the case of Le Neve applied, and the principle of that case was, that the damage was to be equally divided between the parties where there was blame on both sides. The English cases afforded no precedent for any other than an equal division of loss; but that arose from the mode in which the fault was ascertained. The English Court was aided by the brethren of the Trinity House, whose functions were at an end when they had decided that there was fault on both parties. But in Scotland the Court had the assistance of a jury to apportion the blame. The case of Le Neve, while it clearly applied the rule of apportionment of loss, recalled the apportionment of the Court of Session; but it was to be observed, that the apportionment was made by the Court, and not by Sir John Beresford, the Port-admiral at Leith, to whom, as a man of skill, the proof had. in that case, been remitted by the Court, as it had been, in this case, to the jury. This case had been referred to the jury as the best judge of the amount of damage. Their verdict was not to be tried by any arithmetical rule. They might have no rule; *tota re perspecta* was their only principle. They considered the whole case, and assessed the damages. And this observation applied to a special verdict. There were many cases in which it might be reasonably held that one party was more to blame than the other for damage resulting from a collision; as, for instance, if on board of one vessel there was reckless neglect to shorten sail. The doctrine of apportionment of damage being applicable, it was no less reasonable to divide the damage by three than by two. The principle of dividing equally was a rough mode of estimating damage, resorted to for want of the means of estimating more accurately what was the result of the blame of each party. The jury having given effect to the doctrine of apportionment on their oaths, on a consideration of the whole facts, there was no ground on which their verdict, assessing the damages, should be departed from.

At advising on 17th January 1861,—

LORD JUSTICE-CLERK.—The jury have found that the collision, which occurred in the river Carron between the two ships belonging to the pursuer and the defenders respectively, and resulted in damage to the pursuer's ship "Camilla," was caused by the fault of both parties; and they further record their opinion, that "the fault was attributable to the defenders in the proportion of two-thirds, and to the pursuer in the proportion of one-third." On this ground (there being no damage proved to have been sustained by the defenders' ship) they find the defenders liable in two-thirds of the damage sustained by the "Camilla;" but reserve leave to the defenders to move "the Court to reduce the damage to one-half of the loss actually sustained, if the Court shall be of opinion, in point of law, that, according to the facts as above found, the loss ought to be borne by the parties equally."

The defenders moved the Court, in pursuance of the leave reserved, and we have now to determine the question, whether the damages ought to be reduced from two-thirds to one-half of the loss actually sustained by the pursuer, as owner of the "Camilla." But in the discussion of this question, the defenders have attempted to raise another and very different question, which, however inadmissible, it would not be proper to allow to pass without observation.

[330] The contention of the defenders' counsel was, that in applying this verdict, the Court are at liberty to hold, that no damages are due to the pursuer at all, but, proceeding on the fact that the collision was caused by the fault of both parties, to enter up the verdict for the defenders, applying to this case the ordinary principle applicable to a collision of vehicles, and other similar occurrences on shore, in producing which both parties are to blame. They further contended, that there is no rule or binding authority of the law of Scotland, which establishes any distinction between the civil consequences of collisions on sea and on land.

If this were a sound view of the law, it is clear that there must have been a great miscarriage at the trial on the part either of the Judge or of the jury. For either the Judge must have directed the jury that they were entitled to give the pursuer

damages, notwithstanding of the fault on his part contributing to the collision; or the jury, if they received a direction in conformity with the law contended for by the defenders, have altogether disregarded it, and given a verdict inconsistent with it.

For all such miscarriage at the trial there are two remedies provided by statute, viz., bill of exceptions, and motion for a new trial; and as the defenders have not raised this question in either of these prescribed modes, it might fairly be held that they are now precluded from raising it on the application of the verdict.

As I tried the case, it may be right I should state that the view of the law now presented to the Court was not only not maintained, but not suggested in the course of the trial. Nor can this cause surprise to any lawyer who considers, however slightly, this newly raised question on its merits.

But though it may be incompetent to entertain this question with a view to judgment, I think we should hardly be doing our duty, if we allowed a proposition so manifestly and dangerously unsound to be stated and elaborately maintained as it was, without expressing a decided opinion upon it. Had this question been proposed for consideration by an unprofessional person, the proposal would have been at once ascribed to ignorance of the principles, and still more of the history, of the maritime law of Scotland. But when it proceeds from counsel of such known and great ability and accomplishments as distinguish the learned gentlemen who represented the defenders in this case, the more inscrutable the object or motive of the party may be, the more is it necessary for the Court to announce the clear opinion which they entertain.

In the present action, we are in the exercise of our admiralty jurisdiction—of that jurisdiction which was transferred to this Court when the High Court of Admiralty was abolished by the Act 11 Geo. IV., and 1 Gul. IV., c. 69, sect. 21—an original jurisdiction in all maritime civil causes and proceedings, which was not competent to this Court while the High Court of Admiralty existed, and in the exercise of which this Court is bound to administer the maritime law, according to the same rules and principles which formerly guided the High Court of Admiralty, and the Court of Session itself, as a Court of review of the judgments of the Judge-Admiral.

That this is a maritime cause, seems to be one of the very few points not disputed in argument. The collision took place, not in the open sea, but in a navigable river, the Carron. But the jurisdiction of the Admiralty Court of Scotland is not confined to the high seas, but extends to "all ports, harbours, or creiks of the same, and fresh waters or navigable rivers below the first bridge, or within the flood's mark, so far as the same does or can at any time extend."—(1681, c. 16.) And within these limits it is sole and exclusive in maritime causes.

What, then, is the maritime law of Scotland applicable to a case of collision, where both ships are to blame for the occurrence? It is impossible to say, that there is any peculiarity in our jurisprudence in this department, which distinguishes it from the maritime law of other nations, or in particular from the admiralty law of England. In many, if not in most departments, the law of Scotland and the law of England are derived from different sources; and thus starting with different principles, it is not surprising that they should, in some departments, still more widely diverge in the practice of centuries. But the admiralty law of the two countries is derived from the same source, namely, the ancient customs of the commercial nations of Europe, which have grown up into a system with the knowledge and assent of both England and Scotland, as members of the commercial **[331]** community of nations, and which, within certain limits and with certain exceptions, have all the force of an international code. It is not, therefore, surprising to find that when, by the 19th article of the Treaty of Union, the Scottish Court of Admiralty, like the other admiralty jurisdictions in the United Kingdom, was placed under the Lord High Admiral or Commissioner for the Admiralty of Great Britain, no conditions or provisions were deemed necessary to secure the maintenance of any peculiar maritime law of Scotland. But it would be very surprising if, at the present day, ships enjoying the privileges, and subject to the conditions of British registry, should sail from the ports of the United Kingdom, under the same flag, and subject to the same statutory regulations in all respects, and yet that, in case of collision, the legal rights of the parties might vary, according as the case may be tried in one British Admiralty Court or another.

The maritime law of Europe has, from the earliest times, applied the doctrine of average in cases of collision. Different states and codes have no doubt differed

from each other as regards the particular circumstances in which they admit its application, and also as to the manner in which it is to be applied. But these differences of detail do not affect the historical and legal fact, that the application of the doctrine of averages, in cases of collision, is an undoubted part of the general maritime law of Europe, almost universally recognised. After the judgments of Lord Stowell, in one of which he is reported to have said, that where collision happens "by the common fault of both parties, the ancient rule of the admiralty was, that it should be considered a common loss," it will hardly admit of dispute that the principle was at an early period established in England. But in Scotland also, we find traces of it so early as the sixteenth century. In the "System of the more Ancient Law of Scotland," compiled by, or at least in the time of, Sir James Balfour, President of this Court in 1561, and which is a book of undoubted authority, it is stated as one of the ancient "sea lawis" recognised in the practice of Scotland, that if one ship break from her moorings and strike against another, and one of the ships is injured, and damage done to cargo, "the skaith sould be prysit or partet betwix the twa shippis, and the skaith of the gudes that were in the twa shippis sould be partet amangis the merchandis of baith." Wellwood, a Scotch lawyer, and professor of civil law, who compiled his Collection of Sea Laws about the end of the sixteenth century (first published in 1613), treating of average, say: "Even so, if two ships rush and crosse one over another, and the company sweare their innocency, as that it lay not in their power to stay the same, contribution must be made for one equal upsett of both their losses." The examples thus given by these early writers do not apply to the present case. But they prove the recognition of the general doctrine at the time they wrote. It would be difficult, if not impossible, to trace the progress of this doctrine in the practice of the Admiralty Court of Scotland, because its decisions are, for the most part, unreported. And it is quite possible that, like some other nations of Europe, the Scottish Admiralty may have varied in its application of the general principle. Some have applied the doctrine in cases of pure accident, others in cases of inscrutable fault, and others in cases of ascertained common fault. But, as regards the more recent practice of Scotland, the case of Le Neve and Others *v.* The London and Edinburgh Shipping Company, decided in the Court of Session, 7th March 1822, and reported in the Faculty Collection, shews that the rule of dividing the loss is applied to cases where both ships are proved to be in fault. It is true that in that case the Court of Session divided the loss in the proportion of two-thirds against one vessel, and one-third against the other, just as the jury have done here. But this is no more consistent with the common law regulating the consequences of such occurrences on land, than is the practice of an equal division of loss. The House of Lords, on appeal, affirmed the general principle of the judgment of the Court of Session, but divided the loss equally, instead of dividing it in proportions supposed to correspond with the amount of blame on either side. The case of Le Neve, therefore, is a leading and direct authority that the law and practice of the admiralty in Scotland recognises the general rule of the maritime law of Europe regarding the application of the doctrine of average in cases where the collision of two ships is produced by faults on both sides. In the earlier admiralty case of Burns *v.* Stirling, Lord Pitmilly, in his charge to the jury, has the same principle of division of loss clearly in view.—2 Murr., pp. 93 and 98. And in the subse- **[332]** -quent case of Innes *v.* Glass and Company, also a case remitted from the Court of Admiralty for trial by jury, the Lord Chief Commissioner said, that in the case of fault by both ships, "the defender does not go free, but the pursuer only recovers one-half; and should this be the case here, I must direct the jury to find for the pursuer, and to give half the damages." Afterwards, in charging the jury, his Lordship said,—"But there is a third situation, when there are faults on both sides; and then, instead of the pursuer recovering the whole, or of inquiring who is most to blame, the damage is divided, and the pursuer recovers one-half."—4 Mur. 167-8. To these authorities it is only necessary to add the opinion of Professor Bell, (1 Com. 579), and the fact that no attempt has been made by the defenders to show that the doctrine of the common law regarding collisions, and other such occurrences on shore, were ever applied, or proposed to be applied to a case of collision of ships arising from common fault. The proposal that this Court, exercising an admiralty jurisdiction, should introduce such a practice now, seems something worse than hopeless.

Much use was made by the defenders, in the course of the argument, of a class of cases decided in the Common Law Courts of England, applying the rule of the common law to collisions of ships in rivers. The simple answer to these cases, when cited as authorities here, is, that the Courts in which they occurred were not Admiralty Courts, and had no other law to apply than the common law, which alone they administered. This apparent anomaly is explained by attending to the simple facts, that since 1830 this Court has both an admiralty and a common law jurisdiction, and is bound to administer and apply maritime law in maritime causes, and common law in common law cases; that their admiralty jurisdiction extends to all navigable rivers as well as the high seas, and that, therefore, cases of collision of ships in rivers, which in England would be tried in the Common Law Courts, fall within the admiralty jurisdiction of this Court, to the exclusion of its common law jurisdiction.

But there remains for consideration the question truly raised by this verdict, whether we can give effect to the division of the loss made by the jury into two unequal shares, proportioned to the amount of blame in their opinion attributable to the parties respectively, or whether we are not bound, by maritime law and practice, to divide the loss equally? It appears to me that the great weight of authority is in favour of equal division. It is the rule of the laws of Oleron. It is the rule of the French Ordnance of 1681. And although the Hanseatic code uses somewhat ambiguous language in dealing with the questions, its most authoritative exponent, Kuricke, interprets the words used, conformably to practice, as ordaining an equal division. The rule is also supported by a preponderating weight of authority among the most eminent writers—Stypman, Loccenius, Valin, Emerigon, and others—not, indeed, as a rule of natural justice, or as depending on any well-defined legal principle,—for Cleirac seems to think one of its chief merits is that it runs parallel to the judgment of Solomon between the two mothers, while others defend it merely on the ground of commercial expediency, on the impossibility or difficulty of finding a better,—considerations which lie more or less at the foundation of many other rules of the maritime law.

But what is of the greatest importance for us is, that it is the only principle of division of loss in cases of this description which has been, in modern times at least, sanctioned by the Courts of England and Scotland. At first sight, indeed, Lord Stowell, in the Woodrop, Sims, seems to speak of "*apportioning*" the loss, as if he avoided saying in what proportions it should be divided, or as if that depended on circumstances. And in Le Neve's case Lord Gifford refers to the evidence as showing that the blame was in that particular case equal. But a careful examination of these cases have satisfied me that they proceed on the rule of equal division of loss, as a rule applicable in every case of common fault, to the exclusion of the inquiry who was most to blame, or in what degrees the parties were to blame respectively.

It is, no doubt, found in this case by the verdict of the jury, that the fault may be apportioned, according to the evidence, in the proportion of two to one. But the law of the admiralty having declared that it will not, in such cases, regard the proportion of fault, but deal with the fault of both parties as equal, wherever there is fault on both sides, we are, I apprehend, bound to disregard this finding of the **[333]** jury, and to reduce the damages under the verdict to one-half of the loss actually sustained by the pursuer as owner of the "Camilla."

The other Judges concurred.

The Court pronounced this interlocutor:—"Find that, on the state of facts as found by the verdict, the pursuer is entitled to recover one-half, and no more, of the loss sustained by him as owner of the ship 'Camilla:' Therefore reduce the damage to L.132, 18s. 2d.; enter up the verdict for the pursuer accordingly; and decern against the defenders for the said sum of L.132, 18s. 2d., with interest since the date of citation; and find neither party entitled to expenses."

[Cf. *Currie* v. *M'Knight*, 24 R. (H.L.) 1.]

No. 51. **XXIII. Dunlop 333.** 17 Jan. 1861. 2nd Div.—Lord Neaves.

DAVID CROMBIE, Pursuer.—*Fraser—Grant.*

WILLIAM M'EWAN, Defender.—*Broun.*

Sheriff—Small-debt decree—Review—Diligence—Poinding—Stats. 1 & 2 *Vict. c.* 18, *sect.* 24; 1 & 2 *Vict. c.* 41, *sects.* 20, 30, 31; 16 & 17 *Vict. c.* 80, *sect.* 22.—In an action of damages for use of diligence on a small-debt decree, the pursuer averred that he had not been cited to attend the court on the day when decree was taken against him, and that the poinding was irregular, in respect the schedule of poinding did not state at whose instance the poinding was used. *Held* (*aff.* judgment of Lord Neaves), 1. That the provision of sect. 22 of the Act 16 & 17 Vict. c. 80, excluding review of all causes under L.25, did not apply to small-debt causes, or exclude the appeal under sect. 31 of the Act 1 & 2 Vict. c. 41 to the Court of Justiciary. 2. That the decree being *ex facie* regular, and not having been appealed against to the Court of Justiciary, all review was excluded; and 3. The poinding on a small-debt decree being under the provisions of sect. 20 of the Small-Debt Act 1 & 2 Vict. c. 41, it was not necessary to insert in the schedule of poinding the name of the party at whose instance the diligence was used.

David Crombie raised this action, concluding for decree against William M'Ewan for L.300, in name of reparation and solatium "for the loss, injury, and damage sustained by him in his character, reputation, credit, circumstances, and feelings, by and through the wrongful and illegal conduct of the defender, or of others acting in his name." Crombie averred, that on 25th March 1859, he was served with a small-debt summons, before the Sheriff Small-Debt Circuit Court at Auchtermuchty, at the instance of M'Ewan, for a debt of L.2, 9s. 9d., being the balance of the price of wheat. In the copy of the summons served, the blank left for the insertion of the court-day was filled up with the date 13th March next. On 13th May 1859 the court was held, and Crombie not having appeared, M'Ewan took decree in absence for the amount sued for, and 4s. 1d. of expenses. The decree was extracted, and on 20th May Crombie was charged, the charge bearing that there were prefixed copies of the complaint and decree. On 3d June a poinding was executed. The officer left a schedule of poinding, which set forth the date, the effects pointed, and the value of them; and proceeded, "I, Donald Ross, sheriff-officer, certify that, upon the 3d day of June 1859 years, I duly poinded the above effects, in terms of warrant, before and in presence of Thomas Stark and George Martin, both indwellers in Auchtermuchty, witnesses and appraisers to the premises." On 8th June an attempt was made by M'Ewan, or others employed by him, to enter Crombie's house in order to carry off the pointed effects; this attempt was resisted, and was desisted from on the arrival of the messenger to serve the summons in this action. It was pleaded;—(1.) The pursuer having received no citation to appear in court on 13th May 1859, the decree, and all that followed on it, was null. (2.) The poinding following on the decree was also inept, in respect of in- **[334]** -formalities in the execution thereof. (3.) The pursuer was not due to the defender the debt sued for. (4.) The standard of measurement used by the defender in the account libelled on in the Small-debt Court was not in conformity with the requirements of the Weights and Measures Acts.

The defender averred;—That though the date of the Circuit Court to which the pursuer was summoned was misstated in the body of the copy summons served, it was correctly intimated on the back of the paper. It was pleaded for the defender;—The action was incompetent, in respect (1) that the small-debt summons, execution of citation, and decree following thereon, are *ex facie* regular and valid, and are not liable to be challenged or set aside in the present action; (2), that the present pursuer having failed to avail himself of the statutory power for obtaining a rehearing, and *separatim* having failed to bring the said decree otherwise under review, cannot now insist in his conclusions for damages. 2. The statements relating to the value and quality or measurement of the wheat are irrelevant, and are incompetently founded on in the present process. 3. The decree, and proceedings following thereon, having been regular, are not liable to be opened up, and can afford no ground for the present action.

The Lord Ordinary, on 10th February 1860, pronounced this interlocutor:—"Finds

that the pursuer has not set forth any competent and relevant grounds sufficient to support the conclusions of the action; sustains to that effect the first, second, and third pleas in law for the defender, and dismisses the action, and decerns: Finds the defender entitled to expenses; allows an account," &c.[1]

The pursuer reclaimed, and argued;—By the Act 1 & 2 Vict. c. 41, sect. 30, it was provided that there should be no review of any judgments pronounced in the Small-debt Court, except (under sect. 31) by the Court of Justiciary, on the ground of malice, or where there had been such informality as prevented substantial justice; but that mode of review was taken away **[335]** by sect. 22 of the Sheriff-court Act 17 & 18 Vict. c. 80, by which the review of all causes not exceeding the value of L.25 sterling was declared incompetent. That enactment clearly applied to small-debt decrees, as well as others. All review being excluded, the pursuer was entitled to insist in this action for damages for the wrong he had suffered.[2] It was not necessary to reduce the decree in order to have the remedy sought.[3] Though review of the Sheriff's decree was held to be excluded, the Court was not precluded from reviewing the legality of procedure in a poinding following on the decree.[4] The schedule of poinding was illegal; because it did not set forth for what debt, or at whose instance, the poinding proceeded. This was necessary under the 24th section of the Personal Diligence Act (1 & 2 Vict. c. 114), and also at common law, otherwise a party whose goods were poinded had no means of knowing to whom he would require to pay the debt for which the goods were poinded, in order to relieve them.

LORD JUSTICE-CLERK.—This is rather a peculiar case, in respect of the form in which the action comes before us. It is founded on the allegation that a small-debt decree was taken in the absence of the pursuer, and without his being cited, and

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[1] "NOTE.—The sole injury here alleged that could properly be taken cognisance of, is the execution and attempted enforcement of a poinding. That proceeding can only be made the subject of complaint on the ground either that it was carried through without a warrant, or that it was executed in an improper manner.

"The warrant here was a small-debt court decree. To the decree itself, as it appears *ex facie*, no objection is taken; but it is alleged that it was unduly obtained without a proper citation being given to the party, and also that the claim to which it related was objectionable and groundless. The Lord Ordinary is of opinion that none of the objections thus stated to the decree are admissible here. Whether they could now be brought forward at all, need not be inquired. It is enough to say that they cannot be entertained so long as the decree stands unaltered and unreduced. Some warrants, such as those of sequestration and the like, may be challenged without reduction, because they are generally granted *ex parte* and *periculo petentis*. But a decree of court, *ex facie* regular, must be held a good warrant for competent diligence so long as it is not set aside.

"Neither in this case does there seem to have been anything improper in the mode of executing the diligence. The only feasible objection stated seems to be, that the schedule list or inventory left with the party of the poinded goods was imperfect, in not setting forth its warrant; but this does not seem a good objection. The Personal Diligence Act 1 & 2 Vict. cap. 114, sect. 24, it is true, requires a specification to be made in the schedule of the poinding creditor's name, which was not here done; but this is not enjoined by the Small-Debt Act 1 Vict. cap. 41, sect. 20; and the Lord Ordinary does not consider that the one statute is in that respect superseded by the other. Even if an omission had been made of something that ought to have been inserted, the Lord Ordinary is not satisfied that this would make the poinding null, or afford a ground for claiming damages, particularly where it is clear, as in this case, that the party who had been duly charged upon the decree knew quite well at whose instance and for what debt the poinding was used. The poinding here did not even proceed as far as a sale."

[2] Graham *v.* Mackay, 25th Feb. 1845, *ante*, vol. vii. p. 515.

[3] M'Leod *v.* M'Leod, 11th Feb. 1829, 7 Sh. & D. p. 396; Grindlay *v.* Saunders, 28th Feb. 1829, 7 Sh. & D. p. 493.

[4] Learmont *v.* Darlington, 28th Feb. 1849, *ante*, vol. xi. p. 884.

that the diligence of poinding to enforce that decree was executed in an irregular way. These, so far as I can see, are the grounds of action. Upon these grounds there is a general conclusion in the summons that the defender shall pay the pursuer L.300, "in name of reparation and solatium to him for the loss, injury, and damage sustained by him in his character, reputation, credit, circumstances, and feelings, by and through the wrongful and illegal conduct of the defender, or of others acting in his name, for whom he is responsible." Now, that can hardly be said to be an action of damages founded on the wrongous use of diligence, for it seems to be for what was done in obtaining a small-debt decree, as well for what has been done after the decree. Small-debt decrees are protected from review by a very stringent provision of the Small-Debt Act, and we cannot entertain, for the purpose of setting aside a small-debt decree, any ground of challenge whatever. Not only is the enactment in the 30th section a most stringent one, for it provides that we shall not, under any circumstances, nor on any ground, entertain a challenge of a small-debt decree; but also, in the immediately following section, the statute provides a mode of review in another court than that in which your Lordships sit: in short, it shuts the door of the Court of Session against this class of cases altogether; this is abundantly clear when the 31st section of the Act is considered, which gives the appeal to the Circuit Court, and states the ground on which it may be taken. For the grounds of appeal do not concern the merits of the action, but they are those very grounds of incompetency and illegality which, if it had not been otherwise provided, would have been good grounds for challenging the decree in this Court. When you take this in connection with the other clause of the statute, the conclusion is irresistible, as fixed in the cases of Graham *v.* Mackay, and Lewis *v.* Patullo, that we cannot entertain a challenge of such a decree here. If we are prevented from entertaining a challenge of this decree, and are therefore bound to consider it as a valid and legal decree, it seems to me a most anomalous and startling proposal that we should award damages to the pursuer, in respect of the defender having obtained that legal decree; for that would amount to nothing else than sustaining *per ambages* our jurisdiction to review this decree. Therefore I never could for one moment entertain this action of damages on that ground. But then there is the challenge of the diligence; and it is argued that, however much the decree of the Small-debt Court is protected from challenge, any irregularity in the diligence following on the decree may be a good ground for setting aside the diligence and awarding damages. But the pursuer attempts to induce us to consider whether the diligence is bad, because it proceeds on a decree in an action in which the party has not been well cited. To that there is the same objection as to the former ground of action. That just comes to be an objection to the decree; and we cannot con- **[336]** -sider the validity of the decree for that purpose more than for any other purpose. I must hold this decree good, because it professes to be a valid small-debt decree.

It is said that the effect of the clause in the Small-Debt Act has been altered by the provisions of the Sheriff-court Act of 1853; and we were told that it was impossible to read the 22d section of that latter Act without seeing that the remedy provided by the 31st section of the Small-Debt Act has been taken away; and it was anxiously argued to us that, if that were true, it ought to revive the common law jurisdiction of this Court to review such judgments on the grounds of incompetency and illegality. But this proceeds on a misapprehension of the provisions of the Act of 1853. It says (section 22), "It shall not be competent, except as hereinafter specially provided for, to remove from a Sheriff-court, or to bring under the review of the Court of Session, or of the Circuit Court of Justiciary, or of any other court or tribunal whatever, by advocation, appeal, suspension, or reduction, or in any other manner of way, any cause not exceeding the value of L.25 sterling, or any interlocutor, judgment, or decree pronounced, or which shall be pronounced, in such cause by the Sheriff."

The first observation I make upon that section is, that it refers entirely to appeal and review on the merits; but even if it were not so, that would not affect the present question, because the 22d section refers entirely to causes in the ordinary rolls, and not to small-debt causes. The first twenty-five sections of the Sheriff-court Act refer to and are concerned with ordinary Sheriff-court causes. And this 22d section is concerned with the ordinary Sheriff-court causes under the value of L.25—that is to

say, practically, between L.12 and L.25. With the 26th section commence the provisions of the Act regarding small-debt causes; and there is no repeal, express or implied, of that section of the Small-Debt Act which prohibits challenge of small-debt decrees in this Court, and gives a right of review in the Circuit and High Courts of Justiciary. The Act of 1853 introduces nothing new in such causes, but leaves the law as fixed by the 31st section of the Act 1 & 2 Victoria, c. 41, as interpreted by the two judgments I have referred to.

But, in the next place, this diligence is challenged as wrongful and irregular, because the inventory of the poinded effects, which was left with the debtor, the pursuer of the action, did not specify on the face of it the creditor at whose instance the poinding was executed, or on what decree. At first sight this objection seemed formidable, because nothing was left with the debtor but the inventory of the poinded effects, and that did not tell for what debt the poinding was executed: it did not give the information which was required to enable the party to relieve his goods from the diligence by paying the debt; and if this case had occurred under the Personal Diligence Act, this would no doubt have been a faulty proceeding, because there would have been a failure to comply with the express directions, which require such particulars to be stated in the schedule of poinding. That Act provides (section 24) "That the officer shall leave the poinded effects with the person in whose possession they were when poinded; and he shall deliver to the possessor a schedule specifying the poinded effects, and at whose instance they were poinded, and the value thereof." But then we are not under the Personal Diligence Act, and it was very well pointed out that that Act is confined in its operation to diligence on decrees in causes other than small-debt causes, and that they were left to be regulated by the provisions of the Act of the preceding session of Parliament; and in the clause in the Small-Debt Act there is not the same provision that the inventory shall mention the name of the creditor.

But it is necessary, in order to make this matter clear, to refer more in detail to the Small-Debt Act. Section 13 provides for hearing and judgment in small-debt causes, and enacts that "the decree stating the amount of expenses (if any) found due to any party," "and containing warrant for arrestment, and for poinding and imprisonment when competent, shall be annexed to the summons or complaint, and on the same paper with it, agreeably to the form in schedule A annexed to this Act, or to the like effect; which decree and warrant, when signed by the clerk, shall be a sufficient authority for instant arrestment, and also for poinding, and sale, and imprisonment, where competent, after the elapse of ten free days, from the date of the decree, if the party against whom it shall have been given was personally present when it was pronounced; but if he was not so pre- [337] -sent, poinding and sale and imprisonment shall only proceed after a charge of ten free days, by serving a copy of the complaint and decree on the party personally, or at his dwelling-place." This is a case in which the defender in the small-debt action was not present, and, therefore, poinding could only proceed after an expired charge of ten days. Accordingly a charge was given, on 20th May 1859, in which the officer tells Crombie, above designed, "You are hereby charged to implement the decree, of which, and of the complaint whereon the same proceeded, the above is a copy, within ten days from this date, under pain of poinding and sale, without further notice."

Then, the ten days having elapsed, the officer proceeded to the execution of the poinding; and his duty in that matter is regulated by the provisions of the 20th section of the Small-Debt Act: "The sequestration, or poinding and sale, shall be carried into effect by the officer in a summary way, by getting the effects sequestrated or poinded duly appraised by two persons, who may also be witnesses to the sequestration or poinding, and leaving an inventory or list thereof for the party whose effects are sequestrated or poinded, and not sooner than forty-eight hours thereafter," selling the same by public roup; "and a report of the proceedings in the sequestration or poinding, and sale, and proceeds, or of the delivery of the effects, shall in every case be made by the officer to the Sheriff-Clerk within eight days thereafter, agreeably to the form in schedule C, annexed to this Act, or to the like effect." These directions are, in material respects, different from those in the Personal Diligence Act regarding the mode of executing poindings on other decrees; but it is unnecessary to specify these, because the only question here is, whether this inventory is conform to that clause of

the statute? We have not to inquire whether the statute provides the best possible form, or does the greatest possible justice to the defender. It may be that it is a great defect in the Act, that the inventory does not convey sufficient information; and if one were framing this Act anew, one might be very much moved by considerations of that kind; but here we can only inquire whether this inventory is imperfect under the 20th section of the Act, and does not satisfy all its provisions. It says that the poinded effects belong to David Crombie: it specifies them and gives their appraised value; it states who the appraisers are—that they are the witnesses; and the document is duly signed by the sheriff-officer. Is anything more required by the Act? It is not required by the Act that the inventory shall contain anything except a statement of the poinded effects and their value, and the names of the appraisers and witnesses; above all, it does not require that the creditor's name shall be stated in the inventory, and there it is in marked contrast to the provisions of the Personal Diligence Act; and therefore, the Legislature must have intended to make a different provision, in that matter, in the Personal Diligence Act from that which was made the year before with regard to the execution of poindings on small-debt decrees. On the whole matter, I am unable to say that there has been any statutory irregularity or omission. I am therefore for adhering. I think the action incompetent, in so far as founded on defects in the small-debt proceedings and decree, and irrelevant, in so far as founded on allegations of fault in the execution of the poinding.

Lord Cowan.—I think the distinction taken by your Lordship is very important, and should clearly appear in our judgment. This is an action of damages on the ground of illegal poinding of the pursuer's effects by the defender. There are two grounds of action which are entirely different. The first is the irregularity in the decree. I think it is as plain a proposition as can be stated, that a decree obtained in the Small-Debt Court must be held as final and conclusive in this Court. In all that your Lordship has stated I quite concur; and I am only desirous to advert to the grounds on which it was attempted to show that the effect of the 30th and 31st sections of the Small-Debt Act has been affected by the provisions of the Sheriff-Court Act of 1853, in its 22d section. All appeals to the Justiciary Court, it was contended, are now done away with; and this being so, it was vehemently urged that no review against gross illegality in the Small-Debt Courts of this country would be open were redress refused in the Court of Session. But there is no foundation whatever for the statement that the power of appeal conferred by the Small-Debt Act has been interfered with by the Sheriff-Court Act. The 22d section relates exclusively to cases between L.12 and L.25 decided by the [338] Sheriff in his ordinary Court. Accordingly, since the Sheriff-Court Act passed in 1853, we have frequently entertained and adjudicated upon appeals in the Circuit Courts of Justiciary without any hesitation. And last year the well-known case of Logan was brought before the High Court under this very provision of the Act, and judgment was given without any doubt being stated, either from the bar or on the bench, as to the competency of the appeal. That leaves, as the sole ground of this action, the alleged defect in the inventory of the poinded effects which required to be left with the debtor. That appeared to us to be a point deserving mature argument; and I arrive at the same view on the matter as your Lordship in holding that there has been no deviation from the rules of the statute. There must be left with the debtor an inventory or list of the poinded effects, just as was required by the previous statute of Geo. IV. That we have here an inventory or list of the poinded effects cannot be disputed. It is said that it may lead to hardship and injustice if nothing but an inventory of this kind is left with the debtor, because he is not informed who is the poinding creditor, or for what debt the diligence has been used. Even if it were so, this would not set aside this poinding, there being no statutory irregularity. But I cannot admit that any injury is likely to result from it. Either the debtor is present when the decree containing warrant for poinding is pronounced, or, if he is not present, he must receive a charge in terms of the statute, and that charge must contain a copy of the summons and decree, and of the warrant, which is to be followed by the poinding. There is no ground or practice, even in the circumstances of this case, for alleging that the poinding was oppressively used or caused damage or loss to the pursuer, for in truth no sale followed on it. But, in any view, there being no statutory irregularity, I concur with your Lordship in thinking that the case of the pursuer, on this ground, also entirely fails.

LORD BENHOLME.—I agree with your Lordships, and I would only add one observation with reference to the argument of the pursuer, that the appeal from the Small-Debt Court decisions to the Court of Justiciary has been abolished by the 22d section of the Sheriff-Court Act 16 and 17 Vict., c. 80; and that therefore, in order to prevent injustice, it has become necessary that such actions of review should be entertained in this Court. It was represented to us that by this section review of all Sheriff-Court decrees was excluded, including decrees in the Small-Debt Court; and it was gravely contended that that clause abolished the privilege of review from the Small-Debt Court to the Circuit Court and High Court of Justiciary given by the Act 1 Vict., c. 41. That argument is quite inconsistent with the first section of the Act. The preamble sets forth the Small-Debt Act, and the previous Sheriff-Court Act of 1st and 2d Vict., c. 119, and then it continues as follows:—"With respect to cases in the Sheriff-Court, other than those provided for by the first recited Act as extended by this Act, be it enacted as follows." Now, is not this a clear statement that what follows does not apply to small-debt causes? I cannot understand how any one that had read the whole Act could seriously argue that this was exclusion of review of a Small-Debt Court decree by a Circuit Court or the High Court—a procedure in daily practice.

LORD WOOD absent.

The Court pronounced the following interlocutor:—"Refuse the desire of the reclaiming note; adhere to the interlocutor reclaimed against: Find additional expenses due, and remit," &c.

[Cf. *Gray* v. *Smart*, 19 R. 698; *Pollock* v. *Goodwin's Trs.*, 25 R. 1056.]

No. 52. **XXIII. Dunlop 338.** 18 Jan. 1861. 2nd Div.—Lord Kinloch.

JOHN DENNISTOUN WOOD and Others, Pursuers.—*Moir—Horn.*

PATRICK WOOD and ALEXANDER WOOD, Defenders.—*Patton—Forman.*

Testament—Legacy—Certainty of Legatee—Trust—Construction.—A testator provided,—"the money left to my wife during her life is at her death to be given to my nephews and nieces," the children of two brothers. He gave his widow power, which she did not exercise, of apportioning the money between the families of the brothers, or the different members of their families, in any way she chose. On her death one-half of the fund was set apart for each of the families. One of the brothers had predeceased the testator. The children of the other brother were born some before and some after the death of the liferentrix. **[339]** *Held* (affirming judgment of the Lord Ordinary), that the date of payment was fixed at the death of the liferentrix, and the children born subsequently were not entitled to share in the bequest.

The estate of Walter Wood, who died in Glasgow in 1832, was disposed of by the following deeds:—Mr. Wood and his wife executed a post-nuptial contract of marriage, by which they conveyed to themselves, and to the survivor of them, the whole heritable and moveable estate then belonging to, or which should be acquired by them. It was agreed, that as there was no issue of their marriage, the fee of their whole real and personal property should, on the dissolution of the marriage by the decease of either party, be divided equally,—one-half to become the absolute property of the husband, or his heirs, executors, or assignees, and the other half to become the property of the wife, or her heirs, executors, or assignees, to be disposed of by them respectively at pleasure, subject to the liferent of the surviving spouse, reserving a right to Mr. Wood to dispose of the fee of one-fifth of the property by deed, to take effect at the dissolution of the marriage.

Mr. Wood executed a will, by which he bequeathed various legacies; among others, a legacy of L.2000 to his brother Patrick, or his family, and a bequest in the following terms:—"The money left to my wife during her life is at her death to be given to my nephews and nieces—that is, to the children of my brothers, John and Patrick Wood; and to them I leave and bequeath said property, burdened as aforesaid

with the liferent of my wife, Mary Dennistoun, and left entirely at her disposal, in as far as regards the sums to be allotted to each, but on no account to be alienated from them. My own feeling is, that it should be left to them in equal sums, giving, however, a preference to my brother John's family; but on this subject she will be better able to judge, as circumstances may have arisen to make it proper and desirable to divide the money unequally, either from some individual of the family requiring more than another, or by their general good conduct and attention to me or to her, deserving more from us than the others."

Mrs. Walter Wood survived her husband, and acted as one of his executors. She died in 1842, leaving a settlement by which she disposed only of the half of the property to which she had right under the marriage contract. No separation of the shares of the fund belonging to Mr. and Mrs. Walter Wood took place till after her death, when it was found that the sum to which the families of Mr. Wood's two brothers were entitled amounted to L.18,400. John Wood, who died in 1820, left five children. Patrick Wood survived till 1846; he received L.6700 to account of the bequest in favour of his children, the executors of Walter Wood still retaining the remainder. Some of Patrick's children were born before and some subsequent to the death of Walter Wood's widow.

This action was raised by John Dennistoun Wood, and the other children of Patrick Wood born before Mrs. Walter Wood's death, against their two younger brothers, concluding for declarator that the pursuers had the sole right and interest in the one-half of the estate of their uncle, Walter Wood, bequeathed by him to the children of their father, Patrick Wood.

The pursuers pleaded;—They being the whole children of Patrick Wood who were in existence at the period fixed by the testator for the payment of his bequest to the children of his brothers, John and Patrick, the pursuers, are the only parties entitled to share in that estate as children of the said Patrick Wood; and as they acquired a vested interest in their share thereof, on the death of the liferentrix, the defenders who were born subsequent to that event have no right or claim to any portion of the estate.

The defenders pleaded;—(2.) Upon a sound construction of these deeds, in their whole clauses and terms, it was the testator's intention that the fee **[340]** of the share of his estate should belong and be accounted for and paid to and among the whole children of his brother Patrick, whensoever born, to whom the same was destined by the testator as *in loco parentis*. (3.) The right of Patrick Wood's children to the said share of the succession of the testator did not vest in any of them absolutely and indefeasibly until the period of the death of their father. (3.) Or otherwise, it vested in those of them born at the period of the death of the testator, but that subject not only to the exercise of the faculty of distribution conferred upon the liferentrix, but also to the right of participation therein of the whole children that were subsequently born, whether before or after the death of the liferentrix, including the defenders.

On 23d June 1859, the Lord Ordinary pronounced this interlocutor:—"Finds that, according to the sound and just construction of the last will of the deceased Walter Wood libelled, the children of his brother Patrick Wood, to whom certain money was thereby given, were the children in existence at the death of the widow of the said Walter Wood: Therefore, finds, decerns, and declares conform to the conclusions of the summons: Finds no expenses due," &c.[1]

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[1] "NOTE.—The question at issue must be decided, as in all such cases, according to the intentions of the testator, Walter Wood. But his intentions are to be given effect to, not as they may be guessed at, but as they are expressed in his deed, giving to that deed the construction proper to all such. Though the deed be written by Mr. Wood's own hand, it is not thereby exempted from the ordinary principles of construction, which are not technical rules, but canons of presumable purpose.

"The money destined to the children of the testator's brothers is expressly ordained to be 'given' to them at the death of his wife, who liferented it. It is also declared to be 'left entirely at her disposal in so far as regards the sum to be allotted to each, but on no account to be alienated from them.' As the widow did not exercise this power of distribution, the provision is only of importance as aiding the construction of the settlement.

"The 'children' thus favoured are mentioned generally under that designation,

[341] The defenders reclaimed, and argued ;—On a sound construction of his settlement, the bequest of Walter Wood, in favour of the children of his brother Patrick, was intended to be in favour of all of them, whether born before or subsequent to the death of the liferentrix. The deed afforded the means of carrying out such an intention by the appointment of executors, whereby a trust was constituted. Had Patrick had no children at the date of the death of the liferentrix, the executors would have required to hold the fund till it was seen whether he had a family. If children born to Patrick Wood, in such circumstances, would have been entitled to the whole bequest in favour of his family, they were not to be cut out of their right to a share, because he had had children born to him previous to the death of the liferentrix, or some of them before the death of the testator. A bequest to a party's children was a bequest in favour of his whole family. There was no legal difficulty in paying to Patrick's children alive at the death of Mrs. Wood their share, subject to the right of children subsequently born to participate.[1]

Lord Cowan.—This question arises under certain holograph testamentary writings executed by Walter Wood, who died on 9th February 1832. By the will, which is dated 12th June 1826, he provides the liferent of his whole estate to his widow in these terms :—" To my much loved wife Mary Dennistoun, I leave and bequeath the

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without further explanation. 'The money' (it is said) 'left to my wife during her life is, at her death, to be given to my nephews and nieces, that is, to the children of my brothers John and Patrick Wood.' The Lord Ordinary cannot doubt that the death of the widow is the prescribed term of payment of the bequest. Such is the natural meaning of the words employed. That such was the intention of the testator is also to be inferred from the circumstance that he makes no provision as to holding or accumulating the fund, and no provision for the disposal of any intermediate interest accruing on the capital sum. 'The money left to my wife during her life is, at her death, to be given to my nephews and nieces,' appears the clearest of all directions, both as to the money intended to be left, and the time when it was intended to be paid.

" It appears to the Lord Ordinary that the terms of this bequest carry it to the children of Patrick Wood existing at the death of the widow, and exclude from participation all subsequently born. He considers it to be a general rule, both of our law and that of England, that, where a term of payment is fixed, a legacy to the children of a particular individual belongs to the children existing at that term. These are the descriptive legatees entitled to exact payment at the time that the legacy is payable. Unless by payment to these, the settlement is not given effect to, in the direction that payment shall then be made. The testator must be presumed to intend what he says, when he declares that at a particular date the bequest shall be paid ; and, in the ordinary case, the only way of fulfilling his direction is to pay to the children then existing, so as to follow out his instructions both as to persons and time, which would not be done by suspending payment to await a possible eventuality. But, whilst such, as the Lord Ordinary conceives, is the general rule, it is open in every case to gather from the deed evidence of a different purpose ; and to hold, if the deed affords sufficient warrant for the conclusion, that it was not the children at any particular date, but the whole children, born or to be born during their father's lifetime, who were intended to be favoured. The general rule must yield to the particular provision, when sufficiently declared.

" In the present case the Lord Ordinary can find no ground for denying effect to the general rule. He perceives no provision in the deed running adverse to the rule. On the contrary, the power given to the testator's wife, to distribute the legacy at her discretion amongst the parties favoured, confirms the presumption that the bequest is confined to those in existence prior to her decease ; because she could not exercise any personal selection amongst parties not born, and therefore not known to her."

[1] Pearson *v.* Corrie, 28th June 1825, 4 Sh. & D. (N.E.) p. 119 ; Scott *v.* Crombie, 14th February 1826, 4 Sh. & D. (N.E.) p. 454 ; Scheniman *v.* Wilson, 25th June 1828, 6 Sh. & D. p. 1019 ; Forbes *v.* Luckie, 26th January 1838, 16 Sh. & D. p. 374 ; Calder *v.* Dickson, 4th June 1842, *ante*, vol. iv. p. 1365 ; Crawcour *v.* Graham, 3d February 1844, *ante*, vol. vi. p. 589 ; Baillie *v.* Seton, 16th December 1853, *ante*, vol. xvi. p. 216 ; Eccles *v.* Hunter, 7th March 1856, *ante*, vol. xviii. p. 778 ; Wyer *v.* Laing, 17th November 1858, *ante*, vol. xxi. p. 4.

liferent of all my property, real or personal, with the following deductions;" and after bequeathing certain legacies, he settles the fee or capital of the estate thus:—"The money left to my wife during her life is, at her death, to be given to my nephews and nieces,—that is, to the children of my brothers John and Patrick Wood; and to them I leave and bequeath the said property burdened as aforesaid with the liferent of my wife Mary Dennistoun, and left entirely at her disposal, in so far as regards the sums allotted to each, but on no account to be alienated from them." In the same deed there is this important provision as to his executors,—"I appoint as my executors, should they, or any two of them, survive me,"—the parties named,—"and of them I beg the favour of taking this trouble, and having the money lent out on heritable or undoubted personal security, and in this they must be very particular, as I consider no one security sufficient,—that is, there must be both a borrower and cautioner, both considered undoubted." There are several codicils which do not affect the question to be decided now, as also a postnuptial deed; but which admittedly leaves the matter as it stood upon the original will.

The liferentrix survived her husband, and died on 11th August 1842, having thus enjoyed her liferent ten years. After her death, the executors gave over one-half of the estate to the children of John Wood, and paid part of the other half to Patrick Wood for behoof of his children, but retained the remaining portion of this half of the estate, and it is with reference to it that the present question arises.

[342] The pursuers and defenders are all of them children of Patrick Wood. The pursuers are the children of his first marriage, and were all born *prior* to the death of the liferentrix in 1842. The defenders, the children of the second marriage of Patrick Wood, were all born *subsequent* to 1842. These being the only parties in the field, the question is well brought out by the conclusion of the summons, and is whether the children born after the death of the liferentrix are entitled to participate in the share given to the children of Patrick Wood, along with their brothers and sisters existing prior to the death of the liferentrix.

The question essentially depends on the intention of the testator. Did he intend that his nephews and nieces in existence at the widow's death should exclusively take the estate, or that the children born or to be born at any time should have an equal participation? The Lord Ordinary has adopted the former view of the testator's intention; and I am of opinion that he has rightly decided the question.

The testator provides the *liferent* of his whole estate to his widow, and the *fee* or capital to his "*nephews and nieces*," the children of his two brothers, Patrick and John, to be given them at her death. And the deed creates a trust to carry fully out these views; to protect the interests of the liferentrix and of the children respectively. No machinery is provided for the prolongation of the trust after the death of the liferentrix; nor is there any provision that children born afterwards are to participate. The terms in which these views are provided for are very significant. At the liferentrix's death, the money is "to be given to my nephews and nieces," "the children of my brothers," and "to them I leave and bequeath," and so forth,—all words expressive of present bequest to take instant effect in favour of the individuals described as his nephews and nieces, or as the children of his brothers. A gift of this kind so expressed leads naturally to the conclusion that it must be taken by those who can take when it becomes available. There is no question of vesting necessarily involved in this discussion. Parties are at one that this was a vested interest taken, at all events, as at the death of the liferentrix. The pursuers contend that the interest vested *a morte testatoris*. It is not necessary to consider whether the interest vested at the one period or the other. The question is—there being children ready to take at the death of the liferentrix, and no machinery to continue the trust, but an express direction to pay on that event—are we to construe the deed so as to confer an interest on parties not then born? I cannot find in the words of the deed anything enabling me to arrive at that conclusion. I think that it was among those alive at the liferentrix's death that the testator intended this money should be divided. That is the inference to which the terms of bequest naturally lead. And in the rest of the deed there is nothing to show that the testator meant to provide for children who might be born afterwards.

A great deal of argument and authority was offered on the general question as to the meaning of a bequest to "the children of A B." When the bequest is to take

effect at the death of the testator, and when there have been children at the date of the deed, the fair and reasonable presumption is that those children alone are entitled to take who are able to take when the distribution of the estate is to be made, and the succession opens. That may be contradicted no doubt by the provisions of the deed; but there is nothing of that kind here,—there is only a power of distribution. Now observe how that is expressed: after the words conferring the fee of the liferented property on the children, which have been quoted, the clause proceeds—"and left entirely at her disposal, in so far as regards the sums to be allotted to each; but on no account to be alienated from them. My own feeling is, that it should be left to them in equal sums, giving, however, a preference to my brother John's family; but on this subject she will be better able to judge, as circumstances may have arisen to make it proper and desirable to divide the money unequally, either from some individual of the family requiring more than another, or by their general good conduct and attention to me, or to her deserving more from us than the other." It may be the better reading of this clause to view the bequest as to the nephews and nieces *per capita*, and not to the two families *per stirpes*, as the parties have dealt with it. But this is of no moment. For, however construed in that respect, I apprehend that the clause, whatever effect it might have on the question, whether the vesting is at the death of the testator or of the liferentrix, cannot affect rights arising posterior to her death. **[343]** The power was given in reference to a state of things that could only occur during her life. The power rather tells in favour of the fair presumption of intention, to which the words of bequest give rise, than against it.

The cases cited at the discussion were not very applicable. They had mostly reference to questions under settlements which contained clear destinations to children born or to be born, or were so expressed as to lead to that inference. There are other authorities, however, in the books, bearing a closer resemblance to the present case. In Mackenzie *v.* Holte's Legatees, 2d February 1781, Mor. p. 6602, the destination was to the children of parties named, to be paid on the expiry of a liferent right, and the judgment of the Court was, that the children alive on the death of the liferentrix had each right to the legacy, while it is taken for granted, in the statement of this case that those born afterwards would not have participated in this division. Again, there is a case reported by Hume (p. 270), M'Courtie *v.* Blackie's children, 15th January 1812, in which it was held that a legacy left to certain persons *nominatim* as individuals, and "to the children" of another person, embraced the whole children *per capita*, each child alive when the succession opened being entitled to participate with the *nominatim* legatees. It will be seen from the report that the decision proceeds on the footing that children *post nati* would not participate. There is also the case of Grant *v.* Fyffe in 1810, where a child *in utero* was held to be entitled to the same rights as if actually born on the opening of the succession. Had the bequest been regarded as embracing all children, whether born or to be born, there would not have been any necessity for specially pressing the claim of the child *in utero* at the testator's death. And these cases were followed by Pearson *v.* Corrie, 28th June 1825, referred to in the discussion, where a bequest left to the lawful heirs of the testator's sister was held tantamount to a bequest to her children, and those existing at the testator's death were preferred. These were proper instances of bequests "to children of A B," called to take either at the testator's own death or at that of a liferenter; and I refer to them in support of the principle, that a bequest simply so expressed has been viewed to be indicative of the testator's intention that the subject of it should be taken by the children alive at the date of payment or distribution, and that there is a presumption to that effect. This is liable to be set aside of course, when there exists in the deed evidence of a contrary intention, but in this particular case there is no room for any such view. And, on the whole, I am very clearly of opinion that the Lord Ordinary's interlocutor is right, in holding that the children alive at the death of the widow are exclusively entitled to the money provided by the settlement of the testator.

LORD JUSTICE-CLERK and LORD BENHOLME concurred.

LORD WOOD absent.

The Court adhered, and found the respondents entitled to expenses since the date of the Lord Ordinary's interlocutor.

[Cf. *Buchanan's Trs.* v. *Buchanan*, 4 R. 759, 761; *Ross* v. *Dunlop*, 5 R. 836, 837, 838.]

No. 53. **XXIII. Dunlop 343.** 18th Jan. 1861. 2nd Div.—Sheriff of Forfar.

HENRY KERR (CHAPPELL'S Trustee).—*Young—Anderson.*

THE DUNDEE GAS LIGHT COMPANY, Defenders.—*Macfarlane—Thoms.*

Obligation—Retention—Compensation—Liquid and Illiquid.—A builder entered into a contract by offer and acceptance to perform work according to a specification. He commenced the work. On his bankruptcy and abandonment of the contract, the building materials and tools he had brought upon the premises were retained by his employers. In an action by the trustee on the sequestrated estate for the value of the work done, and for the value of the materials and tools, the employers averred that they had a claim for damage in respect of the bankrupt's failure to complete the contract, and in respect of that claim pleaded compensation. *Held* (1.) That the employers were entitled to retain the materials in order to complete the work, subject to a claim for the value of them, and to retain the tools for use in the execution of it, subject to a claim for their restoration on the completion of the work, and reasonable remuneration for the use of them. (2.) That no objection being taken to the competency of the plea of compensation as founded on an illiquid claim, the employers were entitled to set off their claim for damages against the **[344]** claims for the work done under the contract, for the value of the materials, and for the use of the tools, but not against the pursuer's right to damage for the illegal detention of the tools after the work was completed.

The directors of the Dundee Gas Light Company having resolved to erect a gas-holder tank, on part of their property called "Peep-o'-Day," had a specification prepared with a view to entering into a contract for the execution of the work. The specification, after describing the nature of the work, set forth that payments were to be made to the contractor monthly, at the rate of 75 per cent of the estimated value of work completed, and the balance when the whole work was finished, which was to be on 31st March 1858, under a penalty of L.5 for every day thereafter. The last clause of the specification contained this declaration:—"The contractor will require to enter into a separate formal contract, along with his securities, for the due fulfilment of the work, in all respects agreeably to the foregoing specifications and plans, and the company will not be held as under obligation in any way, until such contract be adjusted and executed." By letter addressed to the directors, dated 12th October 1857, Joseph Chappell, a contractor in Glasgow, offered to execute the work, according to the specification, for L.1295, 10s. 6d. By letter, dated 19th October, it was intimated to him that his offer had been accepted, and that the draft of a formal contract was in course of preparation, and would be sent for revisal.

A draft-contract was accordingly sent to Chappell on 28th October, but several clauses were altered or objected to by Chappell. These alterations were not approved of on behalf of the Gas Company, and the contract was never adjusted or executed. The draft contained a clause declaring that all materials, articles, and others, which Chappell should bring upon the Company's premises for the purposes of the work, should not be thence removed until after the full completion of the contract, but the same should be held as impignorated to the Company for the due performance of the contract.

On 5th December 1857 Chappell commenced operations. His affairs becoming embarrassed, he ceased working on 28th December. On 2d January following he was sequestrated, and on 18th January Henry Kerr was confirmed as trustee on his estate.

The Gas Company incurred some expense, in protecting from injury from the weather, the work that had been executed by Chappell; ultimately they employed another contractor to complete the work. On 13th January the work done by Chappell was valued at L.90. In the month of February Chappell's trustee having demanded delivery of the materials and tools left by Chappell, the company refused to give them up, and applied to the Sheriff for a warrant to have them valued. The valuators appointed by the Sheriff reported that there were materials and tools of the following value:—Hewn stones, L.46, 10s. 8d.; sand, L.3, 14s. 6d.; timber,

miscellaneous tools, &c., L.14; and a crane, L.25—in all L.89, 5s. 2d. The whole were handed over to the contractor employed to finish the work. The materials were made use of. The tools were never given up to the trustee.

Mr. Kerr then raised this action in the Sheriff-Court of Forfarshire, concluding —(1.) for L.53, 11s. 6d. as the balance of the sum of L.90, 9s. sterling, the value of the work executed by Chappell after deducting L.36, 17s. 6d. paid to account; (2.) for the sum of L.89, 5s. 2d. as the value of the materials, tools, &c., left on the premises by Chappell. It was averred that after the draft-contract had been handed to Chappell various alterations had been made by him which had not been agreed to by the defenders; and the pursuer had offered to the defenders to allow Chappell to complete the contract for behoof of his creditors.

The pursuer pleaded;—The work done having been executed in a workmanlike manner, and the pursuer having offered to allow Chappell to com- **[345]** -plete the work, the defenders were liable in the sums sued for. The specification of work was only binding as a specification of the nature and extent of the work, and not otherwise. The draft contract never having been agreed to or adjusted, and indeed having been objected to, was in no way legally binding on Chappell or the pursuer. The pursuer having offered to allow Mr. Chappell, as aforesaid, to complete the work, he was not, at common law or otherwise, liable for any loss or damage which the defenders might have sustained, supposing such had been the case.

The defenders averred that they had accepted the lowest offer for the completion of the work, being for the sum of L.1327, and that it was not completed till the beginning of August 1858. They had suffered loss by Chappell's failure to implement his obligations. They pleaded, *inter alia*;—(2.) Founding on a contract for execution of certain works at a slump price, the pursuer was not entitled to sue for payment of such price, or any part thereof, until he or the bankrupt, in whose right he claims, has implemented his part of the contract, which alone would entitle him to payment. (3.) The defenders were entitled at common law, on Chappell's bankruptcy, to retain the sums and value of property claimed, in security for the performance by him of his contract obligations, and in compensation of all damages which might be sustained by them in consequence of his failure. (5.) In the circumstances, Chappell must be held to have accepted employment from the defenders on the footing set forth in the draft contract, and the relative specification, and on no other or different footing. (6.) The draft contract, though never executed, and not of itself originally a binding document, was validated *rei interventu*, and the terms thereof are now obligatory on Chappell and the pursuer. (7.) The defenders were entitled, under the contract, to hold the sums sued for, as forfeited to them in consequence of the bankrupt's failure to perform his obligations. At all events, they are entitled, both at common law and under the contract, to set off against the pursuer's demands the whole loss and damage sustained by them in consequence of his failure, as the same are specified in detail in their statement.

The Sheriff-substitute (Henderson) pronounced an interlocutor, finding, *inter alia*, that the averments of parties as to the extent of the defenders' loss by Chappell's failure to complete the work were at variance, and allowing a proof of the true amount thereof, and of the other disputed matters.

Both parties appealed. The Sheriff pronounced an interlocutor, recalling the interlocutor of the Sheriff-substitute, finding that, according to the just construction of Chappell's offer, he became bound by all the conditions of the specification, *inter alia*, to enter into a formal contract when called on, but that the defenders were not entitled to introduce into the formal contract any condition not contained in the specification, and with these findings, "remits the cause to the Sheriff-substitute, with directions to allow to the defenders a proof of all facts and circumstances tending to show (1.) that the said Joseph Chappell failed to implement his contract with them; (2.) that in consequence of such failure they have been subjected to loss and damage in the premises; and (3.) the amount thereof; and to the pursuer a conjunct proof; and with the further direction, that when the proof hereby directed to be allowed shall have been taken, he shall proceed with the cause as shall be just."

Parties put in a minute containing admissions of the facts above stated, that the sum of L.1327 was paid to the contractors who completed the work; and that, besides, the defenders incurred expense to the amount of upwards of L.40 owing to

Chappell's failure to implement his contract. The defenders' engineer was examined as a witness, and deponed, that the expense caused by using six additional retorts, while the tank was not available subsequent to 1st March 1858, amounted to L.75.

[346] The Sheriff pronounced this interlocutor:—After findings that the pursuer sued for decree as above set forth,—"Finds that the value of the said work and materials is admitted by the defenders, but that they plead, in defence to the pursuer's claim, compensation in respect of damage which they have sustained through the failure of the said Joseph Chappell to implement his contract with them as aforesaid: Finds that there has been such failure, and that the damage thereby occasioned exceeds in amount the sums sued for; therefore sustains the defences, and assoilzies the defenders from the conclusions of the summons: Finds them entitled to expenses, whereof allows an account," &c.[1]

Both parties advocated, and on 21st January 1860 the Lord Ordinary reported the case to the Inner-House under the statute.

It was argued for the pursuer;—Parties never having entered into any formal contract, the only contract must be held to be constituted by the specification and missives, under which there was no right conferred on the Gas Company to retain the materials and tools as security for implement of the contract. The counter claim of the defenders did not arise *ex contractu*, but at common law. It had never been liquidated, and could not be pleaded in compensation. It lay with the defenders to establish their ground of defence; and the pursuer was not bound to plead on record that it was irrelevant. The defenders having no title of possession of the materials and tools left on their property, on which they could found a valid plea of retention, were bound to have delivered them up to the pursuer when he demanded them. The defenders never had possession of the materials and tools. They were in the possession of Chappell, who might at pleasure have disposed of **[347]** them or exchanged them. The use of them in executing the work contracted for did not give the defenders right to them any more than the employer of a mechanic got right to the tools or materials he might bring to execute a piece of work. The defenders had no right under the contract to

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[1] "NOTE.—A difficult point might have arisen had the pursuer objected on record that the plea of compensation advanced by the defenders was inadmissible and irrelevant, as an answer to his pursuit. It, however, by no means necessarily follows that the objection would have been sustained, more particularly after the observations of the Lord Justice-Clerk in the recent case of The Scottish North-Eastern Railway Company *v.* Napier, 10th March 1859. There his Lordship decidedly declined to say that a claim of damages can never be stated by way of compensation, instancing a case, in its circumstances much less favourable to the plea than the present, in which he thought it might have been sustained; but be that as it may, there has been no occasion for determining the point, seeing that, as just stated, the competency of the plea has not on record been excepted to by the pursuer. The omission was deliberate, and in the full knowledge that the plea had actually been stated. Indeed, its admissibility, or at least the determination of the pursuer not to question that, appears from one of his own pleas, added after he had seen the pleas of the defenders. That plea was the fifth, and it runs thus:—'The pursuer having offered to allow Mr. Chappell as aforesaid to complete the work, and said offer not having been accepted of by the defenders, he is not at common law or otherwise, liable for any loss or damage which the defenders might have sustained, supposing such had been the case.' Here the validity or practical effect of the plea of compensation is no doubt denied, but at the same time its competency is by plain implication admitted. Under these circumstances, the Sheriff was constrained to hold that the objection, on the pursuer's part, had been waived, and that he was willing that the defenders' claim for damages should be inquired into in this process.

"In these observations, the Sheriff is far from intimating any opinion that the pursuer's legal advisers have been any ways remiss in the course thus adopted. On the contrary, he considers that in this they exercised a sound discretion, and that what they actually did was the best and wisest course for their employer. To have objected to the defenders claiming damages by way of compensation, would not have got rid of the claim. Indeed, it would not even have materially delayed it. To have done so would merely have necessitated a cross action, the result of which would have been a decree adverse to the pursuer, with the costs of two litigations in place of one."

detain the property of Chappell, and their illegal and forcible detention of it could not create any right for them, or entitle them to plead compensation. They were bound now to pay the value of the tools and materials to the pursuer, as much as they were bound to deliver up the articles themselves when formerly demanded.

It was argued for the defenders;—The specification contained a clause declaring that the Gas Company were not to be bound till a formal contract was entered into. The draft contract being in the hands of Chappell when he commenced the work, the rights of parties depended on its terms. Under it, the right of the defenders to plead compensation was well founded; and through the whole case it had been assumed that the defenders' plea of compensation was to be given effect to without raising a counter action, if the plea was otherwise well founded. The defenders had a good title of possession of the materials and tools which had been brought to their premises under the contract; and if taking them away would hinder the execution of the work, they were entitled to prevent it. The defenders did not take possession illegally; but they had possession *de facto*, and were only prevented from using arrestments, as any creditor might have done, by having the higher right of retention. Had the materials been used in the construction of the tank, they would have become part of the defenders' property; when brought upon their premises for the purpose of being so used, the defenders were entitled to insist that the condition on which they had been brought upon their property should be fulfilled.

Lord Justice-Clerk.—The pecuniary interests involved in this advocation are small, but the legal principles are of considerable importance, and require a good deal of discrimination to apply them rightly. In the latter part of the year 1857, Chappell, who is now bankrupt, entered into a contract with the Dundee Gas-Light Company to construct a gas-holder tank on their premises. That contract was constituted by a specification and missives; but in the missives, and particularly in the specification, it was provided that the contract should be reduced to the form of a regularly tested deed, and the company stipulated that they were not to be held bound in any way till the contract was adjusted and executed. If the company had acted on that stipulation, and refused to allow anything to be done till the contract was executed, they were no doubt entitled to do so; but, according to their own statement in the 7th article of their condescendence, they did permit the contractor to enter on the works and begin operations without the formal contract being completed, and that contract has never been executed; and it seems in vain to say that we can ascribe the actings of the parties to any other contract than that embodied in the specification and missives. So far I agree with the first interlocutor under review.

Chappell entered on the execution of the works about 5th December 1857, and it would appear that he was not really in a condition to be able to execute the contract, his affairs being then in embarrassment, which ended in a sequestration. It is admitted that he ceased working on 28th December, so that he had been proceeding with the work for a period of only about three weeks. During that period he had made some progress, and had brought to the ground a quantity of materials, and some tools, of which a crane was the most important.

Chappell was sequestrated on 2d January 1858, and a short time afterwards Kerr, the pursuer, was elected and confirmed trustee on his estate.

In February an application was made by the Gas-Light Company to the Judge Ordinary to have the materials, crane, and other tools valued; and a valuation of them took place, by which their total value was fixed at L.89, 5s. 2d., which is accepted by both parties as a correct valuation. It is only necessary to add, that, in consequence of the bankruptcy of Chappell, the directors of the company were **[348]** under the necessity of making a new contract for completion of the tank, and they appear to have done so fairly, and to have completed the work as cheaply as they could.

In these circumstances, Kerr, as Chappell's trustee, raised this action. He concludes, first, for payment of L.53, 11s. 6d., "being the value of mason-work executed by Chappell previous to the sequestration of his estates, under deduction of the sum paid to account thereof." The second conclusion is for L.89, 5s. 2d., "being the value

of certain stones, sand, crane, and other building materials and articles left by Chappell upon the defenders' premises."

Probably there would not have been any difficulty about this case but for the plea of compensation stated for the defenders. As regards that plea, I think it right to say, in the outset, that it is not now open to us to consider, whether that plea as originally proposed, founded on an illiquid claim of damages, could be competently stated as against the conclusions of this summons; for parties have proceeded on the footing that that plea was competently stated, though the claim of damages was illiquid, because arising out of the contract which gives rise to the action. I take it as admissible, notwithstanding any objection that might have been stated to it on that ground. But the difficulty lies in this question,—How far is such a claim, even if liquidated, pleadable against the pursuer's claim?

First, as regards the conclusion for L.53, 11s. 6d. as for work done. That claim is made under the contract; it was competent to the bankrupt before sequestration, and is now insisted in by the trustee, as being a claim which constitutes part of the sequestrated estate. As to that part of the case, there is no objection to the plea of compensation; because, I believe, your Lordships will have no doubt that compensation can be well pleaded against this conclusion of the summons. Then we come to the second conclusion of the summons; and if it were clear that the pursuer is right in saying that, after sequestration, the defenders, in holding possession of the materials and tools, were acting unjustly and illegally—that is to say, doing something of the nature of a legal wrong, or approaching to the character of a spulzie—compensation could not be pleaded. But were they acting unjustly and illegally? In the fifth article of his condescendence, the pursuer avers, "At the time the said Joseph Chappell was so obliged to stop said work, there was left on the defenders' premises at Peep-o'-Day, Dundee, certain stones and sand, besides a crane and other building material and articles belonging to the said Joseph Chappell, of the value of L.89, 5s. 2d. sterling, being the second item sued for, which stones, and sand, and crane, and other building material and articles, have since been illegally, and without the consent of the said Joseph Chappell or the pursuer, appropriated by the defenders to their own uses." Now, in answering the question, whether it was illegal to detain and appropriate the building materials and tools, it is necessary to distinguish between them.

The building materials were brought on the defenders' premises, and delivered there by Chappell when he was in execution of his contract, and in implement of his contract obligation. They were thereby put in possession of the defenders; and that being done, the defenders were entitled to prevent the materials from being removed or taken out of their possession; and on the occurrence of his bankruptcy, they had a right to retain these materials, to what effect we shall see immediately.

Retention is a right of a varying character, which is always to be measured according to the title on which that possession is held, which is the ground of the right of retention. Now, what was the nature of the defenders' title? It was a title arising *ex contractu*. It is in vain to consider, to what extent, or in what sense, delivery of these materials into the possession of the defenders made them the property of the defenders. In one sense it did, and in another sense it did not. But, in performance of the contract obligation, these materials were delivered; and, in any view, the right emerging to the defenders was, that they were entitled to retain them for those purposes of the contract for which they were brought there, viz. to be worked up into the work contracted to be executed. And, therefore, I come to the conclusion, without any difficulty, that the defenders were entitled to keep these materials, and to use them in building the tank. But, on the other hand, they must allow the pursuer the value of these materials; because, although they have paid for all the work done, they have not paid for [349] these materials; and it is a condition of their right of retention of them that they shall pay their value.

But as regards the other portion of the sum of L.89, 5s. 2d., representing the value of the plant and tools brought on the defenders' premises, not to be permanently worked up into the work contracted for, but merely to be used temporarily in the execution of the work, it is obvious that there is, in point of fact and legal principle, a plain distinction between this part of the claim and the other. But here there is no longer the same right of retention on the part of the defenders, but a more limited

right than they had over the stones and other materials; and it was more limited just in exact correspondence to the purposes for which the plant and tools were brought on the defenders' ground. Their right of retention arising on the contract was necessarily limited to the contract purposes; for the tools were there to be used for the purpose of executing the works contracted for, not to be exhausted in executing the work, as the materials were, but to be used temporarily, and returned (no doubt deteriorated by tear and wear) as soon as the works were executed, and the contract obligation fulfilled by their means. And, therefore, while they were entitled to retain the crane and other tools to be used in execution of the contract, on the completion of the contract there arose to the trustee two rights. In the first place, a right to a reasonable consideration for the use of the tools, that being parallel to his right to payment of the value of the materials. But, secondly, there was a right on the part of the trustee to restoration of the plant and tools as they stood at the completion of the works contracted for. They were then the trustee's property, because the plant and tools were carried by his confirmation, and vested in him as in the nature of a real right, subject to the right which the defenders had over them; and if, on the completion of the contract, and when their only right had come to an end, the defenders retained the plant and tools and applied them to their own uses, they were acting illegally and committing a wrong; and, in relation to the tools, the claim of the pursuer would be a *rei vindicatio*, and not a pecuniary claim. He was entitled to have the special articles handed over to him, and that claim could not be met by a plea of compensation. Therefore, the legal wrong having been committed by the defenders of retaining the plant and tools, when they had no title, after the conclusion of the contract, and converting them to their own uses, there arose to the trustee, for the first time, the right—which never belonged to the bankrupt—of obtaining delivery of the articles, or what is the same thing, an equivalent in money value; and that being a right belonging to the trustee, but which never belonged to the bankrupt, cannot be met by the plea of compensation, which might have been pleadable against the bankrupt himself.

I therefore come to the result, that, so far as regards the first conclusion of the summons, the plea of compensation is well founded. In so far also as regards the conclusion for the value of the materials, the plea of compensation may also be well stated. As regards the tools, when the trustee claims a reasonable consideration for the use of them, compensation is well pleaded; but when the pursuer claims an equivalent in money for that which he was entitled to have *in forma specifica*, or damages for the wrongful appropriation of the tools after the completion of the contract, to meet that claim compensation is not pleadable.

Unfortunately we are not in a position to give practical effect to these findings, because all the pursuer's claims for materials and tools, and the use of them, are mixed up in one aggregate sum of L.89, 5s. 2d.; but the difficulty which prevents us so far from pronouncing a final judgment may be got over by making certain findings, and remitting to the Sheriff to separate into its component parts, in accordance with our findings, the total sum claimed.

LORD COWAN.—I agree so much in the principles that have been stated by your Lordship, that I would rather have confined myself to a concurrence; but to some extent my view does differ from the result at which your Lordship has arrived. I agree that the first interlocutor of the Sheriff is a good interlocutor, and the counter advocation therefore must be dismissed. Then, as to the other parts of the case, according to my view, the property of the materials as well as of the tools passed to the trustee on the sequestration. The real right of the trustee, by force of the Bankrupt Act, attached to both materials and tools which the contractor had brought upon the defenders' ground. But by the very terms of the [350] sequestration statute, the vesting in the trustee is subject to such preferable rights as existed at the date of the sequestration. And, therefore, the only question is, whether any preferable right was in the Gas Company entitling them to resist the claim of the trustee to have the stones and implements or their value in virtue of his real right. There is a plain distinction between the stones and materials, and the implements of trade, including the crane. First, as to the materials, I concur in every word your Lordship has stated. These stones were brought to the ground under the contract. The contract contains provisions that stones of a particular size and form were to be brought to the ground

of the Gas Company for the purpose of being used in the building contracted for. Hence, when so brought by the contractor, he put them in the legal possession of the defenders. The stones were then in their possession for the purpose of being employed in the performance of the contract, and, the work not being completed at the date of the sequestration, there was right in the company to retain the stones till their claims under the contract were satisfied. So far I think the defenders have a preferable right. But I have great difficulty as to the admissibility of the plea in regard to the claim for the value of the tools. These were not brought to the defenders' ground under any express stipulation in the contract, or any implied understanding. There was an obligation on the part of the contractor to do the work; but he was not obliged to use any particular tools. He might have borrowed the necessary tools, or changed for others those with which he commenced operations. The contractor's tools were not in the legal possession of the company, although on their premises at the date of the sequestration. I do not think that the defenders had any right to retain these tools, including the crane. The real right of the trustee and creditors was therefore entitled, so far, to prevail. No preferable right by retention, in my opinion, existed in the defenders over these tools, even of the limited character and to the limited effect which your Lordship is inclined to recognise.

LORD BENHOLME.—I should have been well pleased to have added nothing to your Lordship's judgment. But the doubts of my brother, Lord Cowan, are entitled to my highest respect, and I do not think I am entitled to withhold my views so far as these doubts are concerned. I make no remarks except upon that part of the case on which there appears to be a difference of opinion between your Lordship and Lord Cowan. I agree with Lord Cowan, that, at the bankruptcy of Chappell, the materials, as well as the tools and the crane, still remained the property of the bankrupt. The materials had not been wrought up, and, when the trustee was confirmed, he took the bankrupt's right in the materials, tools, and crane. But he took that right under the whole rights of preference or retention burdening that real right of property. These burdens we must consider and give effect to. As to the materials, my view is, that while this contractor was solvent and able to perform his contract, I am not prepared to say that I would have interfered with him in the execution of his contract had he chosen to remove some materials in order to replace them with others. That would have been allowable during his solvency, while he was in the active and *bona fide* prosecution of the contract. But matters are very much altered, when, in consequence of insolvency, the work comes to a stand, and the company are obliged to provide for the due and speedy execution of the work. Rights then came into existence, especially as regards the stones and other materials, which had not emerged before. The company had that legal possession which is essential to the right of retention. That entitled them to go on to use the materials, subject to the obligation of paying their value to the bankrupt. As to the crane and tools, undoubtedly these, though in the possession of the company, were not in their possession to the same effect as the materials. They could be retained only for the purposes for which they were brought upon the defenders' premises. The real right in the crane and tools passed from the bankrupt to the trustee; but then the trustee took it under a burden which was temporary, and could not exist after the work was completed. The right of the company was temporary, and could only give rise to a temporary right of retention. Here we are dealing with small sums, but not with small principles; and it is necessary to carry out these principles in dealing with the smallest matters. As to the tools and the crane, they were to be used by the defenders; but, when the contract was completed, the right to use them was at an end. The property of them was vested in the trustee, subject to a temporary burden. Had these [351] tools and crane been in the possession of the company without any right of retention at all, then compensation in reference to their value would have been excluded; and when the burden is exhausted, I think the trustee is entitled to recover them as part of the bankrupt estate. Having stated these views as to the points of the case which have led to some difference of opinion, I do not think it necessary to state my views on any other part of the case, as to which I agree with your Lordship and Lord Cowan.

LORD WOOD was absent.

The Court pronounced this interlocutor:—"Advocate the cause: Recal the interlocutor of the Sheriff, of date 9th November 1859." After finding the facts, as above stated, the interlocutor contained the following findings in point of law:—"Find that the defenders were entitled to retain the materials permanently for the purposes of the contract, and to have them used and wrought up into the contract work: Find that they were also entitled to retain the said plant or tools temporarily for the purpose of being used in the execution of the contract work: Find that the pursuer, as coming in place of the bankrupt, is entitled to the value of the said materials, and also to a reasonable consideration for the use of the said plant or tools, if such use was taken by the defenders: Find that the said plant or tools belonged to the pursuer as trustee for behoof of the creditors in the sequestration, subject only to the right of the defenders to use the same for the purposes of the contract work as aforesaid: Find that, on the completion of the work, the pursuer was entitled to enforce delivery to him of the said plant and tools *rei vindicatione*, and that the defenders had then no title to retain the same: Find that they did notwithstanding retain the same illegally, and have never returned the said plant and tools to the pursuer: Find that, in consequence of such illegal retention and appropriation, the pursuer is entitled to the value of the said plant and tools, and in the condition in which they were on the completion of the work: Find that the pursuer has waived any objection, otherwise competent to defenders' plea of compensation, on the ground of the claim being illiquid: Find that the defenders are entitled to plead compensation on their claim of damages for breach of contract by the bankrupt, as ascertained and liquidated in this process, against the pursuer's claim for contract work performed, the value of the materials aforesaid, and also against his claim for a reasonable consideration for the use of the said plant and tools, if such was taken: But find that the defenders are not entitled to plead compensation on a claim of damages due by the bankrupt against the claim arising to the pursuer as trustee, for their illegal retention of the plant and tools, which were the property of the pursuer as trustee when the illegal retention took place: With these findings, remit to cause to the Sheriff, to make such farther investigation as may be necessary to give effect thereto, and to proceed farther in the cause as shall be just and consistent with the said findings, with power to determine all questions of expenses in the inferior court, and decern: Find neither party entitled to expenses in this Court."

[Cf. *Moore* v. *Gledden*, 7 M. 1021, 1025.]

No. 56. **XXIII. Dunlop 358.** 22 Jan. 1861. 2nd Div.—Lord Ardmillan.

CHARLES GIBSON, Suspender.—*Fraser.*

HUGH M'NAUGHTON, Respondent.—*Scott.*

Master and Servant—Desertion of Service.—M'Naughton, a journeyman baker, was employed on weekly wages, with board and lodgings in his master's house, and to give one month's warning before leaving. After twelve years' service, M'Naughton gave warning, but left a fortnight after. In an action in the Sheriff-court of Perthshire, the Sheriff-substitute and Sheriff found M'Naughton entitled to payment of his wages up to the date at which he left the service, under deduction of L.5 as damages for loss of trade suffered by his master owing to M'Naughton's desertion of service. The master brought this suspension, and contended;—M'Naughton having deserted his service, had forfeited all the wages due to him under the contract sued on,[1] or, at any rate, the wages for the year then current, as it was to be assumed that, though paid wages at a specified rate per week, as he had board and lodging in his master's house, that he was a yearly servant;—*Held* (*aff.* judgment of the Lord Ordinary), that the note of suspension ought to be refused, with expenses.

Process—Proof—Circumduction.—The defender in an action in the Sheriff-court closed

[1] Ersk. Inst., l. iii. t. iii. sect. 16.

his proof under a reservation of his right to examine certain specified witnesses, if he obtained an extension of the proof in respect of *res noviter*. He failed to obtain that extension, and did not again propose to examine the witnesses. No interlocutor of circumduction was pronounced, but the case was debated on the proof, and a judgment pronounced in favour of the pursuer by the Sheriff-substitute—which was adhered to by the Sheriff on a new debate, in the course of which no motion was made that additional proof should be allowed. In a suspension,—*Held* (*aff.* judgment of Lord Ardmillan), that, in the circumstances, the defender was not entitled to have the proof opened up.

No. 57. **XXIII. Dunlop 359.** 22 Jan. 1861. 2nd Div.—Sheriff of Dumfriesshire.

JOHN MILLER (Trustee in the Sequestration of SAMUEL DICKSON & SON), Appellant.—*Sol.-Gen. Maitland—Millar.*

JOHN THORBURN, Respondent.—*Patton—Cook.*

Bankruptcy—Sequestration—Ranking—Partnership.—A party, for the purposes of his business, procured a cash credit. He after some years assumed his son as a partner. The stock in trade and whole assets of the going business were taken by the new firm, who carried on the trade in the same premises;—*Held* that the father's trade liabilities were also taken over; and the copartnery having been sequestrated on his death, that the cautioner on the cash-credit bond who had paid the balance due to the bank was entitled to rank therefor on the company estate.

The late Samuel Dickson commenced business as a jeweller and silversmith in Dumfries in the year 1844. To enable him to pay for his stock in trade, and to carry on the business, he procured a cash credit from the British Linen Company, on a cash-credit bond. Dickson carried on business till December 1858, when, having fallen into bad health, he took his son John Dickson into partnership. A contract of copartnery was entered into, by which it was provided, *inter alia*; "Second, That the whole stock in trade and the whole shop furniture, tools, and implements now in the premises, or that shall be provided and supplied by the said Samuel Dickson (except as after-mentioned on the death of the said Samuel Dickson), are and shall be the property of the said Samuel Dickson." "Fourth, That in the event of the decease of the said Samuel Dickson during the co-partnership, the whole stock in trade, shop furniture, tools and implements, shall then belong in equal shares to the said John Dickson, and the party who shall succeed the said Samuel Dickson in the partnership as aforesaid, but that if the said Samuel Dickson's other means and estate shall not be sufficient for payment of his debts and liabilities, the said stock in trade shall be liable for the deficiency in the first place." The business was carried on in name of the firm till Samuel Dickson's death in March 1859. John Dickson carried on the business till September following, when, with the concurrence of a creditor, he applied for and obtained sequestration of the estate of the company, and of his own estate as the surviving partner, and also of the estate of his father. In managing the sequestrations, the trustee distinguished between the estates, so as to separate the ranking of the creditors of the firm, and of the two individual partners.

Mr. Thorburn, one of the cautioners under the cash-credit bond, having paid up to the bank the balance of L.225 due on the cash account, procured an assignation from the bank, and claimed to be ranked as a creditor for that amount on the estate of Samuel Dickson and Son. The following circumstances were set forth in joint minute ordered by the Court:—"(1.) The company of Dickson and Son commenced business on 1st December 1858, with the stock in trade which had previously belonged to Samuel Dickson, and new stock purchased by the company was added from time to time as required. (2.) The company commenced business, which was carried on by and in the name of the company, in the shop previously occupied by Samuel Dickson. (3.) John Dickson was a person of skill and experience, but he brought no capital into the concern. (4.) No special notice was given of the formation of the new company to the creditors or customers of Samuel Dickson, but the fact was advertised in the local

newspapers. The name 'S. Dickson' remained as the sign over the door of the shop. (5.) The company paid business debts previously contracted by Samuel Dickson, both in money and with bills granted in the social name. Neither Samuel Dickson, nor the firm of Dickson and Son, kept regular books; the day book in which Samuel Dickson entered sales was continued by the firm. **[360]** (6.) The debt claimed by Thorburn was incurred by Samuel Dickson for the purposes of his business, and was due to the bank long prior to, and at the date of the formation of the company, but the existence of that debt was not known to John Dickson till after his father's death. Thorburn was the agent by whom the contract of co-partnery was drawn. He did not know how the bank account stood till after Samuel Dickson's death. (7.) The statement of assets belonging to Dickson and Son made up by the trustee included the stock in trade which belonged to Samuel Dickson prior to 1st December 1858, in so far as not disposed of by the company since that date, as well as stock acquired by the company. (8.) The said statement includes the debts incurred and due to Samuel Dickson prior to 1st December 1858, in so far as these were unpaid when the statement was made up. (9.) The firm of Dickson and Son recovered payment of several debts due to Samuel Dickson prior to 1st December 1858." The trustee rejected the claim *in toto*.

Mr. Thorburn appealed.—The Sheriff-substitute's interlocutor contained the following findings, *inter alia*:—"Finds that the debt in the bond on the assignation to which the appellant founds his claim to be ranked on the estate of Samuel Dickson and Son, was a debt due and resting owing by Samuel Dickson at the time of his death, and one of those debts for payment of which the deed of copartnery aforesaid provided that the stock in trade and others should be liable in the event of the said Samuel Dickson's other means and estate being insufficient to meet the same: Finds that in terms of the aforesaid provision of the deed of copartnery, the stock in trade and others therein specified remained *in bonis* of the said Samuel Dickson at the date of his death, and subject to his debts and liabilities, at least in so far as his other means and estate were insufficient to meet the same; that subsequent to the death of the said Samuel Dickson, and down to the date of the present sequestration, the firm of Samuel Dickson and Son continued to carry on the business as formerly; and instead of appropriating said stock in trade, and others, in terms of the deed of copartnership, in liquidation of the debts and liabilities of the said Samuel Dickson, they intromitted with the same, and appropriated the same to the uses and purposes of the said copartnery; that said stock in trade, and others, being in terms of the deed of copartnery *in bonis* of Samuel Dickson at the time of his death, and subject to the debt now claimed by the appellant, and the other debts and liabilities of the said Samuel Dickson, the firm of Samuel Dickson and Son, by intromitting with, and appropriating said stock in trade, and others, have rendered themselves responsible at common law for the debt claimed by the appellant, at least in so far as the other means and estate of the said Samuel Dickson are insufficient to meet the same, and to the extent of the value of the said stock in trade, and others, and that the appellant is entitled to be ranked on the sequestrated estate of the said Samuel Dickson and Son, on account of said debt accordingly."

The trustee appealed. It was argued in support of the appeal;—A partnership was not to be made responsible for debts contracted by all the partners previous to their admission into the copartnery. The ground taken by the respondent, that he was a direct creditor of the company of Samuel Dickson and Son, was a very startling one, and led to some very new and unexpected results in the law of bankruptcy and partnership. John Dickson had never heard of this cash credit bond till after the sequestration. He could not be held to have had it in view when he entered into the partnership, and it would be most inequitable to hold that merely because he had been assumed as a partner by his father, he was liable for all his debts. Supposing John Dickson had succeeded to a fortune, the whole might be swept away to pay debts that were never debts of his or of the company, but which had been contracted by his father. The cases founded on by the **[361]** respondents were very different from this; in the one,[1] a company composed of a former company, with the addition of one new partner, had carried on the same business. There, the new company were

[1] Ridgeway *v.* Brock, 6th Dec. 1831, 10 Sh. & D. p. 105.

properly made responsible to a creditor who had dealt with both companies, there being no notice of the formation of the new company or settlement of accounts with its debtors and creditors. In the other case,[1] the debt for which the company was held liable was regularly traced through the books to the subsequent firm. There was no case where, in a competition with the creditors of a copartnery, a creditor of one partner had been admitted to rank for a debt contracted previous to the constitution of the copartnery.

LORD JUSTICE-CLERK.—In this case the facts are all either admitted or very clearly ascertained, and they are neither numerous nor complicated. Samuel Dickson had been carrying on business in Dumfries as a jeweller for some years prior to December 1858, when, on the suggestion of some of his friends, he took his son into partnership, under the firm of Samuel Dickson and Son. It appears that that firm just carried on the business which had been carried on by Samuel Dickson, and with precisely the same stock in trade as belonged to him. It appears further that the debt which is claimed by the respondent had been incurred by Samuel Dickson for the purpose of his business, and had been due long prior to the constitution of the copartnery. It is admitted that John Dickson brought no capital to the business. He had some skill and experience, which was to be made available in the concern. The formation of the copartnery was notified to the public in the newspapers in accordance with the fact, thus,—"Samuel Dickson," "begs to intimate to his friends and the public, that he has assumed his son as a partner, who has had long experience in one of the first houses in the trade in Liverpool, and the business will in future be conducted under the firm of S. Dickson and Son." There was no winding-up of the business carried on by Samuel Dickson, or any realisation of the estate for the purpose of handing it over to the new firm, nor were the creditors called together, or obligations granted to them for their claims, nor were they secured in any way. In short, this mercantile concern continued to be carried on as if no change had taken place in the persons who were interested.

Such being the nature of the transaction, it is material to observe the terms of the contract of copartnery, because although it was not intimated to the respondent, or to the creditors, or to the public, it is satisfactory to see that its terms are applicable to the case as I have described it. The second condition of the contract provides, "Second, That the whole stock in trade, and the whole shop furniture, tools and implements, now in the premises, or that shall be provided and supplied by the said Samuel Dickson (except as after-mentioned on the death of the said Samuel Dickson), are and shall be the property of the said Samuel Dickson." And further on it is provided in the fourth condition, "Fourth, That in the event of the decease of the said Samuel Dickson during the copartnership, the whole stock in trade, shop furniture, tools and implements, shall then belong in equal shares to the said John Dickson and the party who shall succeed the said Samuel Dickson in the partnership as aforesaid, but that if the said Samuel Dickson's other means and estate shall not be sufficient for payment of his debts and liabilities, the said stock in trade shall be liable for the deficiency in the first place." I understand that last clause to mean that the stock in trade shall be liable for these debts before they are liable for anything else, and that the transference shall not have the effect of defeating the rights of Samuel Dickson's creditors, or preventing them from sharing the proceeds of the stock along with subsequent creditors of the copartnery. The debts of the father, so protected, are, as it appears to me, his trade debts. It appears on the face of this contract that the parties were desirous to do what they were bound to do to prevent Samuel Dickson's creditors from being injured. In accordance with this view of the copartners,—of the conditions on which the estate of Samuel Dickson was transferred to them,—it is admitted that they paid the debts of Samuel Dickson with money in some instances, and in others granted **[362]** bills for them, and, before the death of Samuel Dickson, recovered debts due to him. In short, so far as the world could see, they carried on the business just as it had been carried on before.

As a matter of general principle, it appears absurd to hold that a person in trade,

[1] M'Keand *v.* Laird, decided on 17th March 1860, to be reported *infra*, of date 30th March 1861.

by taking his son into partnership, can do anything to injure the rights of his trade creditors; and the way in which the law interpones, in such a case, to prevent injustice, is by holding that where a new firm takes over the whole stock and business of a going concern, it is held also to take over the whole liabilities. In short, the business being taken over, and not wound up, the business and its liabilities must be held to go together. That is matter of general principle, which was established by the cases of M'Keand and Ridgeway, and I see nothing to take this case out of it.

LORD WOOD.—This is a claim made on the sequestrated estate of Samuel Dickson and Son for a debt incurred by Samuel Dickson, who had previously carried on trade as an individual. Looking at the case, as explained by your Lordship, and considering the way in which this partnership of Samuel Dickson and Son was constituted—John Dickson having been assumed by his father as a partner of a going concern, and the business having been carried on just as it was before, without any realisation or winding-up of the old concern of Samuel Dickson—I can have no doubt, in point of law, that the new company are liable for the proper trade debts incurred by the old concern; and it is such liability, and not a liability for any individual private debt of Samuel Dickson, that is here in question, the debt claimed being admitted to be a trade debt of Samuel Dickson. I am of opinion that it cannot be maintained, that, by merely taking a partner into a business, the stock can be relieved of previous debts incurred in the course of that business by the party carrying it on. It is satisfactory to see, as your Lordship has pointed out, that the contract of Samuel Dickson and Son shows, that by the parties to it no such thing was contemplated, and that, on the contrary, it was intended that the claims of the old creditors should be protected. While that is shown by the terms of the contract, it is equally apparent from the mode in which the business of the new firm was conducted, as much so as if entries to that effect had been contained in the books. The company took over the assets of, and debts due to Samuel Dickson, and, as might be expected, and, indeed, was unavoidable, paid debts due by him. Accordingly, it was admitted that in the sequestration there are claims upon bills, or at least a claim upon one bill, granted by Samuel Dickson and Son for a trade debt due by Samuel Dickson, which has been sustained by the trustee. And it would be a strong thing to hold that while some creditors of the old concern have been taken as having good claims on the new company, others, as in this instance, are to be excluded, because they had not procured a direct acknowledgment of the debt by the company, whose obligation to pay is precisely the same in the one case as in the other. I entirely concur in your Lordship's opinion.

LORD COWAN.—I have little to add to what has been said by your Lordships. I concur in the principle given effect to in the cases of Ridgeway and M'Keand, that in the general case where the whole estate of a company is given over to and taken possession of by a new concern or partnership, the business being continued on the same footing, the estate goes to the new company *suo onere*—that is, the liabilities go along with the effects. To sustain any other principle might result in the greatest injustice. This is the general presumption, although there may be special circumstances in particular cases not admitting of its application. In this case there are no such specialties. Of course private debts are not in the same position as trade debts. But we assume this to be a trade debt. It is distinctly admitted to be so. It is admitted to have been contracted for the purposes of the business by Samuel Dickson, and formed his outstanding bank account when he assumed his son into partnership.

I would also remark that the son brought no capital into this concern. The stock consisted only of what had been the stock of his father's business. In these circumstances, and with a debt of that character, I have no difficulty.

LORD BENHOLME.—I think that since this case has come here it has assumed something of a new form. We have the minute of admissions, of which the Sheriff had not the benefit in the Court below. The interlocutor impeached in this appeal proceeds on too narrow a ground of judgment. It proceeds mainly on that clause **[363]** of the contract of copartnery which, while it might indicate the intention of parties, is not such a distinct ascertainment of the right of Samuel Dickson's trade creditors to claim upon the company estate as to entitle us to give to it the weight it has received from the Sheriff. The clause of the contract in question seems to establish a preference over his property in favour of his former creditors, rather than a mere claim to rank upon it. The judgment of the Court ought to be founded on the facts

of the case as they are now admitted, as well as upon the clause of the contract on which the Sheriff founds. The judgment your Lordship proposes is, that, taking the whole facts, the new firm must be held to have assumed the responsibilities as well as the assets of the former company. That view is strongly supported by the minute of admissions, from which it clearly appears that the sum contracted to the bank was a trade debt, and that the trade debts of Samuel Dickson were paid as they fell due, by the new firm. It appears to me that this is the true ground of judgment; and that, in adopting it, we are giving effect to the same general principle as was recognised in the case of Ridgeway.

The Court pronounced the following interlocutor:—"Recal the said interlocutor: Find that the company of Samuel Dickson and Son having taken over the whole business and assets of the going business of Samuel Dickson at 1st December 1858, did thereby also assume the trade liabilities of the said Samuel Dickson, and, among others, the debt due to the respondent as a trade creditor of the said Samuel Dickson: Therefore, of new sustain the respondent's appeal against the trustee's deliverance, and ordain the trustee to rank the said John Thorburn, respondent, on the estate of the bankrupts, in terms of his claim and oath of verity: Find the respondent entitled to expenses in this Court; and remit to the Auditor to tax and report."

[Cf. *Nelmes* v. *Montgomery*, 10 R. 978, 981; *Heddle's Executor* v. *Marwick and Hourston's Trustee*, 15 R. 698, *passim*.]

No. 58. **XXIII. Dunlop 363.** 23 Jan. 1861. 2nd Div.—Sheriff of Lanarkshire.

FRANCIS BROWN, Pursuer.—*Clark—D. M. Smith.*

ALEXANDER KIRKLAND, Defender.—*Patton—Gorrie.*

Cautioner—Indirect Discharge—Delay—Bill of Exchange—Notice of Dishonour.—In an action against a party who guaranteed payment of a bill, to whom notice of dishonour was not given until twenty-two days after the bill became due, *held* that the cautioner was not freed of his obligation by want of notice of dishonour.

Observed,—That a party who merely guarantees payment of a bill when due without his name being on it, is not entitled to the same notice of dishonour as a drawer or indorser.

On 19th January 1859 James Houston, builder in Glasgow, accepted a bill payable at two months, drawn by Francis Brown, quarry-master at Bishopbriggs, near Glasgow, for L.55. Of the same date, Alexander Kirkland, architect, addressed a letter of guarantee to Brown in these terms:—"I hereby become bound to see you paid the bill granted you to-day by Mr. James Houston, amounting to L.55, for stones already provided, and stones still to be got for his building, St. Vincent Street." The bill not having been paid by Houston, Brown raised this action before the Sheriff of Lanarkshire against Kirkland, for payment of the sum contained in the bill.

In defence it was stated that Kirkland was not due the pursuer the sum sued for, in respect the pursuer did not intimate to him Houston's failure to retire the bill, and without consultation with the defender gave Houston time, and unduly delayed operating payment. Had the defender received timeous notice of Houston's failure to retire the bill, he could have operated his relief from funds then payable to Houston, but beyond the defender's reach when the intimation was made.

A proof was allowed. The defender deponed,—He was aware that Houston had negotiated a loan over his property, payable by instalments, as the work proceeded. In consequence deponent gave the guarantee. Deponent first received intimation of the bill not having been paid on 13th April 1859. **[364]** Deponent did not think it right to delay intimation to him so long, as he knew that Houston had received several instalments of the loan. On inquiry deponent found that Houston had assigned the instalments to be payable after the date of the intimation, so that deponent could not operate his relief against them. No other witness was examined for the defender. He produced a statement, admitted to be correct, shewing that before the date of intima-

tion Houston had received the following instalments of the loan, viz., on 24th March 1859, L.75; on 2d April, L.150; and on 8th April, L.35.

The Sheriff-substitute (Glassford Bell) assoilzied the defender. On appeal the Sheriff (Alison) recalled the interlocutor, repelled the defences, and decerned against the defender in terms of the conclusions of the summons, with expenses. The Sheriff's interlocutor contained the following findings in point of law:—"Finds, in point of law, that, under the decisions of the House of Peers, particularly that of Creighton *v.* Rankine, 26th May 1840, 1 Robinson's Appeal Cases, p. 99, where a creditor does not, 'by positive contract' between him and the principal, give time to the principal to pay the debt, but merely 'remains inactive,' he does not thereby discharge a cautioner of his obligation to pay the debt, and there being no proof in the present case that the pursuer, by positive contract with Houston, the principal, granted him time to pay the debt, although he did remain inactive for a period of twenty-two days after the bill fell due, Finds that the defender is still liable for the amount of the bill under the letter of guarantee granted by him, seeing the pursuer did nothing to tie up the hands of the cautioner from proceeding against Houston, the principal, so as to operate his relief; and the defender, who was in the knowledge of it when the bill fell due, and of Houston having funds out of which the debt might have been secured, might himself, the very day after the bill fell due, have adopted proceedings against the principal debtor so as to operate his relief, and have attached, by arrestment, the instalments of the loan which he says he knew were payable to him, before the same were entirely paid over to or assigned by Houston."[1]

The defender advocated, and the Lord Ordinary made avizandum to the Court. It was argued for the advocator;—It was clear on the authorities, that when loss occurred by want of notification after a bill became due, a cautioner was relieved.[2] The cases of M'Taggart *v.* Watson, and Creighton *v.* Rankine[3] were very different from this, in respect this was an action on a guarantee for payment of a bill. Such documents required to be dealt with according to strict rules. Notice of dishonour after the lapse of twenty-two days was certainly insufficient; and the defender having proved loss by the delay in giving notice, was entitled to absolvitor.

It was answered;—This action was founded on the guarantee for payment of the debt, and not on the bill. A party who guarantees a debt due by a bill, but does not make himself liable to diligence on the bill, is not entitled to any but reasonable notice of dishonour. A party granting a letter of guarantee was bound to see the bill paid, in order to protect himself, and not to wait for notice of dishonour; and unless, in case of very gross neglect, he was not freed by want of notice.[4]

[365] Lord Justice-Clerk.—As this case presents itself to my mind, it does not seem to involve any nice question of law; if I thought otherwise, I should have proposed that we should take time to consider it, but I think the case may be very easily disposed of. I am for adhering to the judgment of the Sheriff. I think it clear that one who is not a party to a bill by his name being on the bill, but who merely guarantees payment of the bill when it falls due, is not entitled to notice of dishonour in the same way, and on the same grounds, as a drawer or indorser of the bill. And that is all the length I am inclined to go. I should be sorry to affirm the general proposition, that a party who guarantees payment of a bill may not be entitled to some kind of notice. That is a question not in the law of bills, but in the law of cautionary obligations, and it depends on this, whether the creditor in the cautionary obligation has dealt fairly with the party who guaranteed the debt. Cases may be

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[1] In his note the Sheriff made reference to the speech of the Lord Chancellor at advising M'Taggart *v.* Watson, H.L., April 16, 1835, 1 Sh. & M'L. 591.

[2] Thomson on Bills, p. 507; 1 Bell's Coms. (5 edit.), p. 377; Anderson *v.* Wood, 20th November 1735, 2 Elchies, p. 54; Borthwick *v.* Robertson, 3d June 1830, 8 Sh. & D. p. 857; Ewing *v.* Burnet, 7th January 1681, Mor. p. 8,219.

[3] *Ut supra.*

[4] Chitty on Bills, p. 308 (10 edit.); Tindal on Bills, p. 568; Walton *v.* Mascal, 22d November 1844, 13 Mee. & Wels., p. 452; Van Wart *v.* Woolley (1824), 3 Barn. & Cres., p. 439; Hitchcock *v.* Humfrey, 29th April 1843, 5 Mann. & Gr., p. 559; M'Taggart *v.* Watson, *ut sup.*; Creighton *v.* Rankine, *ut sup.*

supposed in which the drawer of a bill, who gets a guarantee, and finds that the bill is dishonoured when due, may have placed himself in such a position as regards the granter of the guarantee as to be bound to give him intimation, so that the party granting the guarantee may be liberated, if he suffer loss in consequence of the want of intimation. On the other hand, I am satisfied that we have no such case here, for what are the facts? This bill was dishonoured at maturity on the 22d March 1859, and intimation of the dishonour was made by the bank to the drawer, and the drawer did not give intimation to the granter of the guarantee till the 13th April. But what prejudice has he suffered by that delay? What he says is this, that "had he received timeous notice of Houston's failure to pay the bill, he could have operated his relief from funds of Houston's then payable to him, but which were beyond his reach" when the pursuer sent the intimation. That is his statement of the prejudice he has suffered by the pursuer's failure to intimate, and a more irrelevant statement for this defence it is hardly possible to conceive. It is merely this, that one fund, out of which he could have operated his relief, was placed beyond his reach,—not that there were no other funds within his reach, or that there was any difficulty in operating his relief.

And the proof does not come up to the averment, for what he says in his evidence, and there is no other evidence but his own, is, "I was aware at the time that Houston had negotiated and received a loan over his property, and that the loan was payable to him by instalments as the work proceeded;" and he produces an excerpt from an account showing that these instalments had been paid by the lender to Houston between 22d March and 13th April. But he has failed to explain in what way he could have operated his relief, or by what species of diligence he could have attached these sums. If a party agrees to make a loan to another on a condition and contingency, is that a debt which can be attached by arrestment? That would be a novel doctrine; and before arriving at that conclusion I should have required to examine the terms of the obligation. We have no information about the arrangement between the lender and the borrower, whether the borrower had any means of enforcing payment, or whether the lender might not be entitled to say, I am not satisfied with the progress of the work, and decline to make further advances. And, therefore, in the absence of allegation or proof raising any presumption of loss or damage sustained by the cautioner from the want of notice, I concur in the opinion of the Sheriff.

The other Judges concurred.

The Court pronounced an interlocutor, which, after recalling the interlocutors of the Sheriff-Substitute and Sheriff finding the date of the letter of guarantee that the bill fell due on 22d March 1859, but was not retired by the acceptor, but was, on 13th April, retired by the drawer, and that then only was notice given to the defender that the bill had not been paid, proceeded,—"Find that the defender has not proved or relevantly averred that he suffered prejudice or loss in consequence of the fact of the non-payment of the bill by the acceptor not having been previously intimated to him: Find, that in these circumstances, the defender has not been liberated from the said obligation of guarantee: Therefore repel the defences, decern against the defender in terms of the conclusions of the summons, **[366]** and find the pursuer entitled to expenses both in this Court and in the Inferior Court, and remit," &c.

No. 59. **XXIII. Dunlop 366.** 24 Jan. 1861. 1st Div.

JOHN THOMAS FENTON and MANDATORY, Pursuers.—*Fraser.*

ALEXANDER THURSTANUS LIVINGSTONE, Defender.

Foreign—Succession—Domicile—Incestuous Marriage—Legitimacy—Comitas legum—Statute 1567, *c.* 14; 1567, *c.* 15; 5 & 6 *William IV. c.* 54.—A Scotchman domiciled in England had issue by a marriage celebrated in England with his deceased wife's sister. Having died, and inquiry being thereby barred by a technical rule in the English Ecclesiastical Court as to the validity of such marriage, the Court of Session held, in a question of succession to heritage in Scotland, that the issue of that marriage must be considered legitimate, and entitled to succeed; but the House of Lords having reversed that interlocutor, and remitted to the Court of Session to do

as was just, with an indication of opinion (1.) that the technical rule barring inquiry could not operate beyond the limits of England, and (2.) that no country was bound to recognise even a valid foreign marriage which is prohibted on grounds of policy, morality, or religion;—*Held* (1.) that the marriage being null in *loco contractus*, it must be held null in Scotland, and the issue illegitimate; and (2.) that such marriage is not lawful according to the statute law of Scotland, and the issue are illegitimate, the relationship by affinity being held to be the same as by consanguinity, and on both grounds that the issue were not entitled to succeed to Scotch heritage. *Question*, as to the penal consequences of such a marriage in Scotland.

See *ante*, vol. xvi. p. 104, vol. xviii. p. 865, and vol. xxi., House of Lords' cases, p. 10.

The original pursuer of this action of declarator of bastardy was Mrs. Ann Livingstone or Fenton, now deceased. The present pursuer, John Thomas Fenton, her eldest son, was sisted as appellant in her room in the appeals which were then depending in the House of Lords.

The original defender was Alexander Livingstone. He died in 1859, and the present defender, Alexander Thurstanus Livingstone, his eldest son, and his tutors and curators, were sisted as respondents; and farther, the pursuer executed against them a summons of transference, in which he obtained decree on 12th June 1860. The facts shortly stated were these:—

The deceased Admiral Sir Thomas Livingstone of Westquarter and Bedlormie died on the 1st April 1853. A competition immediately took place between his sister, the late Mrs. Fenton, and the son of his brother, Thurstanus Livingstone, for the entailed estate of Bedlormie.

The original defender Alexander Livingstone presented, of date June 4, 1853, a petition to the Sheriff in Chancery, "to be served nearest and lawful heir-male of tailzie and provision in special of the said Sir Thomas Livingstone in the lands and others (the estate of Bedlormie) above described." The ground of this application was, "that the petitioner is the eldest lawful son of the deceased Thurstanus Livingstone, who resided at Bow, in the parish of St. Mary's, Stratford Bow, in the county of Middlesex, brother-german of the said Sir Thomas Livingstone."

On the other hand, Mrs. Fenton claimed to be served, by a petition presented to the Sheriff of Chancery, of date July 4, 1853, "nearest and lawful heir of tailzie and provision in special" to her brother, Sir Thomas Livingstone, on the ground that the petitioner was his eldest surviving sister, and only sister-german; "and by the death of the said Sir Thomas Livingstone himself without lawful issue, and by the failure of heirs-male of the body, and also of heirs-male whomsoever of the said Alexander Livingstone, the entailer, the petitioner is the nearest heir whomsoever of the said entailer, and thus the nearest and lawful heir of tailzie and provision in special of the said Sir Thomas Livingstone in the lands and others foresaid."

[367] These two petitions were conjoined, and were advocated to the Court of Session, where a record was made up.

Mrs. Fenton, of date 22d December 1853, raised an action of declarator of bastardy against the said Alexander Livingstone, in which also a record was made up.

The alleged marriage, of which the original defender Alexander Livingstone was said to be the issue, was celebrated in England. The averment upon the subject in the eighth statement of facts for the defender, was in the following terms:—"The said Thurstanus Livingstone was on or about the 7th of August 1808, while residing and domiciled as aforesaid (in England), married in the church of Hackney, in the said county of Middlesex, to Catherine Ann Ticehurst, a domiciled Englishwoman; and the defender Alexander Livingstone is the eldest son of the said marriage, and was born in June 1809, and was at his birth domiciled, and has ever since been resident and domiciled in England."

The pursuer did not admit that Thurstanus Livingstone was at the date of his marriage domiciled in England, and averred that Catherine Ann Ticehurst was the sister of a person to whom he had been married in 1797, but was dead in 1808.

A proof was thereafter led in both processes; and, of date 15th January 1856, the Lord Ordinary found that Alexander Livingstone was entitled to be served; and his

Lordship, of the same date, assoilzied him from the action of declarator of bastardy. The First Division, upon a reclaiming note, adhered to the result.

These judgments were reversed by the House of Lords, of this date, and the case was (July 15, 1859) "remitted back to the said Court of Session in Scotland, to proceed and do therein as shall be just."

The House of Lords held it established as matter of fact that Thurstanus Livingstone was domiciled in England in 1808, and that Alexander Livingstone's mother was the sister of his first wife, and indicated opinions (1.) that, apart from the technical rule which prevented inquiry into such marriages after the death of either of the parties, they were by the law of England null and void *ab initio*, that that technical rule could have no force out of England; and farther, (2.) that the law of Scotland was not bound to recognise such a foreign marriage, even if valid in England, provided it was prohibited in Scotland as contrary to policy, morality, or religion.

On 15th May 1860 the Court "appoint the pursuer and his mandatory to give in a minute, stating what judgment he now asks in this cause, and the grounds on which he maintains his right to such judgment."

In obedience to that interlocutor a minute was lodged for the pursuer in the declarator, craving "decree in terms of the conclusions of the summons; or otherwise, failing the Court granting decree in terms of these conclusions, he craved decree in terms of the following conclusion contained in the summons,—viz., 'That he (Alexander Livingstone, the late defender) was not lawfully procreated of the said Thurstanus Livingstone, and was not entitled to succeed to the lands and estate of Bedlormie, situated in the county of Linlithgow, and other lands contained in the deed of tailzie thereof, as heir of entail of the said now deceased Admiral Sir Thomas Livingstone, under and in virtue of the said tailzie and investitures following thereon; and in particular, under a bond of tailzie executed by Alexander Livingstone of Bedlormie on 17th December 1702, and registered in the Register of Tailzies 26th December 1702.'"

In the conjoined petitions for service the pursuer also lodged a minute in which, referring to the minute lodged in the declarator, and the argument contained in it, he stated "that, in the event of the Court pronouncing decree in the advocator's favour in the said action of declarator of bastardy, in terms of the motion contained in the said minute, he moved the Court to **[368]** remit the process of advocation of the petitions for service to the Sheriff in Chancery, with instructions to recal his interlocutor serving the late defender as heir of tailzie to the deceased Sir Thomas Livingstone of Bedlormie, and thereafter to dispose of the said petitions according to law."

No appearance was made for Alexander Thurstanus Livingstone or his tutors and curators.

On 12th July 1860 the Court having resumed consideration of the cause, appointed the pursuer to give in a case on the whole cause. In obedience to this order the pursuer submitted a full argument in the order of the pleas stated by him in the action,—viz., (1.) The defender is not the lawful son of the said Thurstanus Livingstone, in respect his father and mother were not married persons. (2.) The defender is not the lawful son of the said Thurstanus Livingstone, in respect he is the offspring of an unlawful and incestuous connection. (3.) The defender can, in no view, be entitled to succeed to the estate of Bedlormie, in respect he was not, in terms of said entail, lawfully procreated of his father.

He pleaded that the marriage having been celebrated in England, its validity must, in the first place, be determined according to the *lex loci contractus*. The place of contract here was also the place of domicile.

According to the law of England prior to the Act 5 and 6 Will. IV., cap. 54 (commonly called Lord Lyndhurst's Act), the validity of a marriage, challenged on the ground of being within the prohibited degrees, did not admit, according to the constitution of the English tribunals, of being inquired into after the death of either of the parents, if the object were to bastardise the issue. It was, however, allowed to be inquired into with reference to all other purposes,—*e.g.*, in order to punish the surviving spouse for committing incest.[1]

It has been held by the House of Lords that the rule which prevailed in the

[1] Ray *v.* Sherwood, 1 Curteis, p. 199.

English Courts was merely a rule binding upon these Courts, but not upon those of foreign countries, and that these latter Courts are entitled to make inquiry into the fact, as to whether there was, in reality, a valid marriage, and decide the question as to the legitimacy, not upon a fiction or presumption, but upon the truth.[1]

The pursuer now asks the Court to do that which was done by the English Courts in the case of Birtwhistle, namely, to inquire whether or not the defender's parents were married according to the law of England? This is a question of fact, and evidence has been led upon it by both parties; but the Court had the opinions of all the law Lords expressed in the appeal in the present case—M'Q., vol. iii., p. 497—that if it could be inquired into, it would be declared invalid *ab initio* to all intents and purposes; and when the House of Lords announces its opinions upon English law, these opinions are of the nature of evidence to a Scotch Court, and are certainly entitled to considerably more weight than the opinion of counsel. The Scotch Court was, therefore, bound to find that the marriage was null and void by the law of England.[2] See also opinions of House of Lords as to invalidity by English law. The validity of the English marriage of Thurstanus Livingstone, by the law of England, is absolutely essential to the claim of the children of that marriage. If there was no valid marriage in England, there was no **[369]** marriage; and if there was no marriage, the issue cannot serve as a *hæres legitimus* of his father, or of any predecessor of the father. In the question of the constitution of a marriage in a foreign country, the law of Scotland, in the first instance, withdraws from the scene, leaving it to be ascertained whether the marriage is good by the law of the country where it was celebrated. That being ascertained, it repudiates all attempts to show that such a marriage, if it had been celebrated in Scotland, would have been good. The law of Scotland cannot operate *extra territorium* in validating an English marriage. If it is found that the marriage is good by the law of the foreign country, the law of Scotland reasserts its right, on a demand to give effect to the foreign law, by inquiring whether it can recognise such a marriage consistently with its own principles. The party who claims inheritance at law, must, according to the law of Scotland, be a lawful child, and the law of Scotland cannot recognise as legitimate the offspring of a foreign marriage which is in itself invalid in the country where solemnised, or the recognition of which, if valid, would do violence to its own principles. It adopts and gives effect to the principles of international law, so far as regards the validity or invalidity of the marriage, and displaces its own law where there is no ground for withholding the rule of giving effect to foreign law *ob comitatem*. So, when the invalidity of the foreign marriage, according to the foreign law, has been ascertained, there truly remains nothing to be inquired into. The law of Scotland rejects all inquiry as to the legitimacy of those who are proved to have been the fruit of a connection not legalised by marriage. It may be necessary for the Court to affirm this doctrine of the law of Scotland, or at least to recognise and apply it in the case; and if affirmed, it is submitted that there is no necessity for going farther. It is clearly contrary to all authority to hold that the mere fact of the undisturbed possession of a status, to which rightfully the party has no claim according to the law of his domicile, could make that party legitimate every where. It has sometimes been said that there is a general rule which fixes the status of a person to be that enjoyed by him according to the law of his domicile. There is, however, no such general rule in international law, even where the status is rightfully enjoyed, and does not rest, as here, upon the mere fact of the absence of a challenge during a particular period. A person is a minor according to the law of his domicile; a host of writers on international law, and the decisions of learned Judges, refuse to recognise his minority when pleaded in a foreign country, the laws of which, upon the subject of minority, were different. If a nun, a monk, or a priest came to Scotland and contracted marriage, the Scottish Courts would recognise the marriage as lawful,

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[1] Scrimshire *v.* Scrimshire, 2 Hag. Con. Rep., pp. 395, 407, 416; Middleton *v.* Janverin, 2 Hag. Con. Rep., pp. 421, 437; M'Culloch *v.* M'Culloch, Mor. 4591—Ferg. Con. Law, p. 19—2 Paton's Appeals, p. 33; Johnston *v.* Godet, 1813, Ferg. Con. Law Rep., p. 8; Birtwhistle *v.* Vardill, 1 Robertson, App., p. 627—4 W. S. Appx. 95.

[2] Stein's Trustees, 5 W. & S., p. 47; M'Pherson *v.* M'Pherson, 1 M'Queen, p. 243—See also Trotter *v.* Trotter, 3 W. & S., p. 416; Regina *v.* Chadwick, 11 Adolphus and Ellis, p. 173.

and the children as legitimate, though the law of their own country prohibited them from marrying. Other illustrations might be drawn from international rules as to bankruptcy, slavery, &c.[1] The obligations upon courts of law by the general international code extends no farther than to give effect to a status derived from a lawful marriage. If the municipal law of a particular country abolished the distinction between legitimacy and bastardy—abolished marriage itself, and declared concubinage to be lawful—it is quite manifest that the courts of foreign countries could not be compelled to acknowledge the concubine as a wife, or the bastard as legitimate; so that legitimacy impressed in one country is not a personal status *necessarily* following a man all over the world, [370] or even into any other country, and enabling him to maintain there a civil claim on the ground of legitimacy.[2]

Assuming, however, that the marriage must be proved incestuous by Scottish law, the law of Scotland rests upon the statutes 1567, c. 14 & 15. The second of these statutes is an enfranchising one, and was intended to remove, and not to impose prohibitions. The old law, which was thus amended on the side of freedom, remains (except in so far as altered) still in force. By that law the marriage of a widower with the sister of his deceased wife was clearly incestuous and null; and the argument on the other side must be that what was formerly prohibited as incestuous is now permitted. The Act 1567, c. 14, did not make the connections therein reprobated incestuous for the first time. The only object of that statute was to increase the punishment. The Act 1567, c. 15, allowing parties to marry within certain degrees before prohibited, left all marriages outwith the permitted degrees in the same position as they formerly were by the common law of Scotland,—*i.e.*, incestuous and null. But the punishment under the common law was merely ecclesiastical penance, which was altered by the Act 1567, c. 14, into death. Prior to the statutes in question, the law prohibited persons related, either by consanguinity or affinity, within the fourth degree of the canon law computation, to marry, which gave rise to evils which the statutes of 1567 were intended to cure.[3]

The 18th chapter of Leviticus does not permit the marriage of a man with the sister of his deceased wife. Such a connection is, by the law of Scotland, incestuous and null, unless there be permission; but the prohibition is clear. The reason assigned for every prohibition, in the chapter referred to, is the propinquity of the parties. Propinquity, therefore, is the rule which must govern every case; and, therefore, if the law in any one case declares a given degree of propinquity to be so great as to render marriage unlawful, it virtually declares an equal or a greater degree of propinquity in any other case to be so great as to render marriage unlawful. And the general law contained in verse 6th, viz.—"None of you shall approach to any that are near of kin to him,"—applies to affinity as well as consanguinity. This is quite obvious from the chapter itself. Of the eleven cases specially mentioned, six are cases of consanguinity, and five of affinity; but, by the 16th verse, marriage with a brother's "wife" is prohibited. To marry a brother's widow, and to marry a wife's sister, is to marry persons in the same degree of propinquity; so that there is a plain prohibition against both connections. The Bible itself affords conclusive evidence that it was not a prohibition against adultery with a brother's *wife* that was here intended, but a prohibition against incest. There are four female connections expressly mentioned as the wives of given individuals—1st, a father's wife (verse 8); 2dly, a son's wife (verse 15); 3dly, a brother's wife (verse 16); 4thly, an uncle's wife (verse 14); and if the word "wife" does not mean widow, then in not one of these cases is the marriage with a father's wife, a son's wife, and an uncle's wife unlawful. The difficulty of the 18th verse arises from the use of the word "sister." The translators, on the margin of the Bible, insert another reading in these words:—"Neither shalt thou take one wife to another," which makes the prohibition one against polygamy; and this is the

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[1] Lord Meadowbank in the case of Gordon *v.* Pye, Ferg. Div. Cases, p. 361; per Lord Robertson in the case of Edmonstone, Ferg. Div. Cases, p. 397; Warrender, 9 Bligh, N.R. 112—2 Cl. & F. 532.

[2] Birtwhistle *v.* Vardill, 9 Bligh, p. 45; Ersk. 3, 10, 7.

[3] Canons of the Council of Perth in 1242 and 1269, can. 65; Book of the Universal Kirk, vol. i., p. 5.

true meaning of the verse. The opposite construction leads to the conclusion that it is a permission of polygamy, except with a wife's sister, and permission to marry her after the death of the wife; but the Scriptures do not contain a single passage which implies that there could have been **[371]** two wives to one husband, except in certain special cases of polygamists, when the writer simply recorded the fact, not as if it were an usual, but a novel or wicked thing, that a man had so many wives. Then reverting to the law of Scotland:—

The statutes 1567, caps. 14 and 15, were merely the echo of the resolution of the first General Assembly of the Church of Scotland, which was not a mere ecclesiastical conclave, but was attended by nobles and commoners. The permissive statute regards affinity and consanguinity as the same. It enacts, "that seconds in degree of consanguinity and affinity, and all degrees outwith the same, contained in the decree of the Eternal God, may marry." The important fact is the most complete identification of consanguinity and affinity in the civil and permissive statute. The words "affinity and consanguinity" do not occur in the criminal statute; and a word occurs there which does not occur in the permissive statute, viz. "expreslie,"—thus, "as God in his word has expreslie forbidden." It is no necessary part of the pursuer's case to establish that the connection is criminally incestuous in the sense of the Act 1567, cap. 14. A criminal court may or may not be disposed, when the question arises, to adopt, as has been suggested by Baron Hume, any construction which would enable the accused to escape the infliction of the formidable penalty. In considering the question as to the extent and operation of this Act of Parliament, we have got the most important authority in the legislature itself. The Confession of Faith contains this passage (cap. 24, sect. 4), "Marriage ought not to be within the degrees of consanguinity or affinity forbidden in the Word; nor can such incestuous marriages ever be made lawful by any law of man, or consent of parties, so as these persons may live together as man and wife. The man may not marry any of his wife's kindred nearer in blood than he may of his own, nor the woman of her husband's kindred nearer in blood than of her own." Now this Confession of Faith was confirmed by the Act 1690, (9 Thomson's Acts, p. 133).[1] The Confession of Faith is a portion of the statute law, binding upon all, and this appears to have been the view of Parliament that ratified it. It was read and voted, article by article; and then it is inserted in the statute book as being a portion of the statute law. The legislative construction afforded by the Act 1690 is, without anything farther, conclusive upon this question; for it cannot be imagined that the legislature would have passed the Act 1690 if the law were in favour of the legality of the marriage.

These views have been given effect to in decisions of the Court of Justiciary finding the connection incestuous.[2] The Court of Session appears never to have had the question as to the validity of a marriage with a wife's sister under consideration. In the Consistorial Court, there has been only one case where it was thought necessary to bring the question before the Commissaries as to the validity of a marriage within the prohibited degrees.[3] The case brought before them was the marriage of a man with the daughter of his deceased wife's brother; and the Commissaries declared it null and void. Now there is no express prohibition in Leviticus against such a marriage. It was a case of affinity. The wife's brother stood no nearer towards the widower than would the wife's sister, and the wife's brother's daughter stood in a degree more remote. The judgment then is one precisely in **[372]** point. It is of the highest authority, looking at the time at which it was pronounced; for during the forty years subsequent to the Reformation, the Commissary Court at Edinburgh was the most important court in the kingdom.[4]

The ecclesiastical tribunals (long before the Confession of Faith, as well as after-

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[1] Philips *v.* Innes, 2 Sh. & M'L. p. 465.

[2] Hume, vol. i. p. 449; Case of Drysdale and Tannahill in 1705; Hume, p. 450; Pitcairn's Criminal Trials, vol. iii. p. 248; *Ib.* p. 3; Omand, 2 Irvine Just. Rep. p. 146.

[3] Riddell's Consistorial Law, p. 1002; Commissary Records preserved in the Register House, vol. vii., 26th July 1575.

[4] Ferguson's Consistorial Law, p. 171.

wards) also treated the marriages in question as incestuous.[1] We have here the best interpretation.[2] It is not merely contemporaneous, but continuous. It is the submission of a whole people. *Interpretatio a consuetudine approbata optima est;* or, *Illa interpretatio sumi debet, quam consuetudo probat.*

The opinions of institutional writers are all of one unvaried character, with the single exception of a doubt expressed by Baron Hume. These writers—although not all possessing equal authority, and although not all of the same authority as contested decisions of a court of law—are yet good evidence to the fact, that it was the understanding of the profession in their day that the marriage was illegal. If any doubt had been entertained upon the subject, it would have been made the matter of comment; and thus we have even a far higher authority than any general understanding among the people of Scotland, in the universal acquiescence by lawyers of all times in one opinion.[3] The opinion of Mr. Rutherfurd is relied upon in support of the opposite view. The opinion is not entitled to the same consideration as a judicial decision, and being without the reasons for the conclusion at which Mr. Rutherfurd arrived, it is difficult to deal with it. Of course the deliberate opinion of so great a lawyer is always of importance; but it stands alone in the history of published opinions on this question, and is opposed to that of Scottish lawyers equally eminent.

Of this date the case was advised.

LORD PRESIDENT.—We have had a very full and elaborate argument in this case on the part of Mr. Fenton. When we had occasion to deal with the case formerly, we were of opinion that the defender in the action of bastardy having unquestionably the status of legitimacy in England, giving him all the rights of succession which belonged to a party born in wedlock, we ought to recognise his status here, and hold that he was legitimate, and entitled to succeed. The case went to the House of Lords, and in the Supreme Court a different view was taken. It was held that that was not a sound view of the matter in fact or in law. It was held there that this party, though he had the status of legitimacy, was not entitled to plead that status here as unquestionable in a contention for succession to heritable estate. It was explained to us, that in England there was an obstacle to inquiring into the validity of the marriage which had been in form celebrated between his father and mother, and that therefore he was entitled to the status of legitimacy, and that his illegitimacy could not be ascertained or inquired into in that country; but that here, in reference to the succession to heritable estate, we were not fettered by that rule, and ought to inquire. He might be legitimate—that is, have the status of legitimacy in England—but not have that status here in regard to succession to heritable estate; and I am not sure whether the view goes to this, that he might have the status here in regard to personal estate, but not in regard to heri- [373] -table estate. That, however, is a matter with which we have nothing to do at present, because there is no question before us as to personal estate—it is only with the succession to heritable estate that we are dealing. And I understand the opinions then given to go to the effect of instructing us that we are entitled and bound to inquire whether, according to the law of Scotland, this would have been a lawful marriage; that is, whether the parties who celebrated this marriage were within the prohibited degrees; that is, the degrees which, according to the law of Scotland, are prohibited. I understand that to have been a direction given to us by the Supreme Court. I further understand the opinions there expressed to have gone to this, that the marriage that was in form celebrated in England was not a lawful marriage; that the parties were within the degrees prohibited by the law of England, although there was a formal obstacle to inquiring into that matter, by reason of rules of Court there,

[1] Booke Univ. Kirk, p. 196, and p. 377—Maitland Club; Selections from Ecclesiastical Records of Aberdeen, p. 164—Spalding Club; Ecclesiastical Records, Presbytery of Lanark, p. 9—Abbotsford Club; Presbytery Book of Strathbogie, p. 64—Spalding Club.

[2] 1 M'Queen, p. 401.

[3] Stair, 1, 4, 6; M'K. 1, 6, 5; M'Ken. Crim. Law, p. 160-1; Forbes' Inst. p. 61; Bankton, 1, 5, 47; Wallace's Principles, p. 145; Hutchison's Justice of Peace, vol. ii. p. 207; More's Stair, p. 15, Notes; Bell's Principles, sect. 1527; Erskine, 1, 6, 9.

but that these rules of Court did not preclude us from inquiring. There may perhaps therefore be two questions presented to us, and the pursuer, Mr. Fenton Livingstone, has, in this very full paper, presented the case to us in two views. He has presented the case to us in this view, that if we go entirely by the law of Scotland, we will find that the marriage which is said to have been formally celebrated in England was a marriage within the degrees prohibited by the law of Scotland, and that therefore we cannot recognise or give effect to it as legitimating the offspring of that marriage. He has also presented it to us in this view, that England was the country in which the parties were domiciled, in which they are said to have contracted the marriage, in which they did go through the ceremony of marriage, but that, according to the law of that country, there was no lawful marriage; and that there having been no lawful marriage according to the law of the country of the domicile of the parties, and according to the law of the country in which the marriage is said to have been celebrated, there is no marriage anywhere. Now as regards the question, viewing it in reference to the law of Scotland, I must say that it is a question upon which I have no doubt at all. It is a question which I have considered now by no means for the first time—the first time judicially, but by no means the first time professionally—and I have never had a doubt upon the question. I do not think, in the view which I take of this case, that it is at all necessary to go into those disquisitions in theology or in biblical criticism that have been indulged in with reference to this matter, and which are followed out very ably in the paper which is before us. I think that, in reference to the construction to be put upon the prohibitions in the Levitical law, we have an authoritative interpretation of them by the law of Scotland, which Scotch lawyers must follow. I leave the other question to another class of persons. There is perhaps no book in regard to which questions have been raised more widely, or interpretations more perverse have been adopted by some persons, than in regard to the sacred volume which is the subject of these discussions. Hence the great variety of sects that we have in this Christian country. It is very easy to cull passages, separate them from their context, and give an interpretation to them. It is very easy to cull separate passages from various contexts, and then bringing them together, and bringing the one to bear by comparison on the other, and assuming the superiority of the one over the other, to overthrow or disturb almost any principle of doctrine. Ingenious views may be suggested in regard to figurative expressions, taking them literally, and in regard to literal expressions representing them figuratively. In short, there is no end to the variety of opinions that may be held, and that may be stated in regard to these matters. There are sound views on the whole of them undoubtedly; there are views in regard to each and all of them that are sound. But we are dealing with this question as lawyers, and if we find an authoritative interpretation put by the law of Scotland upon this particular matter, that is the interpretation which we are to follow. Now I think that there is a uniform interpretation, which runs through the whole statute law and the law writers of Scotland, upon this subject. I do not think it necessary to go very far back, but I notice the statutes of 1567, which certainly imply a previous more stringent prohibition in regard to the degrees within which marriage might be celebrated. Chap. 15 of that year certainly professes to give greater freedom, and undoubtedly it assumes that there existed wider prohibitions formerly; and while it gives that freedom, it puts the degrees of relationship—of affinity and consanguinity—on the same footing; and in conformity with that, we have the interpre- **[374]** -tation which is put on that chapter by the express terms of the Confession of Faith, and that interpretation—for there is the importance of the matter—confirmed by Act of Parliament. This is the authoritative interpretation which we have to follow. In administering the law we must take that interpretation. The consciences of people are free in regard to any interpretation which they may put on passages of Scripture, but when they come to touch matters of civil right, and when we are asked to deal with them as matters of law, we must take that interpretation which is authoritatively laid down by statute, and we have that expressly given here. Now, regarding the interpretation put upon the 18th chapter of Leviticus by the Confession of Faith, confirmed by Act of Parliament, there is no room for question—there is no ambiguity of any kind. It is clear and explicit that, in such a case as we have here, the marriage with the sister of the deceased wife—the relationship by affinity—is held to be the same as by consanguinity, and that it is a forbidden degree for marriage.

Now that being the statute law, and the construction which has been put upon it, I think by every writer on the subject, there is no room for our pronouncing any other judgment than that this was not a lawful marriage. It is the opinion which is expressed without hesitation by Stair, and by Erskine, and by Bankton, and by Mackenzie. It is also mentioned by Forbes, and by Wallace, who had a good deal of experience in such matters, and was himself a commissary. But still more, I think it is the opinion which is expressed by Professor Bell, and by Professor More. It is the opinion also which is expressed by a gentleman of great experience in consistorial law, Mr. Ferguson. It is therefore the doctrine which has been taught by all our institutional writers. It is the doctrine which has been taught from the chair of law. It is a doctrine that is not controverted by any writer of note in the law; for although, in Mr. Hume's Commentaries on the criminal law, there are expressions of doubt in reference to the penal consequences, it is to be observed, in the first place, that these doubts are raised upon a very curt consideration of two passages in the Levitical law, as suggesting doubt; and, in the second place, that they have reference only to criminal or penal consequences. It is not the expression of an opinion, but only a statement of the existence of room for doubt in regard to the criminal law. I cannot take that as counterbalancing or shaking those other authorities to which I have referred. We are not here dealing with any criminal question; we are dealing with civil rights and interests.

Upon the matter of the illegality of this marriage, the degrees being prohibited, I think that there is no room at all for hesitation or doubt. There may be ingenious speculations, and I know that there have been ingenious speculations by very able and very learned persons upon the subject, but they go no further than mere speculations. Such speculations are beyond my ingenuity; and the impeachment of direct statute law, and of a uniform train of authority of the highest writers, unbroken and unshaken, is beyond my courage. I, therefore, have no hesitation in saying that, according to the law of Scotland, this was an unlawful marriage, being within the prohibited degrees; and in the view which I take of the case, the consequence of that is, according to the instruction we have got from the House of Lords, that this party was not a legitimate son of his reputed father, and cannot succeed to this estate. In regard to the question arising out of the view of the English law, I have already said what appears to me to be the short result of that, and it is this; if it is to be held that there was no lawful marriage in England,—that this was a marriage within the prohibited degrees in England as much as in Scotland,—that the law of England holds that it was null *ab initio*, that it never was a marriage at all, then I cannot understand how a ceremony which does not make a marriage according to the law of the domicile of the parties—according to the law of the country where they lived and died, and where the ceremony is said to have been gone through—can be regarded as a marriage anywhere. The language of some of the learned Lords is not very clear as to that. Some of them appear to have thought that perhaps we in Scotland might take a different view on that subject from what I have now expressed, but certainly I cannot take it as the law of Scotland that what was no marriage at all between parties who never were in Scotland and had no domicile here, is to be held as a marriage in Scotland. Therefore, in either view of the case, I think that this party is not to be regarded as a legitimate son of the alleged marriage between his father and **[375]** mother, and consequently that judgment must go to that effect. The terms of the judgment perhaps require a little care. Mr. Fraser at one time gave us a minute in which he stated the terms of the judgment he proposed, but there have been some changes in the position of parties, and it would be necessary to look carefully into that matter. We have to deal both with the declarator and with the advocation, and it is necessary to see that we have parties here to enable us to deal with them, and the form in which they are to be dealt with.

LORD IVORY.—I have no doubt upon either point raised here. I entirely agree in the conclusions at which your Lordship has arrived, and I adopt almost implicitly the grounds upon which these conclusions have been formed.

LORD CURRIEHILL.—I, like your Lordship, felt this to be a very important question, requiring all the more serious consideration that we have now to dispose of it *ex parte*. The summons in this case, in the action of declarator, asks us to find and declare that Alexander Livingstone was not the lawful son of Thurstanus

Livingstone, his reputed father, and, moreover, that he is not entitled to succeed to a Scotch estate called Bedlormie, in virtue of a deed of entail. It is, therefore, an action relating to a Scotch succession. The ground upon which that decree is sought is this,—that the mother of Alexander Livingstone, a Mrs. Catherine Ann Ticehurst, was the sister of another woman to whom Thurstanus Livingstone had been previously married, and that although the ceremony of marriage had been solemnised between Thurstanus Livingstone and this Mrs. Ticehurst, after the death of his first wife, yet that marriage was a nullity in respect that they were parties within the forbidden degrees of propinquity. A doubt has been raised in the case whether or not this matter is to be decided according to the law of Scotland, where the estate the succession to which is in dispute is situated, or by the law of England, where the marriage was celebrated, and where the parties were domiciled at the date of this ostensible marriage, and continued to be so. In the view which I take of the case, the question depends in the first instance upon the law of Scotland—upon the *lex rei sitæ*, in respect the case relates to the succession to a Scotch estate. But when we inquire what the law of Scotland is on that subject, I think the law of Scotland itself refers us to the law of England; because England being the country in which the marriage in question was celebrated, and where the parties to it were domiciled, I think the question whether or not it was a lawful marriage must be regulated by the law of that country; and, therefore, although in the first instance the case depends upon the law of Scotland, yet thus following out the law of Scotland upon the subject, it becomes necessary for us to inquire what is the law of England in reference to the validity of that marriage. Dealing with the case in that view, I think we have a very easy task in the present state of the proceedings in ascertaining what the law of England is upon the subject; because in the appeal to which your Lordships has referred, I think we have obtained the opinion of noble and learned Lords in the House of Lords quite unanimous upon the point so far as I understand it—that according to the law of England this marriage was an absolute nullity. And I hold that expression of opinion, as well as the evidence which was led at an early stage of the case, to be quite conclusive upon that subject,—although it does appear that, according to the technical rule of procedure in that country, this nullity could not be declared in any competent court there, in respect that it is only in the ecclesiastical courts that such a proceeding could have taken place, and that an inquiry is prohibited in these courts of such a nullity of marriage after the death of the parties by whom it is said to have been entered into.

When the case was formerly before us, I concurred with your Lordship in thinking that as the parties had acquired a status in England which could not be upset, we were bound to give effect to that status; and, therefore, I thought that we were precluded, as the English Courts would have been precluded, from inquiring into this matter of nullity. We were in error in this respect, as has now been settled by the House of Lords; and that being the case, we are now at liberty to inquire into the question of the nullity of that marriage; and, on the ground which I have stated, I have now no hesitation whatever in holding that this marriage was a nullity by the law of England; in other words, that Thurstanus Livingstone and Mrs. Ticehurst never were married; and that as there never was any valid marriage between them, the offspring of their connection, was not, and could not be, legiti- **[376]** -mate. In my view of the case, that is conclusive of the present question; and were I to rest entirely upon my own views, I would go no further.

But, looking at the opinions given in the House of Lords, their Lordships seem to have expected that we are to give our opinions as to what is the law of Scotland on the subject, even supposing this ostensible marriage had taken place in Scotland; and I have felt it therefore to be my duty, out of deference to the expression of these opinions, to consider that question also. With reference to that question, I do not know that we have very clear evidence as to what is the common law of Scotland upon the subject. That law must have been formed at a very early period, but we have not institutional writers anterior to the Reformation to let us see very clearly into it. I think the only thing that we have been referred to is an Act or resolution of the meeting of an Assembly that took place in December 1560, as mentioned in the Book of the Universal Kirk, in which there is a statement that, anterior to the Reformation, the law as to the degrees within which marriage was lawful was much more stringent.

The statement is, that "the question being proponed anent marriage in second and uther degrees of consanguinitie forbidden be the Pope to be solemnizat betwixt parties, it is found that, of the law of God, mariage may be solemnizat betwixt parties beand of second, third, and ferd degrees of affinitie or consanguinitie, and uthers sick as are not prohibited expressly be the Word of God; and therefore to desyre the Lords and estates to interpone there authoritie and approve the samen, and make lawes thereupon." I think this sufficiently indicates what, historically, I believe, admits of no doubt, that before the Reformation marriage was forbidden by the canon law within much more remote degrees than it is now; although there was a mode of obtaining relief from that hardship by dispensations from the Pope. But soon afterwards we have statutory enactments upon the subject, in the year 1567,—chapters 14 and 15,—which, although two statutes, I read as substantially and in effect being parts of the same code. They were passed simultaneously, and they stand in juxtaposition in the statute-book. By the first of these, c. 14, sexual intercourse between parties within the degrees mentioned in the 18th chapter of the Book of Leviticus, is rendered incest, and punished capitally. The other is an enactment by which the Legislature ordained that "the hailie band of mariage, made be all estaites and sorts of men and women, to be als lawful and als frie, as the lawe of God hes permitted the samin to be done without exception of person or persones—and hes declared and declares that secunds in degrees of consanguinitie and affinitie, and all degrees outwith the samin contained in the word of the Eternal God, and that are not repugnant to the said word, might, and may lawfully marry at all times sen the viii. day of March, the zeir of God ane thousand five hundreth fiftie aucht zeiris, notwithstanding ony law, statute, or constitution maid in the contrare—and ratifyis and approvis all the said mariages done sen the said day; and the bairnis gottin or to be gottin in sik marriage, to be as lauchful, as weill toward their succession to landis, heritages, or other liberties, as ony bairnes gottin in mariage, and to be repute and esteemed in all time to cume, lauchfullie gottin in lauchful mariage, notwithstanding any lawes, statutes, constitutionis, or Acts, maid or to be maid in the contrare." I think that the present question depends upon the true meaning and construction of these statutes. I concur entirely in the remarks which have been made by your Lordship as to the view in which we, sitting as a Court of law, are bound to approach this question. If the statutes had said in so many words (and if we had no other means of getting at their construction), that the law of Moses was to be the law of Scotland, it might have been necessary for us to have entered into those wide speculations to which your Lordship has alluded; but I think that we would have had to do so, not because it was the law of Moses, as *ipso jure* binding by the law of Scotland, but because the Legislature had enacted it. And, therefore, I think that the question before us is, what is the true meaning and construction of these statutes, particularly the statute c. 15? I think there are three questions that we must solve in order to get at the true meaning of this statute. The first is, whether it imposes any prohibition whatever? for it is expressed as if it were an enabling statute, merely permitting marriage within certain degrees. We must, therefore, be satisfied that it imposes a prohibition upon marriage within certain other degrees. Then, assuming that question to be answered in the affirmative, the next question is, whether the statute prohibits the marriage of a man with his [377] sister by consanguinity? And the remaining question, and the only one attended with the slightest difficulty, is, whether or not, assuming the second one also to be answered in the affirmative, the prohibition applies to a sister by affinity as well as consanguinity?

With reference to the first of these questions, I think it is impossible to put any other meaning upon the statute than that it implies a prohibition as well as a permission. It declares that seconds in degrees of consanguinity and affinity, and all degrees outwith the same, are to be permitted to marry. I think it implies that all within that degree,—viz., parties who are within the degree of consanguinity that is accounted first, are prohibited from marrying. It would have been useless to have given permission to those beyond that degree to marry, unless it was implied and understood that those within that degree were to be prohibited. If they were prohibited before, of course they remained prohibited by the common law; but, even apart from that, I think it is necessarily implied by the manner in which this statute is expressed, that there was a prohibition. And that is made clear when we read it in

connection with the statute c. 14, because c. 14 makes the conjugal intercourse between such parties incestuous positively; and it is impossible to hold that the Legislature understood it to be lawful for parties to marry, whose conjugal intercourse would have been incestuous, and would have exposed them both to capital punishment. I have, therefore, no doubt that this implies a prohibition, notwithstanding the peculiar terms in which it is expressed.

Then, secondly, there is no question that the prohibition which the statute contains applies to parties in the degree of brother and sister; because, by consanguinity such parties are connected in terms of the statute, in the first degree. They are not in the second, or third, or fourth, or any more remote degree. There were two modes of counting degrees; but the one which was adopted with reference to marriage was that of the canon law, and according to that law the ascendants or descendants in a direct line of any person, were not reckoned degrees at all. It was only when you went to the collateral line that you began to reckon degrees. In this way a brother and a sister were connected by the first degree. The rule upon that subject is very well stated by Lord Stair, i. 4, 4,—"The degrees in which marriage is allowed or forbidden are by divine institution; for the next degree collateral is only forbidden. For of ascendants and descendants there is properly no degree, the great-grandmother being in that regard as near as the mother. And so the next collateral to all ascendants and descendants is in the same degree with brothers and sisters." I think that upon this point, perhaps, the law of nature would itself have been sufficient. But looking at it according to judicial rules, it is very clear that had Mrs. Ticehurst been the sister by consanguinity of Thurstanus Livingstone, the marriage would have been within the forbidden degrees.

Then, thirdly, holding that to be clear, the question comes to be this—Does the prohibition in this statute against marriage, within the first degree of consanguinity, apply to propinquity by affinity as well as by consanguinity? I think the question in dispute comes to that point. Now, upon that point, the statement in the passage I have read from the Book of the Universal Kirk is ambiguous, because it speaks of the Pope having prohibited marriages within these different degrees by consanguinity. But as to the subsequent statute, I am of opinion that, according to its sound construction, the prohibition in that statute applies to propinquity by affinity as well as by consanguinity. I think the view of the law is, that as to this matter parties in the married state are to be held as identified; and that those related to the one in any degree, are to be held to be related to the other in the same degree. This appears plainly enough from the very words of the statute, c. 15, because it expressly declares that seconds in degrees, either by consanguinity or affinity, and all degrees without the same, are permitted to marry; and I hold that this implies that those within these degrees, either by consanguinity or affinity, are prohibited from marrying, because the Legislature having the propinquity by affinity as well as by consanguinity in view, made the prohibition as to the one corresponding to the other. But fortunately we are not left to the bare terms of that statute itself, in order to ascertain its meaning. During the period between the Reformation and the Revolution, this was the construction which was put upon it by the institutional writers. It was between these periods that Lord Stair wrote, and he says (1, 4, 6)—"Marriage is also void and inconsistent when contracted **[378]** within the degrees prescribed (Lev. xviii.), whereby the next degree collateral is only prohibited, both in consanguinity and affinity, which makes those joined in affinity in the same degree as being by marriage one flesh." Mackenzie also wrote during the same period, and states the doctrine thus—"The degrees forbidden in consanguinity are also forbidden in affinity." But, above all, immediately after the Revolution we have the statutory interpretation of the law upon this subject, to which your Lordship has alluded. It is quite explicit; for then the Church having drawn up their creed in the Confession of Faith, inserted the following unambiguous statement of their interpretation of this prohibition, in c. 24, sect. 4—"Marriage ought not to be within the degrees of consanguinity or affinity forbidden in the Word; nor can such incestuous marriages ever be made lawful by any law of man, or consent of parties, so as these persons may live together as man and wife." That is the general statement of the law, and it applies to affinity as well as consanguinity; and there follows this explanatory sentence, to avoid the possibility of misunderstanding:—"The man may not marry any of his wife's kindred nearer in blood than he

may of his own, nor the woman of her husband's kindred nearer in blood than of her own." That is quite express. And although it was only the view which the Church took of the matter, this interpretation was adopted by the Legislature also. In 1690 this Confession of Faith was laid before Parliament; and the Legislature passed an Act (c. 5), the preamble of which sets forth, that "it is the duty of the State, in the first place, to settle and secure therein the true Protestant religion, according to the truth of God's Word, as it hath of a long time been professed within this land, and also the government of Christ's Church within this nation, agreeable to the Word of God, and most conducive to the advancement of true piety and godliness, and the establishment of peace and tranquillity within this realm." Then, after some things which we have nothing to do with in the present case, there follows this clause:—"Likeas they, by these presents, ratify and establish the Confession of Faith now read in their presence, and acted and approven of the public, and avowed confession of this Church, containing the sum and substance of the doctrine of the Reformed Churches." And as the Confession of Faith which was thus ratified professes to give the true meaning of the Word of God, and the Legislature expressly confirmed and adopted that meaning of this portion of the Word of God, this also serves to show the meaning which the Legislature put upon the same portion of the Word of God in the prior statutes of 1567. I think that this matter is thus put beyond all question in the law of Scotland. This statute of 1690 has no application to the present case, except in so far as it confirmed the Confession of Faith, and thereby gives us a key to the construction which the Legislature put upon it. And this is made more emphatic, as at the Union of Scotland and England, not only is there another ratification of this statute, and of the Confession of Faith therein contained, but that ratification is made an essential article of the Union. I therefore think we have got the most explicit interpretation by the Legislature itself, as well as by the institutional writers preceding the Revolution, as to the true meaning of the statute regulating the degrees within which marriage may take place.

And since the date of the Revolution, the authorities, as your Lordship has stated, have been explicit; and, with the exception of a kind of sceptical remark by Hume, the authorities are uniform and explicit upon the subject. Bankton and Erskine are so; and then we have Professors Bell and More to the same effect. We have, therefore, this statute interpreted, by a practice of three centuries, by all the institutional writers, and by the Legislature itself. On these grounds, I concur with the judgment proposed by your Lordship.

Lord Deas.—The object of the present litigation is to ascertain which of two competing claimants is entitled to succeed, under a Scots deed of entail, to the lands of Bedlormie and others, situated in Scotland.

The late Mrs. Ann Fenton, on the one hand, applied to the Sheriff in Chancery to be served heiress of entail; and the late Alexander Livingstone, on the other hand, applied to be served heir of entail to these lands and estate. The Sheriff in Chancery conjoined the applications, and allowed a proof before answer. At this stage the applications were advocated to the Court of Session, and Mrs. Fenton instituted an action of declarator, to have it found and declared that Alexander Livingstone was not the lawful son of his father, Thurstanus Livingstone (through **[379]** whom he claimed), but a bastard; and, consequently, that he was not entitled to succeed to the lands of Bedlormie and others under the tailzie.

Mrs. Fenton had neither title nor interest, and her son, who now comes in her place, has neither title nor interest to insist in this action of declarator farther than as regards the succession to the above entailed estate; and anything in the summons which goes beyond that succession must, therefore, be laid out of view. Mrs. Fenton and her son,—the latter of whom I shall now call the pursuer,—were, of course, entitled to oppose out and out the application for service of Alexander Livingstone; because the only prayer of that application was, "to serve the petitioner nearest and lawful heir-male of tailzie and provision in special of the said Sir Thomas Livingstone in the lands and others above described." But the true and only question, under these applications and relative declarator, is, whether Mrs. Fenton, or Alexander Livingstone, was entitled to succeed to the estate of Bedlormie under the entail? And this, again, entirely depends upon whether Alexander is or is not to be held the lawful son of Thurstanus Livingstone? The precise nature of the question is of great importance

to be kept in view, with reference to how these cases are now to be dealt with and decided.

The Lord Ordinary, upon advising a proof, applicable both to the advocation and declarator, assoilzied from the conclusions in the declarator, and, in the advocation, remitted to the Sheriff in Chancery to serve Alexander Livingstone. The interlocutors thus pronounced were reclaimed against. The Lord Ordinary, in the note appended to his interlocutor in the declarator, expressed a doubt whether the only objection taken to the marriage of the parents of Alexander Livingstone, viz., that his mother was the sister of his father's first wife, was a good objection to marriage by the law of Scotland. But his Lordship did not think it necessary to solve that doubt, but rested his judgment substantially upon the ground that Alexander Livingstone had the status of legitimacy in England, where he had been born of an English marriage contracted there, between English parents, and was himself domiciled, and that he ought, therefore, to be recognised as legitimate in Scotland. This Division of the Court concurred with the Lord Ordinary in thinking the latter ground sufficient to sustain the judgment, even upon the assumption, for the sake of argument, that such a marriage in Scotland would have been null and incestuous; and deleting, therefore, from his interlocutor, all reference to his note, we adhered to the interlocutors of the Lord Ordinary in both causes, and the service of Alexander Livingstone, in Chancery, was thereupon proceeded with and completed. These interlocutors of the Lord Ordinary and the Court have been reversed upon appeal; and the processes of advocation and declarator remitted to us to do therein as shall be just. Mrs. Fenton and Alexander Livingstone both died while the causes depended in the House of Lords. The pursuer was sisted in place of his mother; and the pupil, son of Alexander Livingstone, and his tutors, were sisted in place of Alexander, as parties respectively to the appeals. No appearance has, however, been made for the pupil or his tutors since the causes returned to this Court.

In the ordinary run of cases, the course would be to pronounce, in absence of the other party, whatever judgments the pursuer should ask, not inconsistent with the shape of the cause. But, by the statute 11 Geo. IV., and 1 Wm. IV., c. 69, enacting that "all actions of declarator of legitimacy and of bastardy," &c., shall be competent in the Court of Session only, it is also enacted (sect. 36), that no decree or judgment shall be pronounced in such action in favour of the pursuer, "whether appearance shall or shall not be made for the defendant, until the grounds of action shall be substantiated by sufficient evidence." This, it is said, renders it necessary for us to give judgment in the declarator *causâ cognitâ;* and, in the absence of any contention to the contrary, I do not well see how we can do otherwise. It is unfortunate that we should have to decide such a case upon an *ex parte* argument. For the plea now pressed upon us by the pursuer, as his primary and prejudicial plea, that we ought to decide in his favour without entering upon the Scots law of incest at all, is an entirely new plea in the case, never insisted in before us so long as there was a contradictor in the field, and in itself, to say the least of it, of a very subtle kind; while the question of incest by the Scots law is one of the most difficult and important questions which can be raised in our law, being, as the pursuer himself says in his appeal case, "a question that has long [380] agitated the public mind in Scotland, and which it is highly desirable for the peace of families should be set at rest by judicial determination or legislative enactment." Set at rest, however satisfactorily, it can scarcely be by an *ex parte* judgment; whereas a judgment upon full argument would have been valuable not only in this Court, but for the guidance of such of us as, in another Court, may be called upon at any time to deal with the same question as a matter of life and death. Besides, even as in this cause, I do not know that anything we can here do *ex parte* will be absolutely conclusive to deprive the pupil-heir of his heritable estate, if he can afterwards shew that it really belongs to him.

If we are now to deal with this case without entering upon the Scots law of incest, the assumption upon which the argument formerly proceeded must be *reversed*. The pursuer must assume that the statutes 1567, chaps. 14 and 15, do not apply to the case of marriage with a deceased wife's sister,—that such a marriage in Scotland would not be unlawful; and he must shew that, nevertheless, he is entitled to have the original defender, who was born in England of an English marriage, contracted between parties domiciled in England, declared illegitimate and incapable of succeeding to a Scots estate.

Upon the assumption thus made, I am not prepared to assent to the pursuer's proposition. I admit that the law of Scotland, which of course is to be our guide, looks to the law of the domicile where the marriage took place in considering whether that marriage is to be held *ab origine* null. But the law of Scotland looks also to the law of the domicile in considering whether the issue of a marriage be or be not legitimate. If the child of the marriage has the status of legitimacy in the country of the domicile,—if the law of that country bars all objections to that status, I know no ground upon which it can be objected to here, except upon the ground that, by acknowledging it, we are acknowledging something contrary to the fundamental principles or policy of our own law, or of our rules of succession to heritable estate.

I can quite understand the view taken in the House of Lords (differing from our original view), that, by acknowledging the legitimacy, we are acknowledging the marriage; so that if the marriage, by our own law, would have been incestuous, and would have subjected the parties, had they cohabited here, to the punishment of death, this provision of our own law must introduce an exception,—at all events, in a question of succession to a Scottish heritable estate,—to the general rule that the status of legitimacy, in the country of the domicile, follows the party everywhere. But, when the ground of exception is removed, the exception itself vanishes. Assuming that, by our law, the marriage was good, we are then not violating, but acting upon the principles of our own law when we give the same effect to the status of legitimacy as is given to it in England.

It is said the marriage was void in the country in which it was made. True, it was void in this sense—that it was subject to be declared void *ab initio* in the lifetime of the contracting parties. But that was not done, and cannot now be done. The marriage was a regular marriage in *facie ecclesiæ*, unobjectionable in every respect, unless we inquire into a latent disqualification which the law of England will not and cannot inquire into. If this disqualification implies, by our own law, the crime of incest, I admit we must inquire into and give effect to it, although the law of England, by refusing inquiry, covers up and virtually effaces the disqualification, as respects its bearing upon legitimacy. But, if by our own law, it is no disqualification at all, why are we to give an effect to the law of England which the law of England does not and cannot give to itself?

Let it be that the statute barring inquiry has no effect beyond the territory; and therefore that it cannot compel us to accept as lawful a marriage which our own law declares to be incestuous:—So neither could the whole marriage law of England. But when our own law adopts the law of the territory, we must adopt it as it is, in its entirety; not take part and reject part, as if it were a favourite object with our law to hold one who is legitimate in England a bastard in Scotland.

It must never be forgotten that the law of Scotland does not require,—as the law of England does,—that a child, to be legitimate, must be born in lawful wedlock. The inquiry, in a Scots service, is not whether the child is legitimate by reason of being the issue of a lawful marriage,—but, substantively, whether the [381] child be legitimate. The child may have been born a bastard, and legitimated by the marriage, regular or irregular, of its parents, many years afterwards; and this, even although there has been an intervening marriage, as was found in M'Robert *v.* Martin, 6th March 1840, F.C. Consequently, it could form no objection by the law of Scotland, to Alexander Livingstone's service, that there had been a period of years during which he was not legitimate either by our law or by the law of the domicile. The answer would be, by the law of the domicile he is legitimate now, as at the time the succession opens, and this is enough, if no other principle in the law of Scotland interferes to exclude him from the succession. Suppose, for instance, that a father incurs an irritancy under an entail, by which he forfeits in favour of the next heir, although descended of his own body. In that case his only son could not claim the estate, if the son's mother was not yet married to the father. But suppose the father marries the mother, and then forfeits another estate under a similar entail, the son would take that estate as being the lawful son of his father at the time when the succession opened. Nor is it necessary to such a result that the marriage should be carried back, by a fiction (too much dwelt upon at one time), to the date of the conception, or of the birth. If that were so, the son, in the case supposed, would take the first forfeited estate from the heir in possession of it, as well as succeed to the second; and a man, by marrying, in

his old age, the mistress who had born a son to him in his youth, would not only deprive his son, by his deceased wife, of his expected inheritance—which is a question in our law not decided—but would bastardise the issue of the marriage, which had been dissolved by the wife's death, as having been contracted during the subsistence of what the law now held to be the prior marriage—a result for which nobody contends. It is quite consistent with our law to hold that the legitimacy begins with the act or event without which there would have been no legitimacy; such as, in the case before us, the event of the death of the parent, which rendered the legitimacy unchallengeable. I do not inquire, therefore, how the case would have stood had anything occurred, such as the forfeiture of a Scots entailed estate, to raise the question of legitimacy in Scotland in the lifetime of Alexander Livingstone's parents. I take matters as they stood at the time when the succession opened; and, there, looking exclusively to the law of England as the law of the domicile, which we are to adopt, if not repugnant to our own law, I find nothing to affect the legitimacy, or bar the right of succession. It follows that, if a Scots marriage between the parents of Alexander Livingstone would not have been held null and incestuous in Scotland, we cannot refuse to give effect to his status of legitimacy, there being, in that view, no ground for an exception to the general rule that the status of legitimacy, recognised by the law of the domicile, follows the party everywhere.

But I acknowledge the *exception* which the House of Lords have laid down. We should never have doubted it had we thought that, by acknowledging the legitimacy, we were acknowledging the validity of the marriage. Had it been our law, as it is the English law, that to prove legitimacy you must prove the child to have been born in lawful wedlock, we should at once have held the case to fall within the exception. But the substantive question with us being legitimacy, however attained,—to which the marriage is merely incidental,—we thought we were not called upon to go beyond the substantive question and inquire into the incident which could not be inquired into by the law of the domicile. In this we stand corrected; and I now, therefore, proceed to inquire,—very reluctantly, I admit, upon this *ex parte* argument,—how the law of Scotland stands upon the question of the validity of a marriage with a deceased wife's sister, on which, according to my view, this case turns.

The statute law on the subject of such marriages is to be found exclusively in the Acts of 1567, chaps. 14 and 15. It is necessary to consider these two Acts separately. The marriage may be null under the one, although not struck at by the other. The first is a purely criminal statute. The second is exclusively civil.

The Act 1567, c. 14, "Statutes and ordaines that quhatsumever person or persones, that committes the said abhominable cryme of incest,—that is to say, quhatsumever person or persones they be that abuses their bodie with sik persones in **[382]** degrie as God in his word hes expreslie forbidden, in any tyme cumming, as is contained in the xviii. chapter of Leviticus, sall be punished to the death."

With reference to this statute, it is necessary to consider—1st, The terms of the statute itself; 2d, The judgments which have followed upon it; and, 3d, The *dicta* of our institutional writers.

As regards the statute itself, it virtually enacts that whatever sexual intercourse is expressly forbidden by the 18th chapter of Leviticus, shall be deemed incest, and punished with death. The 18th verse of the chapter bears, "Neither shalt thou take a wife to her sister, to vex her, to uncover her nakedness, besides the other in her lifetime." Intercourse with the wife's sister, after the wife's death, is not expressly forbidden either in this verse or in any other verse of the chapter. If called upon to interpret the statute, in the absence of precedent or authority, I should say that this was enough. The statute punishes with death what the chapter expressly forbids. If the chapter does not expressly forbid marriage or intercourse with a deceased wife's sister, then the statute does not punish it with death.

I cannot adopt the pursuer's argument that we are to resort to the original Hebrew, and hold that the words which have been rendered "take a wife to her sister," ought to have been rendered, "take one wife to another," "to vex her," and so on; and that, consequently, the verse is to be read as merely importing a prohibition against polygamy, which is said not to have been unlawful among the Jews, notwithstanding of a contrary practice having been followed by their most venerable and venerated leaders. The Scots statute does not proceed upon the original

Hebrew, but upon the translation in use in Scotland, which is not said to have been so rendered.

Neither can I proceed upon the supposed analogy of the case of a brother's widow, under verse 16. Apart from the difficulty of there holding the word "wife" to include "widow," notwithstanding of the injunction in the 25th chapter of Deuteronomy to marry a brother's widow, it is sufficient to say that we are not to extend, by analogy, a highly penal statute like this, to cases to which, in its terms, it does not apply. All that the statute does is to enact the punishment of death for offences which the chapter expressly forbids. To whatever the chapter does not expressly forbid,—whether in itself an offence or not,—the statute, in its terms, is inapplicable.

The statute may, however, have been so construed, in practice, as to fix upon it a construction, in this respect, different from what we would otherwise have given it. By a long series of decisions, it has been settled that intercourse, in a wife's lifetime, with her sister, infers the statutory penalty. Upon that point there would be by no means the same degree of difficulty which occurs here, although the question were open. These judgments do not leave the question open; but they are not applicable here. It is not for us to inquire why the one thing was expressly forbidden by the chapter, and not the other. All the things forbidden by the chapter may not have been forbidden as equally against the laws of nature. It would be difficult to affirm that they are so in the face of the admitted exception (if it be a mere exception), already noticed, in the chapter of Deuteronomy, enjoining, in certain circumstances, the marriage of a brother's widow. But, be this as it may, we are not here to reason from the case of the sister of the wife in her lifetime, to the case of a sister of the wife after her death, any more than from the case of the brother's widow to the case of a deceased wife's sister. Upon the question of the brother's widow, there is one case, and one only,—that of Jeffray Irvine, in September 1624, who, having had children by his brother's widow, was sentenced to be beheaded. That case was doubtful enough, and its authority may fall to be considered when a similar case occurs. I cannot hold it to be in point here, although the pursuer says, in his case (p. 64), that the inference drawn from the prohibition there given effect to, formed the successful argument in the only case which is really in point,—I mean the case of James Drysdale and Barbara Tannahill, in January 1705,—which I now proceed to notice.

Barbara Tannahill at first confessed to one act of intercourse with Drysdale, but she afterwards retracted this confession, and both panels were remitted to an assize. The jury found Barbara Tannahill's judicial confession, "together with the concurring witnesses, their depositions," (meaning witnesses who spoke to her extra-
[383] -judicial confessions,) "doth sufficiently prove the indictment against her, but refers her retracting to the Lords themselves. And, as to James Drysdale, we find nothing proven against him, except the woman's assertion, which is proven by concurring testimonies," (meaning, again, testimonies to her extrajudicial confessions,) "which is a great presumption of his guilt of the crime indicted." The pursuer, in the appendix to his case, has printed the proof led *ad longum*, from which it will be seen that the concurring testimonies to the woman's assertion, referred to in the verdict, consisted entirely of the evidence of three witnesses, that she had sometimes asserted, and at other times denied to them, that James Drysdale (who was not present at these statements or confessions) was the father of the child of which she was then pregnant. The Court sentenced the woman to be hanged; and, at the distance of three months thereafter, during which the man remained in prison, they resumed consideration of the verdict, and, "in respect thereof, by the mouth of John Park, dempster of Court, banish the said James Drysdale furth of the kingdom;" and ordained him to depart betwixt and the 10th of July then next, and to lye in prison till he found caution so to depart.

The respect due to the above procedure is not increased by the Court having punished James Drysdale, against whom the jury found nothing proved, except the assertions of the other panel, to which he was no party. If the verdict warranted his being banished, it would have warranted his being hanged. But a verdict, virtually to the effect that nothing had been proved against him, would certainly not now-a-days be held to warrant either the one punishment or the other.

This case of Tannahill and Drysdale stands alone in the records of the Justiciary Court. There is no case, before or since, of the statute being applied to intercourse, with or without marriage, between a man and his deceased wife's sister. There are four trials for incest, of dates prior to the above, mentioned by Mr. Hume (vol. i. p. 451),—the first in August 1628, and the last in November 1669,—in which, although there was neither consanguinity nor affinity between the panel and the two sisters or the two brothers with whom the panel was said successively to have had connection, a capital sentence was pronounced. Of these cases Mr. Hume justly says, that however immoral or even criminal the acts, "yet it may well be doubted whether, in any of them, the offence amounted to incest, or was subject to the statutory pains." They only serve, I think, as beacons to warn us against extending a capital statute by inferences, to which, if once admitted, there are no limits.

3*d*. As regards our institutional writers, it so happens that not one of them expresses any opinion with reference to this particular statute, or to the criminal law, except our leading authority Mr. Hume, who, after expressing his doubts—which, we all know, with him generally indicated contrary opinions—as to the case of a brother with a brother's widow, goes on to say (v. i. p. 449), "There is the like room for scruple with respect to the sister of one's wife, whom (in v. 18) one is indeed forbidden to know, but this only in terms ('in her lifetime') and for such a reason ('to vex her') as make it somewhat difficult to apply the rule to the other case, of intercourse with a wife's sister after the death of his wife. Doubts, have, accordingly, been entertained, as well among divines as lawyers, concerning the successive marriage of two sisters, whether it is not even a lawful, and to all effects a sufficient marriage. Our practice affords, however, one precedent for applying the pains of incest to such a connection. I allude to the trial of James Drysdale and Barbara Tannahill, where the woman had sentence of death for incest committed with the husband of her deceased sister. But, on this conviction, Lord Royston observes in his notes, '*sed dubito an jure*,' 'for since King James' Act has an express reference to the judaical law, Levit. xviii., it ought not to be extended to other cases not therein expressly mentioned.'"

It is plain enough, from this passage and the context, that Mr. Hume's opinion agreed with that of Lord Royston, so that we have nothing in favour of the construction put upon the statute in the case of Drysdale and Tannahill, except the judgment itself, pronounced upwards of a century and a half ago; and we have a clear indication of opinion from our greatest criminal lawyer against that construction and that judgment. We do not now implicitly follow the practice of those times, and I cannot regard this single case as authoritatively fixing upon this highly penal statute a construction which, in its terms, it does not fairly bear.

[384] But it remains to consider the question with reference to the purely civil statute 1567, c. 15. That statute enacts "that the halie band of marriage made be all estaites and sorts of men and women, to be als lawful and als frie as the lawe of God has permitted the samin to be;" and "that secunds in degrees of consanguinitie and affinitie, and all degries outwith the samin contained in the word of the Eternal God, and that are not repugnant to the said word, might and may lawfully marry at all times sen the viii. day of March the zeir of God ane thousand five hundreth fiftie aucht zeiris, notwithstanding ony law, statute, or constitution maid in the contrare. And ratifyis and approvis all the said mariages done sen the said day."

It is material to keep in view that this statute, as indeed its terms sufficiently indicate, was an enabling statute. By the canon law, which was previously understood to prevail, cousins-german, who, by that law, were reckoned seconds in decree, could not marry. It is not surprising, therefore, that the statute should have been construed as prohibitory of marriage between all nearer than cousins-german. As to the applicability of this statute to the wife's relations there is no ambiguity, for, in its terms, it applies equally to consanguinity and affinity. The statute 1690, c. 5, ratifying the Confession of Faith, together with the terms of the Confession of Faith itself, are likewise material upon this point. The Confession of Faith is not incorporated into the statute (as the 18th chapter of Leviticus is into the previous statute), so as to have the force of an Act of Parliament. For instance, it would be in vain to assail a marriage as contracted contrary to the prohibition, in sect. 3, c. 24, against marriages between those who profess the true reformed religion and papists, or between the godly and the notoriously wicked. The Confession of Faith is merely ratified as

embodying the doctrines and rules to be taught and observed in the Established Church of Scotland. But the terms of sect. 4, c. 24, of that Confession are, nevertheless, very material in the construction of the statute 1567, c. 15. That article of the Confession of Faith expressly bears,—"The man may not marry any of his wife's kindred nearer in blood than he may of his own, nor the woman to the husband's kindred nearer in blood than of her own." I do not adopt the pursuer's argument that, because no clergyman of that day could lawfully celebrate marriage except a clergyman of the Established Church, who would have been liable to censure had he celebrated a marriage between a man and his deceased wife's sister, it follows that such marriage was, in itself, unlawful and null. The marriage might be valid although celebrated by a clergyman contrary to the rules of the Church, or although not celebrated by a clergyman at all, as happens in the majority of irregular marriages. Neither can I adopt the argument that, because the holders of certain public offices must sign the Confession of Faith and engage to adhere to its doctrines, these individuals become liable to deprivation of office by marrying otherwise than according to the rules of the Church. The importance upon this question of the Confession of Faith, taken in connection with the statute 1690, really consists in the support thereby given to a construction which the Act 1567, c. 15, in its terms otherwise fairly admits of; and the evidence thereby at same time afforded that our recognition of a marriage with a deceased wife's sister, wherever celebrated, would be inconsistent with the established religion of the State.

As to precedents for holding such a marriage to be unlawful, it is true we have none. But when we come to the institutional writers, who treat of the question in a civil point of view, we find an entire coincidence of opinion, although, with the exception of Mr. Hume, they are all silent as to the effect of the criminal statute. Stair (1, 4, 6), Bankton (1, 5, 41 and 47), Erskine (1, 6, 9), and Bell (Principles, sect. 1527), all lay it down expressly, that the blood relations of husband and wife are held as related by affinity to the one spouse, in the same degree as by consanguinity to the other. Mr. Erskine's words are:—"The degrees prohibited by the law of Moses in consanguinity are, in every case, virtually prohibited in affinity; and by the aforesaid Act, 1567, the prohibition is equally broad in the degrees of affinity as in those of consanguinity. Thus, one cannot marry his wife's sister, more than he can marry his own." I quote this passage for the sake of observing, that, by "the aforesaid Act 1567," Mr. Erskine means the Act 1567, c. 15, which alone he had cited in the context. Afterwards, in treating upon crimes (4, 4, 56), he mentions the statute 1567, c. 14, as adopting the 18th chapter of **[385]** Leviticus, but enters into no particulars. Stair does not mention either statute; and the marginal references in Bankton (sect. 47) cite only c. 15.

I admit that the want of any precedent, and the doubts from time to time expressed on the subject, make this question one of great difficulty; and I shall not hold myself foreclosed from giving effect to a different view of it in any future case in which it may come to be argued. I observe from my notes of Mr. Hume's lectures that, although he does not expressly apply his observations upon the criminal law to the civil question, he says that lawyers of great eminence have entertained doubts how far the prohibition, as regards those related to the spouses by affinity, goes, and whether Mr. Erskine's observations be not somewhat too broad. The views expressed by Lord Rutherfurd, referred to in the pursuer's case, are also entitled to great respect. I am disposed to think that he gave too much weight to the displacing of the argument founded upon the criminal statute 1567, c. 14, as displacing the whole argument against the nullity of the marriage. In my humble opinion, this is not so. I agree with him in holding the statute 1567, c. 14, inapplicable. But I think this is not conclusive of the civil question. Upon the inapplicability of that statute, I find myself in a position to form a satisfactory opinion, because we have before us a full argument on the other side. If that argument were sound, it would be conclusive. The marriage could not be lawful, if a statute were applicable which declares intercourse between the parties incestuous, and punishable with death. I do not feel entitled, therefore, to overlook that argument, or to leave it in doubt, whether, if I were wrong upon the other statute, I might fall back upon this one. I certainly could not do so. I do not connect the two statutes as Lord Curriehill seems to do. On the contrary, I feel bound to say that, if the construction I put upon the statute 1567, c. 15, be

wrong, then the result at which I have arrived is wrong also. The only argument we have upon this latter statute, is an argument by the party in whose favour I am disposed to decide, which is less satisfactory; and all I can say therefore is, that, according to the best opinion I can form, in the absence of argument to the contrary, the marriage in dispute, had it been a Scots marriage, would have been civilly null.

From the sanction given by the statute law to the rules of the Established Church of Scotland which denounce such a marriage, I think it follows that, whatever may be the law of England on the subject, we cannot recognise the marriage as lawful, in a question of succession to a Scots heritable estate. The House of Lords have held that we cannot recognise the legitimacy without recognising the validity of the marriage; and that being so, I think the pursuer must have judgment in the declarator, so far as it is directed to the regulation of the succession to the entailed estate. The effect of this upon the advocation will require to be considered. Both the parties who applied to be served are now dead, and probably an application for service will require to be presented *de novo*.

LORD PRESIDENT.—I wish to say, that my opinion in this case did not go at all upon c. 14, nor upon the criminal question. I purposely threw out of view the criminal question, as not aiding me in this case, and therefore I refrained from giving expression to any opinion as to the criminal law. That may come before me between other parties in another Court, and I desire to keep myself entirely open to consider the whole matter in reference to our criminal law. I think it better at present not to pronounce one way or other on an important question not before us for judgment, and not necessary to be solved or considered with reference to this case.

The Court pronounced the following interlocutors:—In the declarator,—"The Lords having considered the petition to apply the judgment of the House of Lords, No. 17 of process, minute, No. 18 of process, and case, No. 35 of process, and whole process, and heard the counsel for the pursuer,—Find and declare that Alexander Livingstone, the original defender in this action, now deceased, was not lawfully procreated of Thurstanus Livingstone, who for sometime resided at Bow, in the parish of St. Mary's, Stratford Bow, in the county of Middlesex, brother-german of the deceased Sir Thomas Livingstone of that Ilk, Westquarter, and Bedlormie, Baronet, and was not entitled to succeed to the lands and estate of Bedlormie, [386] situated in the county of Linlithgow, and other lands mentioned in the deed of tailzie thereof, as heir of entail of the said now deceased Sir Thomas Livingstone, under and in virtue of the said tailzie, and investitures following thereon; and, in particular, under a bond of tailzie executed by Alexander Livingstone of Bedlormie, on 17th December 1702, and registered in the Register of Tailzies 26th December 1702, and decern accordingly: Farther, find no expenses due."

In the conjoined petitions for service,—"The Lords having considered the petition to apply the judgment of the House of Lords, No. 247 of process, and minute for the advocator, No. 256 of process, along with the case lodged for the advocator in the relative action of declarator of bastardy, and heard the counsel for the advocator,—Remit the cause to the Sheriff in Chancery, with instructions to him to recal the interlocutor serving the late Alexander Livingstone, the original respondent, pronounced by him on the 2d of July 1856, and decern: Farther, find no expenses due."

[Cf. *Purves Trs.* v. *Purves*, 22 R. 513 *passim*.]

No. 61. **XXIII. Dunlop 398.** 25 Jan. 1861. 1st Div.—Lord Ardmillan.

GILBERT M'CORMACK or M'CORMICK and ROBERT COLTART, Pursuers.—*Gifford—Young.*

SAMUEL RALEIGH (Judicial Factor on the Trust-Estate of the deceased ROBERT GILLESPIE, and Others, Defenders.—*Sol.-Gen. Maitland—A. R. Clark.*

Trust—Faculty—"Relations."—A testator conveyed his whole heritable and moveable estate to trustees, of whom Mary M'Math was one, and to the survivor, and to

their heir or heirs, with the following direction:—"And at the death of the longest liver of the said Mary and Ann M'Math without issue as aforesaid, I direct my said trustees to sell my whole remaining heritable property, and to divide the one-half of the clear proceeds thereof among my relations, in such proportions as they shall think proper, or as I may direct," &c. The testator did not execute any directions. Mary M'Math survived Ann M'Math, and eleven years before her own death Mary, as sole surviving trustee, executed a deed of distribution, not confining its benefits to the next of kin. In a reduction at their instance,—*Held* (*alt.* judgment of Lord Ardmillan, *diss.* Lord President), 1. that the period for executing the power of distribution was not necessarily postponed till the arrival of the period of distribution; 2. that Mary M'Math as sole surviving trustee was entitled to execute a deed of distribution, and had well done so—the Court being unanimously of opinion that it was competent for a testator to delegate such a power, and that the word "relations" embraced all who could shew a traceable relationship to the testator, and not merely his next of kin.

"The late Mr. Gillespie of Peelton, who died in July 1814, executed on 14th May 1814 a trust-disposition, regulating his whole succession, heritable and moveable, in favour of his niece Mary M'Math, afterwards Mrs. Corson, John Barber of Terraran (whom failing his son William), James Corson, younger of Dalwhat, and Robert Threshie, writer in Dumfries, and the survivors or survivor, any two, while so many are alive, being a quorum, and to their, her, or his heirs or disponees. No power of assuming new trustees was given, and none were assumed. All the trustees accepted and acted, and all were now dead. Mrs. Corson, the last surviving trustee, lived till 1855.

"The purposes of the trust were, 1st, the payment of debts, &c.; 2d, 3d, and 4th, the payment of certain legacies,—for which purpose the trustees were appointed to sell part of the landed estate,—the providing for payment of certain annuities, and the erection of a monument over the testator's tomb. The fifth purpose relates to the residue or reversion of the whole estates, and is as follows:—'Fifthly, my said trustees shall be bound to pay **[399]** over to my said niece Mary M'Math the clear annual income arising from the reversion of my heritable and personal estates above conveyed half-yearly, at the terms of Martinmas and Whitsunday, during all the days of her lifetime, beginning the first half-year's payment at the first of these terms six months subsequent to my death; and in the event of the said Mary M'Math having lawful issue of her body, I direct my said trustees, and the survivors or survivor of them, to dispone and convey to such issue equally, if more than one, the fee of my said remaining heritable and personal estate, burdened with the said annuities to the said Ann M'Math, John M'Math, and Agnes Gordon; but, in the event of the said Mary M'Math dying without issue before her sister, the said Ann M'Math shall enjoy the liferent of my said whole residuary estates, payable termly as aforesaid; and at the death of the said longest liver of the said Mary and Ann M'Math, without issue as aforesaid, I direct my said trustees to sell my whole remaining heritable property, and to divide the one half of the clear proceeds thereof among my relations, in such proportions as they shall think proper, or as I may direct, by a codicil hereto, or any separate writing under my hand, and the other half as the said Mary M'Math may direct by a will or other writing under her hand.'

"Ann M'Math died without issue in 1826."

On 4th May 1844 Mary M'Math or Corson, then the sole surviving trustee of Robert Gillespie, executed two deeds,—the first a private trust-disposition and settlement for regulating her own succession—about which no question was raised; the second a deed of distribution, bearing to be granted by her as sole surviving trustee of Robert Gillespie, and the object of which was to dispose of the one-half of the free residue of his trust-estate, amounting to about L.10,000, which by the fifth purpose of his trust-deed he had directed to be divided among his relations.

On the death of Mary M'Math or Corson in 1855 application was made by her trustees for the appointment of a judicial factor on Mr. Gillespie's trust-estate; and on 15th December 1855 Mr. Raleigh was appointed, "with power to realise and manage the trust-estate in the meantime."

Thereafter a question having arisen as to the validity of the deed of distribution,

the present pursuers,—being the next of kin of Robert Gillespie, the truster,—brought a multiplepoinding in name of the judicial factor on the trust-estate calling as defenders the various parties claiming or alleging right to that half of the clear proceeds of the residue of Mr. Gillespie's trust-estate destined to be divided among his relations. To this action objections were lodged for the judicial factor, who pleaded, *inter alia*, that all persons interested were not called, that the judicial factor could not be displaced or superseded in the management of the trust-estate, and that at all events the action of multiplepoinding could not proceed until the alleged deed of distribution by Mrs. Corson, on the invalidity of which it mainly rested, should be challenged or set aside in a reduction.

On 19th June 1858 the Lord Ordinary pronounced an interlocutor sisting procedure *in hoc statu*, and thereafter the present action was brought by the next of kin against the judicial factor, and all the parties interested in the distribution of the succession, concluding that the deed of distribution should be reduced, and being so reduced, that it should be declared "that upon the death of the longest liver of the said Mary M'Math or Corson and Ann M'Math, without issue, which took place on or about the 6th August 1855, the whole residue and remaining heritable property of the trust-estate of the said deceased Robert Gillespie fell to be sold, and one-half of the clear proceeds thereof divided among the next in kin of the said Robert Gillespie, the truster, that is, among the parties who are or were next of kin to him as at the 6th August 1855, the date of the death of the said Mary M'Math or Corson; or otherwise, that in consequence of the failure of the said Robert **[400]** Gillespie and of his said trustees validly to appoint the proportions in which the said half of the clear proceeds of the residue should be divided among his relations at the period foresaid, the said half of the clear proceeds of the said residue fell at the said date to the parties who were then the testator's next of kin, in terms of law."

The reduction of the deed of distribution was founded upon the following reasons:—"First, the trustees had no power to execute such a deed until the death of the longest liver of Mary and Ann M'Math, without issue, in which event alone they were directed to sell the residue of the estate, and to divide the one-half of the clear proceeds thereof among the truster's relations, in such proportions as they should think proper. The deed of distribution was executed upwards of eleven years before the occurrence of the event on which alone such deed was competent. The event was an uncertain and contingent event, which might never occur; and until its occurrence it could not be known who were the relations of the truster among whom the half of the clear proceeds of the residue fell to be divided. Further, Mrs. Mary M'Math or Corson had no power to execute such a deed of distribution, and the testator did not contemplate such deed being executed during her life. The testator gave the said Mary M'Math power to dispose of the other half of the residue, and thus indicated in the plainest manner that she should not have power to dispose of the whole residue. The deed of distribution is partial and capricious. It awards or assigns a large portion of the estate to distant relatives of the testator, and only a mere fraction of very small amount to the testator's next of kin, and is not a fair and *bona fide* exercise of the discretion reposed in Mr. Gillespie's trustees. The deed being void and inept, and *ultra vires*, one half of the residue falls to the next of kin as at 6th August 1855, the date of the death of the longest liver of the said Mary and Ann M'Math without issue. The 'relations' of the truster mentioned in the fifth purpose of the trust-deed mean his next of kin as at that date."

The defenders pleaded;—The pursuers have no title or interest to maintain the present action. As the deed sought to be reduced deals only with the heritage of the truster, and as, in the event of decree of reduction being obtained, the said heritage would descend to his heir-at-law, the pursuers, as his next of kin, could take no benefit by the reduction, and have in consequence no title or interest to call for or reduce the said deed. Assuming that the deed in question should be set aside, there has been both a failure on the part of the truster to give directions as to the disposal of one-half of the heritable estate, and no apportionment thereof is now possible among the relatives of the truster, in consequence of the decease of all the trustees; and as the directions to sell the heritage were merely given to enable the trustees to distribute the proceeds thereof in such manner as the truster should direct or should seem proper to the trustees, such directions cannot, in the circumstances stated, have the effect of

converting the heritage into moveable estate; but on the contrary, the subjects dealt with by the deed under reduction must be regarded as heritable, and descending to the heir-at-law. Assuming the subjects with which the deed deals to be moveable and the deed itself to be reduced, the legal consequence thereof would be to open a claim not to the pursuers, but to the next of kin at the death of the truster. Upon a sound construction of Mr. Gillespie's trust-disposition and settlement, the deceased Mrs. Corson, as his sole surviving disponee and trustee, was entitled to execute the deed sought to be reduced; even assuming it to be set aside, the pursuers have no claim in the character in which they sue; but in the event of the said subjects not descending to the heir-at-law, or to the next of kin at the death of the truster, they must be divided among all the relatives of the truster.

On 24th December 1859 the Lord Ordinary pronounced the following **[401]** interlocutor:—"1st, Finds that the deed of distribution by Mrs. Mary M'Math or Corson, sought to be reduced, is null and void; and reduces, decerns, and declares, in terms of the reductive conclusions of the libel accordingly: 2d, Finds that the succession to the residue or reversion of Mr. Gillespie's estate, to which the fifth purpose of the trust relates, is moveable: 3d, Finds that the one-half of the said residue or reversion, in regard to which there has been a failure of apportionment and distribution in terms of the trust-deed, falls to be divided among the persons who, at the date of the death of Mrs. Corson, were nearest of kin of the late Mr. Gillespie: 4th, Finds that the pursuers, as two of the nearest of kin and as executors *qua* nearest of kin of Mr. Gillespie, are entitled to decree in terms of the second or alternative declaratory conclusions of this action; and, therefore, decerns and declares in terms of the said second or alternative declaratory conclusions: Finds neither party entitled to expenses against the other: But finds that the expenses of both parties should be paid out of the trust-estate: Allows accounts of these expenses to be lodged, and remits the same to the Auditor to tax and report."[1]

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[1] "NOTE.—This case is attended with difficulty, and is, in some respects novel. The argument on both sides has been very able, and though no express precedent has been quoted, the reference to authorities, bearing on the principles involved, has been ample.

"The Lord Ordinary is of opinion that the deed of distribution or apportionment executed by Mrs. Corson in May 1844 is not effectual, and must be reduced, as concluded for."—(Here his Lordship stated the facts embodied in the above narrative, and the fifth purpose of the trust-deed.)

"It thus appears that after the death of Ann M'Math, the trustees held the whole of this reversion, 1st, for the benefit of Mary M'Math, afterwards Mrs. Corson, during her life; 2d, for the issue of Mrs. Corson in fee; and 3d, for sale of the heritable property, and division of the proceeds of the whole, after the death of Mrs. Corson without issue, and not before,—the division to be into two parts, one of which parts is again to be divided as Mrs. Corson herself might direct by will or other writing, and the other part to be divided among the testator's relations, the proportions of the division of this last part to be regulated either by the testator's own direction, under codicil or other writing, or as the trustees 'shall think proper.' Mrs. Corson, by a writing, not challenged, directed the disposal of her own half, in regard to which no question is here raised. Mr. Gillespie, the testator, did not, by codicil or other writing, direct the proportions according to which the remaining half of the reversion should be divided; and, accordingly, the right and duty of making that division remained to be discharged by the trustees after Mrs. Corson's death, in terms of the fifth purpose of the trust.

"Mrs. Corson, in 1844, being then the sole surviving trustee, executed the deed of distribution now sought to be reduced, in which she selected the persons, and fixed the proportions for distribution, and, in express words, 'divided and distributed' the same.

"It is not disputed that, during the whole lifetime of Mrs. Corson, the trustees held the reversion of the estate, to which the fifth purpose applies, for the issue of Mrs. Corson. Till her death without issue there could be no division; and there was no vested interest in any person under the ulterior destination, so long as she lived. Until the event occurred when division was directed by the trust-deed, viz., Mrs.

[402] Both parties reclaimed,[1]—the pursuers in so far as the interlocutor found that the expenses should be paid out of the trust-estate.

Corson's death, it could not be known who were the persons among whom, in whatever proportions, division could be made. The trustees, who were directed to sell and divide after Mrs. Corson's death, and who had no power to divide before that event, are the same persons to whom is committed the discretion of fixing the proportions 'as they shall think proper.' The trustees so directed to divide, and so charged with the discretion of apportioning, can only be the trustees alive at the date, when alone apportionment and division is possible—in other words, they can only be trustees surviving Mrs. Corson.

"The deed of distribution here challenged was executed by Mrs. Corson, the surviving trustee, in 1844, eleven years before the period of division. It might have as well been executed by a quorum of trustees in 1816. But could the trustees in 1816 have anticipated, by nearly forty years, the time for apportionment and division, and have apportioned among the relations of the testator existing in 1816 a fund not divisible until 1855, and then divisible among his relations existing in 1855? It is apprehended that this would have been to defeat the testator's intention, and that the trustees could not have effectually apportioned by a deed in 1816. The principle applicable to the present case is the same—the difference is only in degree. The persons among whom Mrs. Corson divided and distributed the estate in 1844, may not have been, and, in point of fact, were not the same persons who would have received shares under any permitted apportionment in 1855, when Mrs. Corson died, and when alone the fund could be lawfully divided.

"The Lord Ordinary thinks that, looking to the structure of the clause, and to the provision for written direction on the part of the testator, and on the part of Mrs. Corson, as to her own share, while no corresponding term is used in regard to the selection by the trustees, there is good reason for concluding that no separate written apportionment by the trustees, prior to the act of division, was contemplated; and, accordingly, Mrs. Corson's deed is not a mere selection and apportionment, but is *in terminis* a deed of division and distribution. The division could not be till after Mrs. Corson's death. The apportionment is declared by the trust-deed to be as those who divide 'shall think proper;' and a minute of trustees, with a relative deed of distribution and division after the death of Mrs. Corson, appears to the Lord Ordinary to be the procedure intended by the testator and appropriate to the case. A premature deed of apportionment, division, and distribution, before it was certain that Mrs. Corson would have no issue, before there could be any division, and before the members of the class among whom there could be division were ascertainable, cannot, in the Lord Ordinary's opinion, receive effect.

"If the deed of distribution by Mrs. Corson is ineffectual, the next question which arises is, whether the reversion of the testator's estate, falling within the fifth purpose of the trust, is heritable or moveable?

"The directions of the deed in regard to this reversion—whose character as heritable or moveable is to be ascertained—present ample materials for disposing of the question.

"The testator directs, 1st, the sale of 'the whole remaining heritable property;' 2d, the immediate division of 'the clear proceeds thereof' in two parts; 3d, the division of one of these parts of the proceeds as Mrs. Corson may direct by 'a will or other writing,' and this she has done; and, 4th, the division of the other parts of the proceeds among his relations, either as directed by a 'codicil thereto, or any separate writing' under his hand, or failing such direction, then, as the trustees 'shall think proper.'

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[1] *Authorities.*—Brown, 3d August 1762, Dict. 2318; Wharrie, 16th July 1760, Dict. 6599; Hill *v.* Burns, 14th April 1826, 2 W. & S. 80; Crichton *v.* Grierson, 25th July 1828, 3 W. & S. 329; Dick *v.* Ferguson, 22d January 1758, Dict. 7446; 1 Roper on Legacies, 100, sect. 5; Pope *v.* Whitcombe, 14th July 1810, 3 Merivale, 689; 2 Tudor's Leading Cases in Equity, 810; Williams on Executors, 1003; Scott *v.* Scott, 17th July 1852, *ante*, vol. xiv. p. 1057, affirmed 10th May 1855, 2 M'Queen, 281.

[403] Of this date the case was advised.

LORD IVORY.—A question of difficulty and importance arises here as to the disposal of the residue of the trust-estate of Mr. Gillespie, under powers conferred by the truster, and exercised by Mrs. Mary M'Math or Corson as his last surviving trustee. She had in every respect as full powers to deal with the estate as any other of the trustees. Her position as surviving trustee was the same as if she had been sole trustee from the first. It is not likely, therefore, that the testator was to give any express direction which she could not possibly execute, and which might thus have the effect of defeating the purposes of the trust.

"Now, the *enixa voluntas* of the testator is here already expressed. He has given his directions plainly and without qualification, explicitly and without allowing discretion. There is no doubt as to what he means—no discretion in regard to the fulfilment of his directions—no event contemplated as contingent on the occurrence of which a sale might be avoided. The sale of the whole heritage, and the division of the proceeds into two parts, was contemplated as necessary under any possible contingency. That sale has actually taken place, and the estate is actually in money.

"The cases quoted by the defenders are not in point. There is here no more power to sell, but an express direction; and not only so, but the sale is directed to be followed by division of the whole proceeds.

"The Lord Ordinary is of opinion that, on this view of the trust-deed, the subject to which the directions in the fifth purpose of the trust relate must be held moveable.

"The remaining question is—assuming the deed of Mrs. Corson to be ineffectual, and the subject to be moveable—who are the parties now entitled to succeed to it?

"The Lord Ordinary is of opinion that the parties entitled to succeed, on failure of the power of apportionment, are the next of kin of the testator at 6th August 1855, the date of Mrs. Corson's death.

"During the life of Mrs. Corson the fee was held by the trustees for her issue, and her issue were possible, and there could be no vesting of any of the ulterior provisions. There could be no intestacy while she lived. Whether on her death the bequest to the relations of the testator be held as still effectual, notwithstanding of the failure to apportion, or whether the intestacy of Mr. Gillespie in regard to that sum be held as arising on the death of Mrs. Corson, and on failure of apportionment, the result would probably be the same. As long as a power of distribution existed, there was a bequest which was to some extent *in arbitrio alieni*. But such bequests, where the extreme generality of the class is qualified by the discretionary power given to the trustees, have been repeatedly sustained. When, however, there is a failure of distribution, and the power of distribution is gone, and the provision to the class remains in its qualified generality, then the bequest to relations as a class—to all relations without restriction or limit, and without any right or power in any quarter to restrict or limit by selection and distribution—may be so wide and general, that the settlement cannot be practically extricated; and, accordingly, the word 'relations' may, in such a case, be construed as limited to the nearest of kin,—the persons who would have succeeded *ab intestato*.

"This appears to have been the rule of the civil law (Voet, 'Tit. de Hæred. Instit.' sections 19 and 20). In England the same rule has been repeatedly recognised; and it is apparently quite settled in the law of England that a bequest to 'relations' as a class, without apportionment or selection, passes to those only who would, at the date when the succession opens, take under the Statute of Distributions.—Green *v.* Howard, 1 Bro. C.C. p. 33; Devisne *v.* Mellish, 5 Vesey, 529; Jones *v.* Colbeck, 5 Vesey Jr. 399; Whitehorn *v.* Harris, 19 Vesey, 403; Roper, vol. i. pp. 101, 108, 110.

"There is no decision in our own law expressly in point; but, on principle, there seems no ground for applying a different rule. If the bequest is still effectual, but without selection or apportionment, the nearest of kin of the testator at the date of division are the proper legatees. If the bequest has failed, and that residue is undisposed of, then the result is the same. The parties who take as nearest of kin are those who stand in that position when the succession opens, and when the intestacy arises. In this case intestacy did not arise till the death of Mrs. Corson, and the pursuers, as executors and representing the nearest of kin at that date, are entitled to succeed."

It is contended that this peculiar provision contained in the fifth purpose, can only be exercised by both the sale and division being made, after the death of Mary M'Math. I think we are not to read it in this way, unless it be made a clear matter of necessity that we must do so, for this reading would make the deed ineffectual, and the rule of construction is always to presume in favour of the reading which will make the deed effectual. Now it does not appear to me that there was any necessity to wait for Mary M'Math's death before making the deed of division. The deed of division, it appears to me, might be made anticipatory, and [404] might be made contingently in such a manner as effectually to secure a distribution according to the very terms of the trust-deed. There are various considerations which are confirmatory of this view. In the first place, the testator reserves power to himself to provide for the division by a codicil to be operative *de futuro*, by a deed which is thus necessarily anticipatory. In the next place, the event upon which it is said the division was to take effect, viz., the death of the longest liver, did not necessarily attach to Mary's death. Ann might have survived, and the event might have attached to her death. Hence it could not be intended that Mary's death was to defeat the purposes of the trust. It may be said that it would not have done so had other trustees survived. But there were forty-one years between the execution of the trust and the time of division. Are we to hold that the testator meant that, unless his trustees survived that time, the deed was to be ineffectual? The truster must have had in view the probability of both his nieces, who were young girls when he made the deed, surviving all the other trustees. Now, there is nothing in the trust-deed which can make it appear that the testator contemplated that anything which could happen to the trustees could make the deed inoperative. If the trustees predeceased, the necessary result of the reading proposed by the pursuers would be, that the disposal to be made by the trustees of the residue could not take place; and, therefore, it must be contended that the truster must have meant to die intestate in such circumstances, or to throw the deed on the hands of the Court. Now, anything is to be presumed rather than intestacy,—anything, that is, which can be fairly and substantially executed, so as to make the deed effectual. In the third place, as to Mary's half of the residue, it is clear that she was to deal with it by an anticipatory deed. Looking at these things, I hold that it was in the view of the testator that a division of his residue might be made by an anticipatory deed; and, taking a general view of the trust-deed, I cannot help leaning to that construction which will carry the purposes into effect, rather than to one which will defeat them.

I have no doubt, Mary being one of the trustees to whom the powers were given, that it must have been intended that she should exercise them, rather than that she should not have power to carry the trust-deed into execution. She must therefore have been intended to do so in her lifetime. I have no doubt that the power of distribution was otherwise competently exercised. She was bound to divide the residue among relations in life at the time of the division, and her deed so deals with it. In some of the shares which she has given, there is no destination over upon the death of the disponees; but, as in these cases the disponees have survived, no question as to competency can arise. I am also of opinion that if Mary M'Math had power to execute this deed, and if the form in which she has exercised that power is authorised, she has made the distribution among the class of persons among whom the testator intended it should be made. I am therefore for recalling the interlocutor of the Lord Ordinary, and repelling the reasons of reduction.

LORD CURRIEHILL.—This case is attended with difficulty; but I have now arrived at a conclusion satisfactory to my own mind. The case must be solved upon a fair construction of Mr. Gillespie's trust-deed. In the first four purposes the testator makes provisions which do not enter into the present question. The fifth purpose is that which gives rise to it. By that purpose the testator provides that the annual income arising from the residue of his estate is to be paid over, subject to certain annuities, to his niece, Mary M'Math, during her lifetime. As to the capital of the residue, the testator directs that, if Mary M'Math should leave children, the trustees are to make it over to them, subject to certain burdens. But if she should leave no children, and be survived by another niece, Ann M'Math, the latter was then to have the income from the residue in liferent. In this event, the testator does not directly dispose of the capital, nor point out the parties among whom it is to be divided. This is what makes the difficulty. He has delegated the power of distributing the capital

in that event to other parties.—(After referring to the fifth purpose of the trust-deed) —As to the power of disposing of one-half of the residue, there is no dispute that power was given to Mary M'Math as an individual to direct, by will, the parties to whom it was to belong. The power to dispose of the other half is reserved to the testator, and, failing his exercising it, it is given to the trustees. Mary M'Math came to be sole surviving trustee; and, in these circumstances, she made the deed of division which is now [405] challenged; and the question is, whether or not it is a valid deed? Two objections have been stated against it. The first is, that Mary M'Math had no power to execute it, because it was not to be executed until the arrival of an event which could not happen in her lifetime. The second objection is, that, even if she had power to execute the deed, that power was not exercised *habili modo*, inasmuch as portions of the estate have been given to persons who were not among the class to which the bequest is said to have been limited.

The first objection depends upon the meaning of the first part of the clause. The words are, "I direct my said trustees to sell my whole remaining heritable property, and to divide the one-half of the clear proceeds thereof among my relations in such proportions as they shall think proper." The sale of the property is not to take place till after the death of the survivor of the two ladies, and, of course, the actual division could not take place until the proceeds were realised. The question is, whether the appointment of the shares could not be made until after that event? Taking the words of the clause literally, it is true that the future tense is used. The division is to be in such proportions as the trustees "shall think proper." But although the time when the appointment is to be made is future, the question remains, to what is it to be future? Of course, to the date of the deed, and also to the date of the death of the testator, when the deed should come into operation. But must it also be future to the date at which the distribution itself was allowed to be made? I do not think that the words necessarily imply that. I think that the future tense is used only in reference to the time at which the power should vest in the trustees by the deed coming into operation. I think the testator meant to say that the trustees might execute the deed of division as soon as the power to do so should vest in them. This reading will enable us to give effect to the deed; and it is a salutary rule of construction that we are to read deeds, whenever possible, in the manner which will best give effect to them. Moreover, I cannot gather from even the mere grammatical reading of these words, as to the futurity of the date, that they imply that the division is to be future to the death of the survivor of the two ladies. Three powers of distribution are provided by this clause of the trust-deed; and although all these were intended, of course, to be executed at a future time, it does not appear that the execution of any of them was required to be postponed until the arrival of the period of distribution itself. Thus, as to the other half of the residue, which Mary M'Math, as an individual, was to divide, her power also was to be future, but future only in reference to the testator's death, as, of course, it might be exercised during Mary's life. There is also the power which the testator reserves to himself to make the distribution of the other half, which is the one in question. That appointment could be made only during his lifetime. These things so far give us the testator's meaning as to show that, although the powers were to be executed at some future time, he did not thereby intend that the exercise of them should be delayed till the time when the distribution was allowed to be actually made.

It is true that the appointment, if made at an earlier period, could be made only contingently. But why not? The distribution of this half of the residue, if made by himself, must have been made contingently. The distribution of the other half by Mary M'Math could be made only contingently. The possibility of making such a distribution being thus plainly present in the testator's mind, I see no reason for contending that the distribution to be made by his trustees might not also be made contingently, or why they should delay making it until they could make it absolutely. There is no doubt some difficulty attending a contingent distribution. Things may not happen as had been anticipated, and there may be a miscarriage. But that risk must be undertaken; and when, as in the present case, no miscarriage occurs, I see no reason why the deed of distribution should not be effectual. Nothing is more common than to give such powers of distribution, both in testamentary deeds and in marriage-contracts, where it is often provided that funds are to be distributed among children in

the event of their existence and survivance according to terms of appointments to be made by the parents. Such powers must be exercised with reference to contingencies, and yet there is no doubt that the deed of distribution will be effectual if the contingencies are effectually provided for. Upon this point I may remind your Lordships of the case of Eccles *v.* Hunter, where a deed of distribution made in such circumstances was held to **[406]** have validity. The objection was taken that the deed provided for contingencies, and it was argued that it was therefore not a valid exercise of the power. The Court found that it was. In the present case, also, I think it was a competent exercise of the power to make the distribution depending upon contingencies. I think it was competent, according to the proper intentions of the testator. On these grounds I think the first objection is not well founded.

The other objection is, that, supposing Mary M'Math had the power of distribution, it was not exercised *habili modo*. The testator described those among whom the distribution was to be made as his "relations;" and it is said that this described a particular class, viz., his next of kin; further that it limited it to those who were so at the time of the death of this lady; that these forming a definite class, ought to have been made amongst them only, and that parties have been brought in who do not belong to that class. That objection depends upon the meaning to be given to "relations," according to the intention of the testator. It is a very ambiguous expression. It is "relations" generally, not nearest relations, as in some cases; and this leaves it all the more indefinite. The only reason assigned to us, why we should limit the expression to the next of kin is, that there is some technical rule of the law of England, according to which a bequest to relations falls to be divided among those who would be entitled to share under the Statute of Distributions. I do not know whether or not that rule is correctly stated, but such rule has no force in the law of Scotland. We cannot hold that the testator had such a rule in view. According to the view which I take, the expression includes the whole class of relations which could be ascertained. The testator has left it with this vague expression, and we must not affix a meaning which is to limit it. Had the testator himself not left the means of defining it, I would probably have held the bequest to relations void for uncertainty. It would have been so vague that it might have fallen. But as I read the deed, a power is given to the trustees to distribute the residue among any such persons as fall under the class of relations, the only limit being that they are not to give any share to persons beyond it. The effect of this, according to our law, is quite clear, whatever may be the law of England. Without going into a detail of the cases upon this subject, I may refer to the opinion of the Lord Chancellor in the case of Chrichton, in which, reviewing a Scottish decision, he comments on all the prior authorities, and brings out the principle that the giving of a power to distribute may make effectual a destination which otherwise might have been void for vagueness, as a selection may be made, and the deed thus carried out. I hold the testator to have given that power, and that the power has been well exercised by the person to whom he gave it. Had the power not been thus exercised, nice questions might have arisen as to who would have been entitled to take the residue, but, in the view I take of the case, these questions do not arise.

Lord Deas.—I agree with Lord Ivory that this is a very important case. It is important both in its bearing upon principle and in its connection with decided cases. I have accordingly bestowed upon it all the attention in my power. The question relates to one-half of the residuary estate of the late Robert Gillespie, who died on 20th July 1814, leaving a *mortis causa* settlement, by which he conveyed his whole heritable and moveable property to his niece, Mary M'Math, and certain other persons as trustees, for the following purposes;—1st, to pay debts and expenses; 2d, to sell as much of his landed property as, with the reversion of his personal estate, would pay the legacies therein specified; 3d, to pay certain annuities; 4th, to erect a monument over his grave; 5th, to pay the clear annual income arising from the reversion of his heritable and personal estate to his niece, Mary M'Math, then residing with him, and to convey the fee to her issue; but, if she should leave no issue, her sister Ann to enjoy the liferent, and, at the death of the longest liver (without issue) the trustees should sell the whole remaining property, and "divide the one-half of the clear proceeds thereof among my relations, in such proportions as they shall think proper, or as I may direct by a codicil hereto, or any separate writing under my hand, and the other half,

as the said Mary M'Math may direct, by a will, or other writing under her hand." The testator left no codicil, or other testamentary writing in addition to the above deed of settlement. Ann M'Math survived the testator, but died unmarried on 12th February 1826. All the trustees survived the testator, and accepted; but the [407] last of them, with the exception of Mary M'Math, died in July 1836. Mary M'Math had married James Corson, but became a widow, without issue, and died on 6th August 1855. She had disposed of that half of the residuary estate which had been placed at her absolute disposal, and about that half there is no question here. As regards the remaining half, she had executed a deed of distribution on 4th May 1844, dividing it among certain of the testator's relations, who are said not to be his next of kin, or at least not to be the whole of his next of kin, either as at the date of his own death, or as at the date of the death of Mary M'Math.

The question now is, whether this deed is to be held effectual? Two objections are made to it:—1st, that the trustees had no power to execute any deed of distribution till after the death of Mary M'Math without issue; 2d, that the trust-settlement imported a bequest of this half of the residue to the testator's next of kin as at the death, without issue, of the longest liver of Mary and Ann M'Math, with a mere power of apportionment to the trustees; and, consequently, that a share, however small, ought to have been allotted to each of such next of kin. The Lord Ordinary, as appears from his note, has given effect to the first of these objections. He takes no notice of the second. It does not form a substantive plea in the record, and may not have been pleaded in the Outer-House.

With reference to these objections, it is important to observe in the outset, that the language of this trust-settlement is, in some respects, ambiguous and imperfect, construe it as you will. For instance, it is difficult to say what is the meaning, in the dispositive clause in favour of the trustees, of the words, "and to their, her, or his heirs or disponees." Does this mean that, upon the death of each successive trustee, his or her heirs were to become trustees along with the trustees named by the truster? or that the trust was to be executed by the heir or heirs of the last survivor? or that the heirs (and if so, which of them) were to become invested with the estate without being trustees? If we have here no valid deed of distribution, these questions may require to be solved. If there be an heir appointed trustee, it may be his right and duty still to execute a good deed of distribution, and, if acceptance of the trust be declined, it will not necessarily follow (although upon that I give no opinion) that the trust is to fail. Mr. Erskine says expressly that, in such a case, "though all of them (the trustees) should die or renounce, the Court of Session may substitute one in their place, with powers to carry the will of the deceased into execution," (3, 9, 14); and he refers to the case of Campbell, 26th June 1752, M. 7440, which was undoubtedly decided upon full argument. The modern practice is to appoint a judicial factor, with the usual powers. Whether, upon application by the factor, after his appointment, the Court would confer upon him special powers to execute a deed of distribution I shall not here inquire. My present purpose is to notice the imperfection of the clause which conveys both the personal and heritable estate to heirs and disponees "in trust always and for the special purposes after mentioned,"—a phraseology which, to say the least of it, is very obscure and ambiguous.

A still more striking imperfection occurs in the fifth purpose, being the one we are now dealing with, where it is said, "and at the death of the longest liver of the said Mary and Ann M'Math, without issue as aforesaid, I direct my said trustees" to sell and divide, etc. Now, there is not a word "aforesaid" (or subsequent either) in this deed about the issue of Ann M'Math. The direction as to the fee is limited to the issue of Mary, the niece designed in the deed as residing with the testator. The next of kin (whom I shall call the objectors) plead their case in the record, as they did also at this bar, on the footing that Ann's issue would have taken the fee—whether jointly with, or only failing issue of Mary, they did not say—and that, if Ann had survived Mary, it would not have been themselves as next of kin at Mary's death, but the next of kin at Ann's death, who would have become entitled to the fee. It may be doubted whether this is a view favourable to their own argument. But, whether it be or not, I lay it aside as untenable. I think it clear that the deed contains no direction to convey the fee to the issue of Ann, and that the words, "without issue as aforesaid," refer to the issue of Mary, about whose issue alone there is anything "aforesaid" in

the deed. The words, "and Ann M'Math," are obviously introduced in a wrong order, and I attach no importance to them, except as showing how misleading it would be to attempt to follow, throughout this clause, the very words the testator uses, in place of gather- [408] -ing his meaning from the whole clause, and the general scope of the deed. It is precisely to an ill-expressed deed like this that Mr. Erskine refers (3, 9, 14), when, in speaking of the liberal construction of testamentary deeds, he says, "and in general though the words should be ambiguous, or even improper, they ought to be interpreted according to the presumed will of the testator, if, by any construction, they can be brought to it."

But it is entirely upon a strict and literal reading of certain words in this fifth clause that the argument against the power of the trustees to execute a deed of distribution in Mary M'Math's lifetime rests. The argument is, that the direction being to sell and divide, the division cannot precede the sale. But this argument confounds the deed of division with the act of division. After the sale the trustees are to divide "in such proportions as they shall think proper;" but it is not said when or how they are to fix these proportions. It is not said there is to be any writing at all. But the direction to divide implies the power to do whatever is necessary for dividing, and it could not be meant that the trustees were to distribute the half, amounting to about L.10,000, of this reversionary estate, without some previous writing to regulate the distribution. If the time for the act of division be the time prescribed for executing the writing regulating that division, it follows that a writing executed between the date of Mary M'Math's death and the date of the sale would be premature and ineffectual, which is too extravagant to be maintained. If, on the other hand, the date of the act of division and the date of the writing, prescribing rules for the division, may be different, it follows that the time for executing the writing is not *in terminis* prescribed by the deed, but is left to be inferred (as well as the necessity for a writing at all) from the object in view, and the general scope of the fifth clause, taken in connection with the rest of the deed.

Viewing the matter in this light, there are to be found, in the clause itself, various considerations favourable to the power of the trustees to execute the necessary writing, without awaiting the death of Mary M'Math. Thus, 1st, The testator confers the power upon his trustees in the same terms in which he reserves it to himself. They are to divide "among my relations, in such proportions as they shall think proper, or as I may direct." He obviously contemplated being survived by Mary M'Math, for he gave her power individually to divide the other half of the residue. If he meant the trustees to supply what he might happen to have omitted, it is natural to suppose that he meant they might do it, as he would have done it, in Mary M'Math's lifetime. If he would have had no difficulty in thereby accomplishing his purpose, so neither could they. The futurity and contingencies to be provided for by him, or by them, were precisely the same. 2d, The one-half, of which Mary M'Math was to have the absolute disposal, was subject to the same contingencies with the remaining half. If she should have issue, any writing she had executed, under the power conferred on her individually, would have been evacuated; and, if the view be correct that Ann's issue were to take, this event, in like manner, would have evacuated that writing. In any view there could be no distribution of this half, more than of the other half, till the death of Ann, who, if she had survived, would have been entitled to the liferent of the whole. If the testator looked upon all this as no obstacle to a writing being executed in the lifetime both of Ann and of Mary, as to the one-half, he can scarcely be supposed to have so regarded it as to the other. 3d, If Ann had survived Mary, although with a mere right of liferent, the theory of the objectors is, and consistently must be, that the trustees could have executed no deed of division till the death of Ann. The argument upon the words, "to sell and divide," would have been the same then as now, although there was no contingency left to evacuate the deed, but a mere ordinary liferent postponing the beneficial enjoyment till an event which must happen, viz., the death of the liferentrix. The objectors, accordingly, carry their argument this length, and add that, in the event supposed, even on the footing of no fee being provided to the issue of Ann, the distribution must have been confined to the truster's next of kin alive at the death of Ann. But all this just shows the extravagance of the argument which would postpone the deed of division, under all circumstances, till the act of division.

Add to these considerations the general improbability that the testator meant to peril the accomplishment of his purpose upon the single contingency that at [409] least two, being a quorum, of the other trustees, who were only three in all, should survive Mary M'Math,—then evidently a young person, although her age is not stated,—and it becomes, I think, impossible to hold that such can be the sound construction of this deed. I do not mean that a quorum would be essential. But that the testator looked forward to the concurrence of a quorum there can be no doubt; and this is all we have to do with in considering whether he meant to postpone the execution of the discretionary power, conferred by him on his trustees, till the death of Mary M'Math. It was a view to be considered whether the power to Mary M'Math to divide one-half did not indicate that she was to have nothing to do with the other. But I think the confidence thus reposed in her rather indicates a preference for, than an exclusion of, her voice as trustee in the distribution we are now dealing with.

I do not go into the question how far a deed of distribution, made by the trustees and retained in their own repositories, might be altered by them, or the survivors of them, if fairly done, to meet emerging circumstances. There would be nothing anomalous in holding that it could. But nothing of that kind occurred here. Mary M'Math became the sole surviving trustee; and, as the necessary writing had not been executed, I think it became not only her right but her duty to execute it. Whatever a quorum could have done before, she became entitled to do *ut voluntas testatoris sortiatur effectum.* By the terms of the deed two were to be a quorum, while so many were alive. But the trust was conceived in favour of the survivors or survivor. She is not said to have abused her power, or to have exercised her discretion otherwise than honestly and fairly. If this deed of distribution, had it been executed by the whole trustees or their quorum, would have been a good deed, it is a good deed as executed by her.

But it is next maintained that the trust-settlement bestowed a direct bequest of half the residue upon those who should be the testator's next of kin at the date of the death of Mary M'Math—that the trustees had a mere power of apportionment—and, consequently, that a deed, distributing otherwise than amongst the whole of such next of kin, and not giving each a share, is *ultra vires* and null.

In my opinion the character of the bequest is not here correctly stated. I think what the testator did was to fix a class within which the trustees were to be entitled to select individuals, as well as to apportion the shares, and that this class was not limited to the next of kin at the testator's death, or at the death of Ann M'Math; but comprehended all who could show a traceable and distinct relationship to the testator, whether by the father's or mother's side, and whether by the full blood or the half blood.

The competency of delegating such a power was long contested, but has been affirmed in various important cases, which were all gone over by Lord Chancellor Lyndhurst in Crichton *v.* Grierson, 25th July 1828, 3 W. & S. 329, when he arrived at the conclusion, the soundness of which will be no longer questioned, "that, according to the authorities in the law of Scotland, it is quite clear a party has this power." (*Ib.* p. 339.)

The mere extent of the class is no objection to the power. In Murray *v.* Fleming (M. 4075) the class was any of the husband's blood relations his wife might think most fit to be nominated—being, as the Lord Chancellor observed in Crichton's case, "a body of persons as extensive as it was possible to conceive; and yet, in that case, the Court were of opinion that the disposition was good." Again, in Snodgrass *v.* Buchanan, 16th December 1806 (F.C.), the class consisted of such of the testator's mother's relations as a friend named in the testament should appoint; which, as the same high authority observed, was likewise as extensive as it was possible for a class to be.

The words "my relations" have no technical meaning in the law of Scotland. They are mere popular language, to be construed in the sense in which they appear to have been used. They are not synonymous with next of kin. On the contrary their natural meaning is more extensive; and the presumption to this effect, in place of requiring to be established, would rather require to be overcome. The phrase "next of kin" is so familiar to every Scotch conveyancer, that we expect it

to be used where it is meant. In a direct bequest to relations, with no discretion anywhere, a limited meaning may be adopted rather than void the bequest for uncertainty. But the more natural limitation, in that case, would be to nearest re-[410]-lations; and even the words "nearest relations" are not necessarily synonymous with next of kin.

Where there is discretionary power of distribution, there is no such necessity for presuming a limitation, as where, without it, the bequest might not be extricable. The presumption rather is, that the testator gave the discretionary power just because he wished to avoid making a limitation. Upon this point the cases of Wharrie, in 1760, and Brown, in 1762, are both important; and, in one respect, they are stronger than the present; for in neither of them was the power to divide accompanied by the words we have here,—"in such proportions as they shall think proper." In Wharrie's case (M. 6599) the executor was directed, by the testament, to remit the surplus to two persons therein designed, "to be by them divided amongst my relations not herein named." James Wharrie, the sole next of kin, who was not otherwise named in the testament than by a legacy being left to his children, claimed the whole residue, in competition with some more distant relations, whose propinquity is not mentioned. The Court "found that James Wharrie is not entitled, as nearest of kin, to claim the said residue, to the exclusion of the testator's other relations not named in the said testament, among whom the trustees shall divide the same." We have no report of the ultimate result, but this judgment does not seem to have excluded James Wharrie from some share along with the more distant relatives, nor to have required that these relatives should, *inter se*, be all related to the testator in the same degree. On the contrary, the case has always been understood—as Lord Gifford described it in Hill *v.* Burns, 14th April 1826, 2 W. & S. 87—to be a case in which the Court "expressly sustained a discretionary power, committed to trustees, of distributing a bequest, the objects of which were uncertain, and not specially defined in the settlement." It could only be because the distribution was not limited to relatives of the same degree, that there was uncertainty as to the objects which the discretionary power served to ascertain and define.

The case of Brown (M. 2318) goes still more directly to this point. There the trust-settlement directed the residue "to be divided amongst my poorest friends and relations, whom I may have forgot herein, or in any other deed to be made by me." It is not unusual, in some parts of Scotland, to speak of "friends" when relations are meant; and it seems probable, from the interlocutor, that the Court held these words to have been used synonymously in Brown's deed. But, however this may be, neither the word "poorest" nor the word "friends" could affect the necessity of determining whether the poorest were to be selected from the next of kin, or from relations generally. The Court held that the trustees were vested with a discretionary power to divide among the poorest friends and relations "without distinction, whether the said relations are connected by the father's or by the mother's side; and also without distinction of degree;" and ordered a condescendence of the names of persons among whom, and the proportions in which the trustees proposed to divide. The requisite of poverty might aid the presumption that the bequest was not confined to the next of kin, if none of the next of kin were poor; but, subject to this remark, the case is a strong one for holding that a power to trustees to divide among relations confers, in the general case, a discretionary power to select the objects, without being confined to the next of kin, as well as a power to determine the amount which each is to receive. Both Brown's case and Wharrie's case have been repeatedly cited as authoritative in the House of Lords.

The case of Scott *v.* Scott, 17th July 1852, to which I referred the parties at the hearing, is also very important. I observe a summary of the argument given in the Scottish Jurist, vol. xxiv. p. 651. The testator there, in case of any residue being left in the hands of his testamentary trustees, appointed "the same to be made over and paid to my nearest relations then alive." The form of the action did not admit of any question as to the amount of the shares when the time for distribution should arrive, which had been fixed, by a previous decision, not to be till the death of a party then living. The object of the action was simply to have it prospectively declared that, when that time should arrive, the parties entitled to

shares in the residue would be the nephews and nieces by the full blood, to the exclusion of the defenders in the action, who were nephews and nieces by the half blood. There was nothing to shew that the class of "nearest relations" went [411] beyond the next of kin, or that it comprehended the half blood, except that the testator had left special legacies both to the pursuers and the defenders in the action, and that, in doing so, he had described all of them as his nephews and nieces. In this state of matters no difficulty was felt, either here or elsewhere, in holding nephews and nieces by the half blood to be included.

Now, if your Lordships will compare the list of parties favoured by the present deed of distribution, with the list of parties to whom the testator gives special legacies by his trust-deed and settlement, you will see that, of the parties favoured by the deed of distribution, some are the same with, and the others are all related to parties who by the settlement receive special legacies; and that the family who apparently receive most under the settlement, are therein expressly described as the children of the testator's brother by the half blood. This comparison is very important, for, if there had been no object to be served by keeping up the residue in the hands of the trustees, the testator would, no doubt, have appropriated it at once; and the probability is, that he would have done so, mainly by increasing the bequests to those whom his deed shews he wished to favour. He indicates no interest in any parties beyond; no anxiety, as in Wharrie's case, about "relations not herein named," or, as in Brown's case, for relations whom he might have forgot. It was necessary to keep up the residue here to meet the liferents of Mary and Ann M'Math, and to await the contingency of Ann having issue. But these purposes being now served, I see no reason to think that this deed of distribution goes beyond the discretion conferred by the testator. On the contrary, I should say that, so far as one can judge from perusing and comparing the two deeds together, this deed makes just such a distribution as the testator most probably contemplated and would have desired. No doubt he does not, in his deed of settlement, apply, as Mr. Scott did, the same phraseology to relations by the full blood, and to relations by the half blood; but he favours both equally, and he does not use, as Mr. Scott did, the word "nearest," without which, in that case, there could not have been said to have been any perplexity whatever.

On these grounds, I am for recalling the interlocutor, and sustaining the deed of distribution.

Lord President.—I am of a different opinion, and think that the interlocutor of the Lord Ordinary should be adhered to. I agree with your Lordships as to the delicacy of the case. I have no difficulty in agreeing with many of the general opinions which have been expressed; but, in regard to the particular words of the clause we are construing, I think that the testator contemplated conferring a benefit upon those of his relations who should be in existence at the time of the death of the longest liver of his two nieces; and that he gave his trustees power to divide it among his relations, at that time, failing directions from himself. I agree with the opinions which have been expressed, that if power was intended to be given to Mary M'Math to make the distribution, there is nothing in the generality of the word "relations," or in the range it includes, which could invalidate that power. A clause in the trust-deed has been referred to by Lord Deas, upon which we had no argument from the bar, and which suggests an additional difficulty whether the deed of Mary M'Math be valid, for it suggests this, that at the time she made it she was not the sole surviving trustee.

My doubt turns upon no point which involves any general question, but entirely upon the words of the deed. It appears to me that the power to sell and divide was to be exercised at the death of the longest liver. This is the time at which the trust-deed directs this to be done, and the division is to be made in reference to the relations then in existence. Before that time it could not be known what relations were to get the benefit. That the testator himself could, by writing under his hand, control this division, is a different matter. We are dealing with the powers which he gave to his trustees. That the testator expressly gave power to his niece to distribute the other half of the residue, had also no bearing. The point is solely as to the power of the trustees in regard to this half,—whether they could exercise the power of division before the time which the testator describes.

If the view I have taken be sound, the question arises, who are to share the

residue? The truster says his relations are to get it, and by that I think he meant his nearest relations—that is, his next of kin—at the time the division was to be made.

[412] The Court pronounced the following interlocutor:—"Recal the interlocutor of the Lord Ordinary reclaimed against; Repel the reasons of reduction: Assoilzie the defenders (the reclaimers) from the whole conclusions of the summons, and decern: Farther, they refuse the desire of the said reclaiming note for Gilbert M'Cormack and others, No. 19 of process: Find neither party entitled to expenses against the other, but find that the expenses of both parties should be paid out of the trust-estate: Allow accounts of these expenses to be lodged, and remit," &c.

No. 63. **XXIII. Dunlop 416.** 29 Jan. 1861. 1st Div.—Lord Ardmillan.

DONALD BAIN (REEVES' Factor), Pursuer and Real Raiser.

CATHERINE EMMA REEVES, Claimant.—*Gordon—M'Lennan.*

ANN JACK or BEATON and HUSBAND, Claimants.—*Millar—A. B. Bell.*

F. M. REEVES and Others, Claimants.—*Rutherfurd.*

Succession—Trust—Heritable and Moveable—Payment of Heritable Debt.—A truster directed his trustees (1) to pay his debts, (2) to convey specific heritable subjects to A, (3) to pay pecuniary legacies to B and to C, (4) to make over the residue to A. The subjects destined to A were affected by heritable debt, and the truster's moveable estate was not sufficient to pay both that debt and the pecuniary legacies;—*Held* (*aff.* judgment of Lord Ardmillan), that A was not entitled to demand that the debt should be paid before the legacies.

John William Albion Reeves died on 27th January 1854, leaving a trust-disposition and settlement, by which he conveyed to trustees certain specified heritable subjects in Inverness, and also all other heritable and moveable estate of which he should die possessed. He directed his trustees as follows:—1st, "My said trustees shall, from the produce of my means and estate, pay all my just and lawful debts. 2dly, On my lawful daughter, Catherine Emma Reeves, attaining the age of twenty-one years, my said trustees shall assign, convey, and make over to her, her heirs and assignees, All and Whole the subjects first above described, consisting of two dwelling-houses on the east side of Church Street, and the dwelling-house and premises in Academy Street, with the ground lying between and attached to these subjects." 3d, The truster then directed other specified heritable subjects to be disponed to three sons; and 4th, L.150 to be paid to a fourth, on his attaining majority. 5th, L.200 to the three sons before mentioned. 6th, "The rents of the properties and interest on the above respective sums," "to be paid out by the trustees in maintaining and educating my said children." 7th, The last purpose was—"That immediately after the foregoing provisions have been carried into effect, my said trustees shall forthwith dispone, convey, and make over, to the said Catherine Emma Reeves, the residue and remainder of my means and estate, and all the rights and securities thereof, vested in my said trustees," &c. The trustees had "unlimited powers" of sale.

The estate was for some years managed by one trustee, who accepted and acted. On his death Donald Bain was appointed a judicial factor.

A bond and disposition in security for L.500, of which about half was still due at the truster's death, had been granted over the subjects directed to be conveyed to Catherine Emma Reeves.

The moveable estate was not sufficient to pay off the heritable debt, and to pay the pecuniary legacies. While in minority the trustees did not pay to Catherine Emma Reeves the free annual proceeds of the heritable subjects destined to her.

In a multiplepoinding she claimed under the first and second purposes, that the debt affecting the heritage should be paid out of the moveable estate, and that it should be found that she was entitled on majority to have the subjects conveyed disburdened

of the debts; and under the sixth purpose, that she was in the meantime entitled to the free proceeds of the subjects so disburdened. She pleaded;—That special legacies do not abate, if there be enough besides to pay the debts and expenses; and general legacies are effectual only if, after paying debts and expenses, there shall be enough to satisfy them. On a fair construction of the trust-deed, the claimant is entitled to the free yearly rent of the subjects mentioned in the second purpose of the trust for her maintenance and education.

On 20th January 1860 the Lord Ordinary pronounced the following interlocutor:—"Repels the claim of Catherine Emma Reeves for payment out of the estate in the hands of the judicial factor of the heritable debt [417] affecting the subjects disponed to her by the deceased Mr. Reeves; and repels her claim to be ranked and preferred *primo loco* to the free annual rents of the said subjects disburdened of the truster's debts: . . . . Finds that, under the sixth purpose of the trust, the rents of the properties and the interests of the sums respectively provided to the claimants are to be applied to the maintenance and education respectively of the children to whom they are respectively provided, and decerns," &c.[1]

A reclaiming note was presented for Miss Reeves, and

The Court repeated the above findings.

No. 64. **XXIII. Dunlop 417.** 30 Jan. 1861. 1st Div.—Sheriff-Court of Fife.

MARGARET ALLAN, Advocator and Defender.—*Alex. Nicolson.*

MRS. MARGARET BEVERIDGE or MUNNOCH and Others (KENNEDY'S Executors), Respondents and Pursuers.—*Gloag.*

Sheriff—Summary Petition—Consignation and Payment.—A servant uplifted, a few days before her mistress's death, the amounts of certain indorsed deposit-receipts, and retained them on the ground of donation;—*Held* competent for the mistress's executors to apply by summary petition to the Sheriff for interdict against her and her agent using the funds, and for consignation, and to find that they belonged to the petitioner; and failing consignation, for decree against the respondents for the amounts uplifted.

Bank Deposit-Receipt—Donation—Prescription.—Mere possession of an indorsed deposit-receipt does not presume donation, or anything more than that the party depositing intended to uplift the money.

This case originated in the Sheriff-court of Fife. Miss Margaret Kennedy, of Falkland, died, at the age of seventy-eight, on 17th June 1856, possessed of consider able property. Her medical attendant had been called in on 6th June, and

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[1] "NOTE.—Where an heritable subject is destined to one person, and moveable property to another, with a general direction to trustees to pay the debts of the testator, and especially with a power to the trustees to sell the heritage, each person is liable in payment of the debts affecting the property provided to him, and there is no obligation on the executors, or on those taking the moveable estate, to relieve the heir or person taking the heritage by paying the debt secured on the heritable estate.

"If the mere form of the title to the heritable subject is considered, then the subject was formally vested in the creditor, and all that the testator had was a right of redemption, and that right was bequeathed. If the substance of the title to the heritable subject is considered, then it was a burdened subject, and it must be held to have been bequeathed, and must now be taken *cum onere*, as it stood in the person of the testator.

"In either view, there is no obligation on the executor or the legatee in moveables to pay the debt heritably secured on the subject destined to the claimant.—(Sinclair *v.* Fraser, 14th Feb. 1798, Hume's Dec. 176; Murray *v.* Murray, 21st Dec. 1837, 16 S. & D. 283.)"

when examined in the cause deponed, that from that time she was unfit to transact important business. When her repositories were examined, four bank deposit-receipts, for sums amounting in all to L.1200, known to have been in her possession, were amissing. It appeared from the proof led in the case that Allan, her sole domestic servant, when first asked by the friends of deceased about these receipts, denied all knowledge of them; but it subsequently appeared that they had been indorsed by Miss Kennedy, and that Margaret Allan had, on 5th and 6th June, herself, or through her agent Mr. Walker, drawn the contents of three of them, and that the fourth, being a National Bank deposit-receipt for L.253, 7s., was [418] then in her possession. Mr. Walker had sometimes acted as agent for Miss Beveridge. Allan's statement, from the time she admitted knowledge of the deposit-receipts, was, that she had received them as a donation.

Miss Kennedy's executors presented a summary petition to the Sheriff, praying him "to interdict and prohibit the said Margaret Allan and Henry West Walker from parting with, or in any way using or diminishing the said funds; and upon advising this petition, with or without answers, to appoint the said Margaret Allan and the said Henry West Walker forthwith to consign, in the hands of the clerk of Court, the several sums uplifted by them, or either of them, as aforesaid; and thereafter to find that the funds referred to belong to the petitioners, as executors, and to authorise the clerk of Court to pay and deliver the same to the petitioners, as executors foresaid; or, in the event of consignation not being made, to decern and ordain the said Margaret Allan and Henry West Walker to make payment to the petitioners as follows, *videlicet*," &c.

A supplementary petition was presented,—the petitioners having omitted a conclusion for delivery of the National Bank deposit-receipt,—praying the Sheriff "to decern and ordain the said Margaret Allan to lodge the foresaid deposit-receipt by the National Bank of Scotland's branch, Kirkcaldy, in favour of the deceased, in the hands of the clerk of Court; and upon the said receipt being so lodged, to authorise the clerk of Court to deliver over the same to the petitioners, as executors foresaid; and to remit the present supplementary application to the said process pending between the said parties, and to conjoin the same therewith."

A record was made up. The respondent Walker pleaded, that no relevant case was stated against him. Margaret Allan pleaded, that a summary petition was an incompetent process for trying such questions.[1]

A proof was then led, a great part of which was directed to the state of Miss Beveridge's mind during the period of Margaret Allan's service.

When examined as a witness for herself, Margaret Allan deponed, that one of the receipts had been given her by Miss Beveridge in January 1856, and the others in May; and that in June Miss Beveridge had directed her to uplift them, with the exception of the sum deposited in the National Bank at Kirkcaldy, which she had told her not to uplift, lest her (Miss Beveridge's) friends there should know of it.

On 29th April 1858 the Sheriff-substitute (Taylor) pronounced an interlocutor, in which he repelled Margaret Allan's pleas, and decerned against her, but assoilzied Walker; to which interlocutor the Sheriff-depute (Monteith), on appeal, adhered.

The defender advocated, and repeated the plea, *inter alia*, that a summary action was inapplicable to the averments and conclusions of the petition. She also contended that the proof established her averment of donation.

LORD PRESIDENT.—As to the question of form, I do not think this summary proceeding incompetent. It is founded upon the wrongful obtaining and retaining of the proceeds of these deposit-receipts. The application for interdict and consignation might possibly have been found to come too late; but these remedies might also be found effectual, and I think were warranted by the circumstances of this case, both as against Margaret Allan and her agent, who, it was alleged, retained the funds which had been uplifted through his agency, and which were still within his control and power,—at least within his knowledge. It may be that the pursuers might competently have brought an ordinary action, and used arrestments on the

[1] Barstow *v.* Inglis, 4th Dec. 1857; Henderson *v.* M'Culloch, 12th June 1859; Heron *v.* M'Geoch, 13th Nov. 1851; Steel *v.* Wemyss, 18th Dec. 1793.

dependence. It does not follow that such proceeding would have been an effectual [419] remedy, nor that, such remedy being competent, this summary proceeding is incompetent.

Upon the merits, the question is, whether there was or was not a donation to Margaret Allan? The mere possession of the receipts does not necessarily presume donation. The fact of indorsation may appear a *prima facie* indication of an intention to uplift the sums. Many people habitually keep indorsed receipts in their possession; but whether there was an intention here to make a gift of these sums to the holder of the deposit-receipts, depends on the circumstances of the case. Here they point, in my opinion, the other way.

It is not presumable that this lady, being in good health, would part with all or so great a portion of her personal property. Then it does not appear that Margaret Allan was in possession of these deposit-receipts previous to the day on which she cashed them. On that day the doctor who attended Miss Kennedy says she was so ill as to be unable to transact important business. In ten days thereafter she died. But Margaret Allan had been in the habit of acting as her amanuensis, and had access to all her repositories. That is the state of the case, apart from Margaret Allan's own evidence; and what does she say? That she got these receipts, two of them in January, and the others in May 1856. But when first questioned on the subject, she denied all knowledge of them. Why did she do so? It is impossible to reconcile that denial with her statement as to donation, or to give credit to her testimony. In these circumstances, I concur in the conclusion arrived at by the Sheriffs.

Lords Ivory and Curriehill concurred.

Lord Deas.—The competency of this application is a fairly debateable question. I think it was rash to trust to this summary petition without raising an ordinary action at the same time; and the petition itself has not been framed and insisted on in the way most favourable to its competency. But, on the whole, I agree in thinking that it is not incompetent. This is not an action for debt. It is an action raised on the ground of a wrong of the nature of a fraud, and the petition asks for consignation of the money. Consignation was not made, but it was competent to ask for it; and if so, the proper way of getting consignation was by summary petition. The petitioners might have moved the Sheriff to order this party to appear and be personally examined, and if it had then appeared that the circumstances were *prima facie* so suspicious as to warrant an order for consignation, that order might have been made. If the narrative had been proved, the case would have been one of theftuous appropriation of money; and in cases of that kind we are familiar in the Justiciary Court with an order for delivery of the money. If the prayer for consignation was competent, an alternative prayer for payment or delivery seemed to be also competent. As to the interdict, it might be difficult to make it available; but I do not think an interdict in such a case is incompetent.

On the merits, I have nothing to add. The burden of proving donation lies on the party pleading it. I am not prepared to say that, even if her own statement had been credible, the evidence would have been sufficient. But her evidence is not credible, and, on the whole, I agree in thinking that she has failed in proving donation.

The Court pronounced the following interlocutor:—"Advocate the cause: Recal the interlocutor of the Sheriff-substitute and Sheriff complained of: Repel the preliminary pleas directed against the competency of the inferior court actions: Find, in point of fact, 1st, That it is proved that the late Miss Margaret Kennedy died on the 17th June 1856, at the age of seventy-eight years or thereby; that the respondents have been decerned executors-dative to her; and that she had belonging to her and in her possession, or within her power, at and prior to the commencement of her last illness, the four bank or banking company's deposit-receipts in her favour mentioned in the record: 2d, That it is proved that, at and prior to the said last illness and death of the said Margaret Kennedy, the advocator Margaret Allan was her sole domestic servant, and was the only in- [420] -mate besides herself of the house in which she lived and died, and had access to her repositories, and to the documents therein, and had been habitually employed by her to assist in the management of her pecuniary affairs: 3d, That it is proved that, within twelve days or thereby prior to the death of the said Margaret Kennedy, and at a time when she was labouring under her last illness, and

unable to transact or attend to business, the advocator drew out from the respective banks or banking companies, who had granted the said deposit-receipts, the contents of three deposit-receipts, and interest due thereon, amounting in whole the sums as drawn to the sum of L.931, 12s. 5d., which sum the advocator retained, and still retains; and that she also retained in her possession, till the same was produced by her in process by order of the Sheriff, the fourth of the said deposit-receipts, being a deposit-receipt by the National Bank of Scotland, granted through their agency at Kirkcaldy, to the said Margaret Kennedy, for L.253, 0s. 7d. sterling, dated 28th January 1853, and forming No. 105 of process: 4th, That it is not proved that the said Margaret Kennedy gifted or made a donation of the said deposit-receipts, or any of them, or the contents thereof, to the advocator, or that she authorised the advocator either to uplift or to retain and appropriate to her own uses and purposes the money contained in or represented by the said deposit-receipts, or any part thereof: And, in these circumstances, Find in point of law that the advocator is not entitled to retain the money uplifted by her as aforesaid, or any part thereof, or to retain the said deposit-receipt by the National Bank of Scotland, No. 105 of process, and authorise and appoint the clerk of Court to deliver up the said deposit-receipt to the respondents, to be used by them as their own proper document; and decern and ordain the advocator to make payment to the respondents of the foresaid sum of L.931, 12s. 5d. sterling, with legal interest thereon from and since the date of the Sheriff-substitute's interlocutor and decree of 29th April 1858, and till paid, and decern: Find the advocator liable in expenses, both in the Sheriff-court and in this Court; modify the Sheriff-court expenses to L.66, 15s. 1d., at which sum they have been already taxed by the Auditor of the Court; and remit the account of expenses in this Court," &c.

[Cf. *Kennedy* v. *Rose*, 1 M. 1048.]

No. 67. **XXIII. Dunlop 429.** 2 Feb. 1861. 2nd Div.—Lord Ardmillan.

JOHN ROBSON (Factor *loco tutoris* for WILLIAM DENNY'S Children), Pursuer.—Real Raiser.—*Young*—*N. C. Campbell.*

MARY CUMMING or DENNY or MACNISH and her HUSBAND, Claimants.—*Graham Bell*—*Macfarlane.*

WILLIAM DENNY, Claimant.—*Millar.*

MARY DENNY and Others, Claimants.—*Fraser.*

Husband and Wife—Terce—[*Succession*].—A proprietor made contracts for the erection of buildings on his property, which were only partly executed at the date of his death, and the cost of which was paid out of his moveable succession. He died intestate, leaving a widow and children;—*Held* (by Lord Ardmillan), 1. That the eldest son who succeeded to the whole heritable estate was entitled to charge against the moveable succession the expense of the buildings executed under contracts entered into by his father; and 2. That the widow was entitled to her terce out of the free rental of the subjects in which her husband died infeft, without deduction of the **[430]** sums expended on buildings during her husband's life, or under the contracts entered into by him.

Husband and Wife—Terce—Public burden—Income-tax—Stat. 5 & 6 *Vict. cap.* 35, *sects.* 102, 103.—By agreement a widow accepted in full of her claim for terce an annuity of L.400 per annum, to be increased or to suffer diminution in case the free rental, as at the date of the agreement, should be increased or diminished on the expiry of current leases. The tenants were bound by their leases to pay income-tax without recourse on the landlord, and the sum stated in the minute as the free rental, was the rent so paid clear of taxes, insurance, repairs, &c.;—*Held*, that the widow was only entitled to payment of her annuity under deduction of income-tax.

William Denny, shipbuilder in Dumbarton, died intestate on 1st July 1854, leaving

a widow and four children in pupillarity. Mr. John Robson was appointed factor *loco tutoris* for the children. Mr. Denny was possessed of heritable subjects in, and in the neighbourhood of, the town of Dumbarton. At the time of his death, some buildings were in course of erection on these subjects; part of the buildings completed had not been paid for, and part of the works, for the execution of which he had entered into contracts, had not been completed. His moveable estate not being capable of being immediately realised, Mr. Robson obtained power from the Court to borrow L.14,128, 15s. 1d. on the security of the heritable estate, to pay for the buildings completed, and to complete and pay for those begun and contracted for.

Mr. Robson afterwards realised Mr. Denny's whole personal estate.

Mrs. Denny claimed her terce and *jus relictæ*, but owing to the state in which Mr. Denny had left his affairs, there were doubts as to the portions of his property to be regarded as heritable; and Mr. Robson raised this action of multiplepoinding in order to have the rights of all parties judicially settled. The claimants were William Denny, the eldest son and heir of the deceased, and Mary Denny, Christian Denny, and John Denny, his younger children. Curators *ad litem* were appointed to them. Mrs. Denny was the only other claimant.

The claim made for William Denny, the heir, was:—To be preferred to the whole heritable estate, under burden of Mrs. Denny's right to terce: That the heritable estate should be reimbursed out of the moveable part of the succession, for all sums expended in operations upon the heritable estate for which Mr. Denny contracted, or was under obligation at his death, or at least for all sums expended in paying the cost of work done in his lifetime.

The younger children claimed two-thirds of the personal estate, that estate being estimated without deduction of any sum which might have been expended since Mr. Denny's death in building or other operations upon the heritable estate. If the sum borrowed by the factor was held to form a burden on the heritable estate, the heir would succeed to an estate of about L.915 per annum, and the other children would get only L.500 each; but if the money borrowed were held to be a burden on the moveable estate, the moveable estate would be entirely exhausted. It was pleaded for them;—1. Being the younger children of the deceased, they were entitled to two-thirds of his moveable estate, as executry and *legitim*. 2. The money paid since Mr. Denny's death, on account of buildings on the heritable estate, was an heritable debt, and chargeable against the heir-at-law. 3. At all events, the heir having derived the sole benefit from said expenditure, was bound equitably to relieve the executors thereof.

Mrs. Denny claimed—1. One-third of the annual value of the properties held in feu, in which the deceased died infeft, in name of terce, such value being taken according as the properties were improved by expenditure made after his death, by the execution of operations contracted for by him, and **[431]** without diminution of any sum on account of money borrowed on the security of the subjects since his death; 2. For one-third of the moveable estate.

The Lord Ordinary pronounced this interlocutor on 21st February 1857:—"Finds that the claimant, William Denny, the eldest son and heir-at-law of the deceased William Denny, is entitled to the heritable estate of the deceased, under burden of the widow's right of terce: Finds that the cost of the works executed on the heritable estate of the late William Denny, during his lifetime, or executed after his death, under contracts entered into by him, and obligations on him, is a charge on the moveable estate and succession, and that the ranking of the claims in the multiplepoinding, ought to take place on that footing; and to that extent and effect, sustains the claim for William Denny and his tutor *ad litem*: Finds that the claim of the widow, Mrs. Denny, to her terce is to be calculated on the annual value of the subjects falling within the infeftment of the late William Denny, and without deduction of the sums expended in operations on the property during Mr. Denny's life, or expended after his death in completing works thereon, under contracts entered into by him, such sums being moveable debts, and not burdening the terce: Appoints the cause to be enrolled for further procedure; and reserves all questions of expenses."[1]

[1] "NOTE.—The obligation to pay the cost of the works executed under contracts by Mr. Denny himself was a personal obligation. The debt was a personal debt, and it is settled law that the executors are liable in payment of such a debt, and that the heir

The whole claimants reclaimed, and the Court, after hearing counsel, **[432]** intimated that this was a case in which an arrangement should be come to, making reasonable provision for the younger children, as whatever might be the rights of parties, the heir was bound to aliment the younger children, if not otherwise provided for.

An agreement was adjusted, which provided an allowance for the younger children, and made this provision for Mrs. Denny—viz., that "she should accept of the sum of L.400 yearly in full of all her claims of terce and *jus relictæ*, or otherwise;" but in case the "free rental of the subjects in which Mr. Denny died infeft, and other than those held burgage, amounting to L.1441," could not be maintained after the expiry of the existing leases, it was "agreed that in the event of any diminution or increase whatever of the free rental as stated below," "the widow's allowance shall suffer a diminution, or be increased, to the extent of one-third part of such diminution or increase of rental."

The note referred to bore, that "the present rental" of the whole subjects amounted to L.1441, "clear of taxes, insurances, repairs, and other charges specified in the leases, which are all paid by the tenants." Admittedly property-tax was payable by the tenants without recourse against the landlord.

The factor *loco tutoris* for the children, after obtaining the approval of the Accountant of Court to this arrangement, presented a note to the Junior Lord Ordinary for special powers to agree to it; and the Court, on report by the Lord Ordinary, authorised the factor *loco tutoris* to enter into an agreement to that effect, and remitted the cause to the Lord Ordinary.

Pending this arrangement, Mrs. Denny was married a second time to Niel Macnish.

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paying it has relief against the personal estate. The case of an estate purchased, but not paid for, and the price not heritably secured, is the best illustration of this rule (Arbuthnot, 23d June 1773, M. 5225). All the equitable considerations here urged by the younger children are applicable to such a case. Yet it is now beyond doubt, that when the debt is left personal, unsecured by being declared a real burden, the heir has relief against the executor.

"In the first case of M'Nicol (June 16, 1814), the rule laid down in the case of Arbuthnot was again enforced, and the authority of the case of Arbuthnot recognised. More recently, the case of Arbuthnot was held by Lord Gifford, in the case of Clayton, to be well decided, (Clayton *v.* Lothian, 3d March 1826, 2 W. and S., p. 48), and no doubt has been thrown on it in any subsequent case; while the authority of Mr. Erskine (B. iii., t. 9, sect. 48); of Mr. Bell (Prin., sect. 1936); and of Mr. More, in his Notes on Stair, (pp. 359, 360), confirms the rule. The case of Geikie, 18th January 1772 (M. 5220), has been referred to as leading to a different result, and it is said, that in that case an equitable principle of recompense was held as qualifying the relative legal liabilities of heir and executor. The Lord Ordinary cannot so read the case, which, he thinks, proceeded on the recognition of the general rule as above explained, but on the special consideration that the repairs on the subjects were executed within burgh, and on the warrant of the Sheriff, thus giving to the tradesmen a preference over the subjects. The case of Arbuthnot was decided after this case of Geikie, and there does not appear to the Lord Ordinary to be any conflict between them.

"If the sums due by Mr. Denny under the contracts were moveable debts at the date of his death, and so chargeable against the executry, then the procedure taken by the judicial factor did not alter the nature of the debt, or the rights of parties, (Moncrieff *v.* Miln, 16th July 1856.)

"Accordingly, though there appears some hardship in the result, the claim of the heir being well-founded in law, and properly urged on behalf of a pupil, must be sustained.

"On the second point, it is not disputed that the husband's sasine is the measure of the widow's terce. From this it follows that the terce cannot be burdened by debts not made real burdens on the property. Any question in regard to expenditure by the heir, on the subjects, not made under contracts entered into during the husband's life, is reserved for further consideration."

The factor *loco tutoris* craved the Lord Ordinary to determine whether he was entitled to deduct income-tax from the provision to the widow.

The Lord Ordinary, on 16th March 1860, pronounced this interlocutor:—"Finds that, in terms of the minute of agreement by the parties, the provision of L.400 per annum is payable to the widow of Mr. Denny: Finds that this annual sum ought, under the circumstances, to suffer deduction to the extent of one-third of the income-tax; and to that extent and effect grants the motion of the minuter Robson: *Quoad ultra* refuses the motion."[1]

Mrs. Macnish reclaimed, praying the Court to find that the L.400 per annum was, during the subsistence of the existing leases, payable to her without any deduction in respect of income-tax. Mr. Robson also reclaimed, praying that Mrs. Macnish should be held entitled only to the L.400, under deduction of the income-tax corresponding to that sum.

It was argued for Mrs. Macnish;—The income-tax on the rents of the heritable estate being, under the provisions of the leases, payable by the tenants without recourse against the landlord, the sum paid to the factor *loco tutoris* as rent was the gross rent, deducting the income-tax. Income-tax had been paid on it by the tenants, and was not payable again. Under the agreement the widow was entitled to L.400 out of that free rental. If income-tax were deducted from that, then she would get less than L.400, and the factor would retain more than the free rental minus the L.400. The L.400 being an equivalent for the widow's terce, was a proportion of the rental, and just as the factor would not pay income-tax on the whole rental (because it had been previously deducted by the tenants), so for the same reason the widow **[433]** ought not to pay income-tax on that proportion of the rental payable to her as an equivalent for terce.

LORD JUSTICE-CLERK.—In this multiplepoinding certain questions arose between the heir and the widow of the late William Denny, which formed the subject of judgment by Lord Ardmillan, and then the case was brought here, and the parties came to an arrangement, on which we pronounced an interlocutor on 24th December 1859, by which, of consent of parties, we recalled the interlocutor of the Lord Ordinary, interponed authority to the minute for the parties, and decerned in terms of it. That agreement and interlocutor we thought settled all questions between these parties, and settled, among other things, the amount of the annuity which the widow was entitled to receive, as in place of her right to terce and *jus relictæ*. After the case went back to the Lord Ordinary, a minute was put in for the factor *loco tutoris*, who was the holder of the fund, in which his counsel stated to the Lord Ordinary what had taken place in this Division of the Court, and that he had offered payment to the widow of William Denny of the sum of L.400 yearly, in full of all her claims of terce and *jus relictæ*, under deduction of income-tax, but that she had declined to take payment under such deduction, and he craved the Lord Ordinary to determine whether he was entitled to deduct income-tax from the provision of the widow.

The Lord Ordinary heard parties on that minute, and he pronounced an interlocutor, which is now brought under review, in which he finds that, in terms of the minute of agreement by the parties, the provision of L.400 per annum is payable to the widow of the late Mr. Denny; and that this annual sum ought, under the circumstances, to suffer deduction to the extent of one-third of the income-tax, and to that extent and effect he grants the motion of the minuter Robson, and *quoad ultra* he refuses the motion.

When I first read this interlocutor, I confess I was wholly unable to understand it, and, I regret to say, that I still remain in that unhappy state of mind. But if

[1] "NOTE.—This matter is not provided for in the agreement; but it appears clearly that the sum of L.400 per annum was fixed as the amount of the provision for the widow, with reference to a rental of L.1441, 12s. 8d., and the amount of income-tax, paid under arrangement by the tenants, and being thus in the same situation as so much additional rent, is not estimated in the rental. The apportionment of this income-tax between the heir and the widow, in the proportion of two-thirds to the heir and one-third to the widow, appears to the Lord Ordinary to meet the justice of the case."

I am utterly unable to understand what the Lord Ordinary means—and I find nothing in his note to explain his meaning—I was still more surprised by the arguments of parties. It appeared to me that the question, whether Mrs. Denny is liable to pay income-tax on her annuity or not, depends entirely on the clauses of the Acts of Parliament imposing the income-tax; and yet the clauses on which this question must depend were not brought under our notice, nor cited, nor mentioned, in the course of the discussion. That appears to me a very surprising thing, because, to suppose the liability or non-liability of this piece of property for income-tax to depend on views of equity or principles of common law, appears an entire mistake. Income-tax is an assessment altogether of an anomalous nature, and in its operation, so far from being founded on principles of abstract justice or common law, is often most unjust and abnormal, and sets at naught the conditions and agreements which parties make about their own interests, and, disregarding all such considerations, charges every species of income, without reference to what it is or where it comes from.

It is singular that, while the 103d section of the statute 5 & 6 Vict. c. 35 has been pleaded to us, the counsel on neither side has noticed the 102d section, under which it appears to me Mrs. Denny's annuity is chargeable with income-tax. That section enacts, "that upon all annuities, yearly interest of money, or other annual payments, whether such payments shall be payable within or without Great Britain, either as a charge on any property of the person paying the same by virtue of any deed or will, or otherwise, or as a reservation thereon, or as a personal debt or obligation by virtue of any contract, or whether the same shall be received and payable half-yearly, or at any shorter or more distant periods, there shall be charged for every twenty shillings of the annual amount thereof the sum of seven pence, without deduction, according to, and under and subject to the provision by which the duty in the third case of schedule (D) may be charged." These words surely provide sufficiently distinctly that every annuity, no matter where it is payable, or whether it is a charge on the property of the person paying it, or a reservation out of it, or whether it is payable by virtue of a personal obligation, or at whatever periods it may be payable, if payable to parties resident in this country, and not otherwise charged, shall be chargeable with the tax.

[434] But the Act farther provides, "that in every case where the same" (the annual payment) "shall be payable out of profits or gains brought into charge by virtue of this Act, no assessment shall be made upon the person entitled to such annuity, interest, or other annual payment, but the whole of such profits and gains shall be charged with duty on the person liable to such annual payment, without distinguishing such annual payment; and the person so liable to make such annual payment, whether out of profits and gains charged with duty, or out of any annual payment liable to deduction, or from which a deduction hath been made, shall be authorised to deduct out of such annual payment, at the rate of seven pence for every twenty shillings of the amount thereof; and the person to whom such payment liable to deduction is to be made, shall allow such deduction at the full rate of duty hereby directed to be charged, upon receipt of the residue of such money, and under the penalty hereinafter contained; and the person charged to the said duties having made such deduction, shall be acquitted of so much money as such deduction shall amount to, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable."

The only words in the whole of this second part of the clause that seem to give rise to any difficulty, are the words "profits and gains." What are the profits or gains charged by virtue of this Act? At first sight these words might seem to refer to an annuity payable out of some limited kind of fund, and to be not applicable to land rights. But we find that that expression is used in reference to schedule (D); and when we look at the first section of the Act, which sets out all the schedules, and what are assessable under them, we find that, under schedule (D), income-tax is payable "upon the annual profits or gains arising or accruing to any person residing in Great Britain, from any kind of property whatever, and from any profession, trade, employment, or vocation," whether carried on in Great Britain or elsewhere.

So that the words "profits or gains" in the Act of Parliament are words of the broadest meaning—of a broader meaning than any other words which are used in the Act.

And, therefore, this portion of the clause demonstrates, first, That Mrs. Denny's

annuity is chargeable with 7d. per pound to the full amount of L.400 a-year; and, secondly, That, as that annuity is paid out of funds brought under charge by the operation of this Act, she is not to be directly chargeable with this 7d. per pound, but she is bound to suffer a deduction to that amount when the annuity is paid to her; so that the party paying the annuity may keep in his hands, to account of income-tax, a sum corresponding to the tax on L.400, and so as to relieve him *pro tanto* of the burden of the income-tax to which he has been subjected.

This mode of levying income-tax is not left to the parties themselves, and cannot be set at naught by agreement of parties. It is an imperative statutory regulation, from which no one can claim or get exemption by means of any private arrangement; for immediately following the 102d section is the 103d, which enacts, that every person who refuses to allow such deduction shall forfeit the sum of L.50 for his refusal; and then follows this clause:—"All contracts, covenants, and agreements made or entered into, or to be made or entered into, for payment of any interest, rent, or other annual payment aforesaid, in full, without allowing such deduction as aforesaid, shall be utterly void."

It is, therefore, perfectly plain that this Court can do nothing but order and authorise this annuity to be paid, under the statutory condition that it shall suffer a deduction of 7d. per pound as income-tax—unless, indeed, it could be shown the annuity was not paid from funds brought under charge by the Act. If that had been shown, a different conclusion might have been arrived at, but not a conclusion more favourable to the annuitant. For then the revenue-officer would simply charge her directly with the tax payable on her annuity, and possibly with a treble tax, as penalty for not having paid it before.

But we have been referred to the arrangements between the parties, and between the heir and widow, and the heir and the tenants, as if such arrangements could possibly interfere with the operation of the clause of the Act. The agreement which was come to with the factor *loco tutoris* was, that this lady was to get L.400 a-year in full of her claims as widow for terce and *jus relictæ*, so long as the rental **[435]** remained at a certain sum; but that if the rental increased, she was to get more, and if it diminished less. But then it is said that, in calculating what the heir derives from the estate, and so arriving at L.400 as the sum equivalent to the right of the widow, it is necessary to look to the fact, that the tenants pay all the income-tax; and reference was made to a clause in one of the leases, and I suppose there are similar clauses in the other leases, in which the tenant binds himself to pay, and thereby free and relieve "the first party,"—that is, the factor *loco tutoris*, "and his successors in office,—of the whole feu-duties, poor-rates, and all taxes and burdens, including property-tax, exigible from and payable out of, and in respect of the whole foresaid several subjects hereby let, during the whole currency of the lease."

The tenant's undertaking to pay the income-tax was matter of supererogation, because the revenue-officer would have seen to that; but whether the tenant became bound to pay the income-tax without relief from the landlord, is a different matter. He becomes bound to free and relieve the landlord—that is to say, not to claim the deduction for the income-tax, which otherwise he would be entitled to claim under the 9th head of schedule A of the statute. I do not express any opinion as to the legality of that arrangement; but this is clear, that if a tenant undertakes to bear the burden of the income-tax, he will just on that account pay all the less rent; and if the landlord agrees to take a smaller rent on condition of the tenant relieving him of the income-tax, I do not see that the landlord escapes the burden of income-tax; and, therefore, I think that this landlord, like everybody else, is liable to the burden of income-tax on the amount of the rent he receives in one form or another. And Mr. Denny's property, and the profits and gains accruing to him from that estate, have been brought under charge by the Act of Parliament, and are not only *de jure*, but, under the conditions of that lease, *de facto* subjected to the tax.

Therefore, this annuity, payable out of property brought under charge by the Act, is subject to annuity-tax under the 102d section—that is, the tax must be paid in the shape of a deduction made by the party paying the annuity; and before the annuitant again refuses to suffer the deduction, she had better consider whether she does not subject herself to the penalties imposed by the Act.

The other Judges concurred.

The Court pronounced this interlocutor:—"Having heard counsel on the reclaiming notes for the parties against Lord Ardmillan's interlocutor of 16th March last, Recal said interlocutor: Find that the reclaimer, Mrs. Denny or Macnish, is bound, on receiving payment of her annuity of L.400 per annum, to suffer deduction to be made therefrom of the amount of income-tax, at the existing rate, corresponding to the amount of said annuity, and remit to the Lord Ordinary: Find the judicial factor entitled to expenses; and remit to the Auditor to tax the same and to report, and to the Lord Ordinary to decern for the same."

No. 68. **XXIII. Dunlop 435.** 2 Feb. 1861. 2nd Div.—Lord Ardmillan.

WILLIAM MANN, Pursuer.—*Young—Mackenzie.*

ANDREW SMITH and Others, Defenders.—*Munro.*

Process—Issues—Fraud.—Held that, in an action of reduction, on the ground of facility, where fraud and circumvention were averred, the pursuer was only bound to put in issue fraud or circumvention.

This was an action concluding for reduction of testamentary writings, five in number, executed by the late Mrs. Jean Rainey or Gordon. The pursuer, who was Mrs. Gordon's nephew and heir-at-law, called as defenders the trustees and executors nominated by the various writings under reduc- **[436]** -tion. The pursuer averred that Mrs. Gordon was, when the deeds sought to be reduced were executed, upwards of eighty-five years of age; she was frail and infirm in body, weak and facile in mind, and easily imposed upon. One of the defenders, taking advantage of these circumstances, and of Mrs. Gordon's weakness and facility of mind, and of her being easily imposed upon, did, "by undue influence and solicitation, and by fraud and circumvention, or one or other of them, impose upon the said Mrs. Jean Rainey or Gordon, and prevail upon and obtain or procure her to execute the dispositions and settlements, and codicils, to her lesion and to that of the pursuer;" and pleaded, *inter alia*, (2.) "Mrs. Gordon having been, at the dates of the said dispositions and settlements and codicils sought to be reduced, weak and facile in her mind, and easily imposed upon, and the said deeds or writs having been obtained or procured from her through fraud and circumvention, or one or other of them, on the part of the defender Andrew Smith, they ought to be reduced." Another plea was in similar terms, applicable to the other writings under reduction.

The pursuer proposed an issue applicable to each of the deeds. They were, *mutatis mutandis*, in these terms:—

"1. Whether, on or about the 11th of November 1852, the deceased Jean Rainey or Gordon was weak and facile in mind, and easily imposed upon; and whether the defender Andrew Smith, taking advantage of her said weakness and facility, did by fraud or circumvention obtain or procure from the said Jean Rainey or Gordon the disposition and deed of settlement, bearing to be dated on or about the 11th November 1852, No. 6 of process, to the lesion of the said Jean Rainey or Gordon?"

Parties having failed to agree on issues, the Lord Ordinary reported the case by interlocutor, dated 12th January 1861.[1]

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[1] "NOTE.—Looking to the recent decisions in the House of Lords, and to the observations there made by their Lordships on the subject of alternatives in issues, the Lord Ordinary is of opinion that in actions of this kind the words of issue should be "fraud and circumvention" instead of "fraud or circumvention." If put alternatively the jury might consider fraud proved and not circumvention, or circumvention proved and not fraud, and a general finding on the issue would not disclose which of the alternatives was considered to be proved. The pursuer maintained that circumvention is a species of fraud, and that the true meaning of the word is fraud, being circumvention, or that kind of fraud which consists in circumvention, and that thus there is no alternative.

It was argued for the pursuer;—The issue as proposed was in the form that had been in use for a long period. The only appearance of authority for putting in issue fraud and circumvention, otherwise than alternatively, was the report of the case of Buchanan v. Heugh and others, 19th May 1858, where, by mistake, the 5th issue was reported as containing the words "fraud and circumvention," instead of "fraud or circumvention."[1]

To which it was answered;—No doubt the proposed form was in general [437] use prior to the case of Marianski v. Cairns, in which case an alternative issue had been disapproved of.[2] In other cases fraud and circumvention had *ex proposito* been treated as distinct.[3]

LORD JUSTICE-CLERK.—I must say I can see nothing of worse example than to alter a form of issue that has been in use so long. To alter it now would be in effect to say that every case tried on such an issue had been tried on an improper issue. It is stated that Mrs. Gordon, when she executed the writing sought to be reduced, was in a state of facility, and that she was got the better of by fraud and circumvention, or one or other of them. Either of these averments (fraud or circumvention) is sufficient; it is not necessary that both be made out, but it is necessary to put in issue whether by one or other of fraud or circumvention this facile person was got the better of. I see no reason why a party should be put to take two issues in such a case. I think the practice is settled otherwise, and that it is a sound and just practice.

The other Judges concurred.

The Court pronounced this interlocutor:—"Approve of the issues proposed by the pursuer, and remit the case to the Lord Ordinary: Find the pursuer entitled to the expense of this discussion, and modify the same to seven guineas."

No. 69. **XXIII. Dunlop 437.** 5 Feb. 1861. 1st Div.—Lord Ardmillan.

ROBERT and MATTHEW FAULDS, Pursuers and Respondents.—*Sol.-Gen. Maitland.*

JOSEPH TOWNSEND, Defender and Advocator.—*Young—A. B. Shand.*

Sale—Purchase—Theft—Bona Fides—Liability—Dole.—The servant of a manufacturing chemist purchased, in the course of the business, about midnight, a horse, for which he paid 12s., and which he immediately killed and boiled up before morning. It turned out that the horse was stolen, and of the value of L.10;—*Held* (*aff.* judgment of Lord Ardmillan) that although there was no *mala fides* or actual dole, the circumstances of the purchase as disclosed on the proof evinced such want of due care and caution, as to infer responsibility on the part of the chemist for the proved value of the horse.

"But the pursuer, notwithstanding this, declined to take an issue in any words which did not leave the alternative open, and in the 2d and 4th pleas in law for the pursuer the words used are "fraud and circumvention."

"The practice till very lately was to take an issue with the words "fraud or circumvention." But the Lord Ordinary is of opinion that, having regard to the views taken in the House of Lords on the use of alternatives in issues, the style should be now altered, and that the proper form of expression is "fraud and circumvention"—fraud being the term expressing the moral quality of the act, that which consists in the evil intention of the actor; and circumvention expressing the dynamic or operative quality of the particular kind of fraudulent act here alleged, by which the deed is said to have been procured."

[1] See *ante*, vol. xx. p. 947.

[2] See *ante*, vol. xv. p. 268, and H. of L. p. 26.

[3] Clunie v. Stirling, 14th November 1854, *ante*, vol. xvii. p. 15; National Exchange Company v. Drew and Dick, 27th July 1860, *ante*, p. 1.

Robert and Matthew Faulds, contractors, Glasgow, brought an action in the Sheriff-court of Glasgow against Joseph Townsend, manufacturing chemist, Port-Dundas, Glasgow, concluding for L.30 sterling, being the price and value of a horse belonging to the pursuers, and which had been stolen from a field occupied by them near Glasgow, during the night between the 8th and 9th days of July 1858, "and which horse the defender, sometime during the said night, took, received, or resetted for a few shillings, or other trifling consideration; or otherwise, without any lawful title, did receive or reset the same, and did immediately and hurriedly thereafter kill, or otherwise destroy and use the said horse for the purposes of his business."

The defence was a denial, with the following explanations:—"The defender, who carries on an extensive chemical business in the preparation of manure, holds a special licence from the Sheriff of Lanarkshire (under the statute 13 Victoria, cap. 92), for killing horses and cattle not intended for butcher meat; in other words, old and useless animals, the carcasses of which he uses in his business. The persons employed by him in this department have special instructions not to purchase or kill any horse fit for work. To avoid offence or annoyance to the neighbourhood, animals brought for the above purpose to the defender's premises, are so brought [438] after nightfall. On the evening of 8th July last, the horse in question, which was old, diseased, and useless, or otherwise unfit for work, was brought to defender's premises by a person who represented it as his property, and sold it to the defender's servant for 12s. The animal was killed in the ordinary course of business. It was afterwards discovered to have been stolen from pursuers, and the thief was tried and punished, but the defender and his servants acted in the most perfect *bona fides*. In these circumstances, the defender tenders and consigns the sum of L.1, as more than covering any amount which he was or could be *lucratus* in the transaction."

After proof the Sheriff-substitute (Smith) on 13th April 1859 sustained the defences, and assoilzied the defender. On appeal the Sheriff-depute (Alison) on 23d August 1859 decerned against the defender for L.20 sterling as the value of the horse.

The defender advocated, and on 11th February 1860 the Lord Ordinary pronounced the following interlocutor:—"Advocates the cause: Recals the interlocutors complained of: Finds, in point of fact, that the white horse mentioned in the record and in the proof, and the property of the respondents, was stolen from the respondents, and was taken to the advocator's premises, and was there, on the night of the 8th July 1858, purchased from the thief by the advocator or his servants, and was immediately, or very soon thereafter, slaughtered, and used up in the defender's business as a manufacturer of manures: Finds that the said horse was so purchased about midnight, and boiled up before next morning: Finds, that although there are no grounds for a charge of reset of theft, yet that, under the circumstances, and having regard to the peculiar nature of the advocator's business, and to the peculiar care and caution exigible from the advocator in the purchase and disposal of horses, there was a failure on his part, or on the part of his servants, in due care and caution in the purchase and disposal of the said horse: Finds, in point of law, as applicable to these facts, that the advocator is responsible for the proved value of the respondents' horse: Finds that the value of the said horse, at the date of the theft, was L.10: Therefore, decerns against the advocator (the defender in the Sheriff-court) for payment to the respondents (pursuers in the Sheriff-court) of the sum of L.10 sterling, with interest from the date of citation: Finds the advocator liable to the respondents in expenses in the Sheriff-court: Finds him also liable to the respondents in the expenses in the process of advocation, but subject to some modification: Allows accounts of expenses to be given in," &c.[1]

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[1] "NOTE.—Though there is certainly conflicting evidence in this case, there are three matters of fact which the Lord Ordinary thinks cannot be disputed:—

"1st, The respondents' horse was grazing in a field; it had been lame, but was, at least to some extent, improving; it was not sent, or meant to be sent, by the owners to the slaughter; it had not been condemned by the police.

"2d, It was stolen from the field, and sold to the advocator or his servants for twelve shillings, as an animal fit only to be slaughtered.

[439] Both parties reclaimed,—the respondents in so far as the interlocutor fixed the value of the horse at L.10, and found them only entitled to modified

"3d, It was immediately destroyed and used up by the advocator, so that vindication or restitution was by the act of the advocator rendered impossible.

"In regard to the identity of the white horse spoken to by the witnesses on both sides, the Lord Ordinary does not entertain any doubt; and no doubt on that point was raised by the respondents during the course of the proof. The conflicting testimony of the witnesses must therefore be considered on the assumption that they are speaking to the same horse, though differing in their statements and their opinions with regard to it.

"There is no ground for a charge of reset of theft, and no reason to believe that in making the purchase, the advocator or his servants actually knew the horse to be stolen.

"But such is the peculiar nature of the advocator's business, and such the inducement and temptation which that business must present to the theft of horses, lame, infirm, or old, yet not meant by the owners for slaughter, or condemned by the police, that great care and caution on the part of the advocator is necessary, both in the purchase of horses, and in the disposal of horses when purchased. Some peculiar responsibility, in respect both of purchase and of disposal, must attend the conduct of such a business. The advocator's description of his own mode of procedure makes this manifest. The business of purchasing animals at night, and boiling them up, sometimes hide and all, before morning, rendering discovery and identification so difficult as to be generally impossible, cannot be conducted with safety to the rights of property, except on the footing that the law will require great caution, and enforce peculiar responsibility. This is required by public policy, and by the necessity of protecting property.

"On considering the whole evidence, the Lord Ordinary is of opinion, that the respondents' horse is not proved to have been in such a state as to warrant the advocator, with a due regard to the caution required from him in such a matter, in buying him from a stranger at midnight, and boiling him up before morning. The servants, for whom the advocator is responsible, ought at least to have kept the animal till next morning, that he might be seen by their master, or, if necessary, by the police.

"This is not an action for vindication or restitution of the stolen horse. That has been rendered impossible by the act of the advocator. If the horse had still been alive, and in possession of the advocator, he must have restored it, and *bona fides* in the purchase would, in that case, have been no defence. If the advocator had fairly and honestly parted with the possession of the horse to another person, then the advocator, except in so far as *lucratus*, would be free, and the owner would be left to seek restitution from the possessor. If the advocator purchased the horse, not merely in good faith, and without knowledge that it was stolen, but with due care and caution under the circumstances, and then disposed of the horse by slaughtering and using it up, also with the due care and caution which the law requires in the prosecution of his business, then he would only be liable in *quantum lucratus*, which, in this case, would be a very small sum, probably not exceeding eight or ten shillings.

"If, on the other hand, the advocator had, *in mala fide* or by dole, or by such fault as is equivalent to dole, parted with or put an end to possession of the horse, he would be liable in the proved value of the animal, *si dolo desiit possidere, dolus pro possessione habetur*.—(Stair, B. 1, t. 7, sect. 11; Ersk. B. 3, t. 1, sect. 10; Bankton, B. 1, t. 8, sect. 11; Bell's Prin. sect. 528; Scott *v.* Low, 15th June 1704, M. 9123; Walker *v.* Spence and Carfrae, 13th Nov. 1765, M. 12,802; Henderson *v.* Gibson, 17th June 1806, M. *voce* Moveables, App. No. 1.)

"On applying these rules and principles of law to the facts of the present case, the turning point appears to the Lord Ordinary to be, whether, in the purchase and disposal of this horse by the advocator, there was a want of that due care and caution which the circumstances required, and whether such want must be here held as amounting to the *culpa quæ equiparatur dolo?* Here there has not been reset of theft or *mala fides*, or actual dole, but there has been want of care or caution.

[440] expenses. The defender pleaded that he ought to be assoilzied. The interlocutor of the Lord Ordinary practically amounted to this, that the defender should be put under restraint in the mode of conducting his business; and that he shall be bound to conduct it differently from the way in which it is conducted at present. The Lord Ordinary had not found that there was anything peculiar about this horse to raise suspicion. Before anything could be recovered, *mala fides* must be proved.

The respondents were not called on.

LORD PRESIDENT.—The proof shews that the condition of this horse was such that the defender ought to have used more cautious inquiry before making the purchase. Therefore I think that the Lord Ordinary has put the case on a right ground.

The Court pronounced the following interlocutor:—"Recal the interlocutor of the Lord Ordinary reclaimed against, except in so far as it advocates the cause; and recal the interlocutors of the Sheriff-substitute and Sheriff complained of: Find it established in point of fact, 1st, That the horse mentioned in the summons was the property of the respondents, and was stolen from a field occupied by them in or near Glasgow, and taken direct to the advocator's premises in Glasgow, between 11 and 12 o'clock of the night of the 8th of July 1858, and there sold by the thief (who was afterwards tried and convicted of the offence) to the advocator's servants acting for his behoof, at the price of 12s. sterling, and was by them immediately or within a few hours thereafter slaughtered, and the carcass boiled up for manure, with the carcasses of other horses, in the course of the advocator's business as a manufacturer of manure; 2d, That the said horse at the time when it was so sold and slaughtered, was of the value of not less than L.10 sterling, and was not in the useless state and condition in which horses usually are when sold for the purpose of being slaughtered, and the advocator's servants acting on his authority to purchase horses in his absence, nevertheless at once purchased the horse and paid the price without any inquiry at the police or otherwise touching the character of the seller, or the true ownership of the horse; and in these circumstances, find in point of law that the advocator is liable to the respondents for the said sum of L.10 sterling, as the value of the said horse, and decern against the advocator for said sum accordingly, with interest, as libelled: Find the respondents entitled to expenses, both in this Court and in the Sheriff-court: Allow an account thereof to be given in, and remit," &c.

"There is some nicety in this question. Want of care and caution is fault—not always *culpa lata;* but it may be *culpa lata* in circumstances where great care and caution are required, and are not given. The peculiar circumstances which demand great care and caution raise the character of the *culpa*, which consists in the want of that care and caution. When, on grounds of public policy, an unusual degree of care and caution is required from a person who carries on a business which must afford temptation to theft, then the want of that care and caution in the purchase and disposal of a stolen article is not only a fault, and a fault through which the purchaser has acquired the property, or has ceased to possess it, and prevented the possibility of vindication, but it is a fault in regard to which public policy, and consequent personal responsibility in the matter, have raised and aggravated the quality.

"Therefore the Lord Ordinary is of opinion that the advocator, though not guilty of reset of theft, has evinced such want of due care and caution, under the circumstances, as to infer his responsibility for the proved value of the horse.

"On the question,—what was the true value of the horse? there are not materials for a clear opinion. But, on the whole, the Lord Ordinary thinks that the sum awarded by the Sheriff, of L.20, is too high, and he has accordingly reduced the sum to L.10."

No. 70. **XXIII. Dunlop 440.** 5 Feb. 1861. 1st Div.—Sheriff-Court of Forfar.

ROBERT GRAHAM, Pursuer.—*Millar.*

ROBERT LINDSAY, Defender.—*A. R. Clark.*

Damages—Lease—Outgoing and Incoming Tenant—Obligation—Failure of Crop.—An outgoing tenant failed to fulfil an obligation in his lease to harrow grass seeds [441] furnished by the incoming tenant, and sown with the waygoing crop. There was a failure of grass crop;—*Held*, that in the absence of any other cause, the failure of crop was to be attributed to the neglect to harrow, and damages awarded against the outgoing tenant.

[*Lease—Breach of Obligation—Proof—Presumption.—Held* where a tenant fails to cultivate in terms of his lease and the crops to which the obligation applies is a failure, it is presumed that unless some other cause is proved the failure has arisen from the breach of the obligation in the lease.]

In November 1855, Lord Panmure let to the pursuer, Robert Graham, the farm of Pitskelly, assigning to him all the landlord's privileges against the outgoing tenant, who was the defender, Robert Lindsay. The waygoing crop was crop 1856, and in the spring of that year Graham furnished the grass seeds to be sown down therewith. The seed was sown, but Lindsay neglected to harrow the greater part of it, which by his lease he (Lindsay) was bound to have done. The grass crop failed to the extent of thirty acres, and in August 1857 Graham brought an action in the Sheriff-court of Forfar against Lindsay, concluding for damages, on the ground that the neglect to harrow down the grass seeds was the cause of the failure of the crop. Proof was led, the result of which was thus stated in the interlocutor of this Court:—"Find that it is established as matter of fact—1*st*, That the pursuer, as incoming tenant of the farm of Pitskelly, was in right of all obligations against the defender as outgoing tenant of the said farm, and that one of those obligations was that the defender should harrow and roll down such grass seeds as the incoming tenant might sow with the last or waygoing crop; 2*d*, That in the spring of the year 1856, being the year of the defender's waygoing crop, the pursuer sowed grass seeds in certain fields of the said farm, and it is not proved that in doing so he acted irregularly, or exceeded his right as incoming tenant; 3*d*, That to the extent of thirty acres or thereby of the land so sown with grass seeds, the defender failed to fulfil his obligations to harrow in the grass seeds, and merely rolled them down without harrowing; 4*th*, That the said thirty acres or thereby so sown and rolled down, but not harrowed, produced no grass crop, while other portions of the same fields which had been harrowed, produced good grass crops; 5*th*, That it is established by a preponderance of evidence, that the failure to harrow the grass seeds was disadvantageous for the growth of the grass crop, though advantageous for the grain crop, with which the grass seeds were sown, and which grain crop belonged to the defender, and that the failure to harrow the grass seeds is sufficient to account for the failure of the grass crop; 6*th*, That it is not established that the failure of the grass crop was owing to any other cause."

On 6th May 1859 the Sheriff-substitute (Ramsay Ogilvy) "assoilzies the defenders with expenses."[1]

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[1] In a note he stated,—"The law applicable to the subject seems quite clear. The defender failed to implement an obligation incumbent on him by the contract of lease. He is therefore liable for the loss actually sustained in consequence of such failure; but as there is no averment of malice, the pursuer is only entitled to be reimbursed for the loss he can show to have been actually occasioned by the failure to harrow on the part of the defender. If the failure of crop occurred from any cause not imputable to the laches of the defender, the Sheriff-substitute considers that there is no claim. The principle is equitable in itself, and is nowhere perhaps so clearly stated as by Mr. Bell in a note to the case of M'Lean *v.* Grant, Illus. i., p. 130. It seems also to be the general principle recognised by Mr. Greenleaf, when he says, 'the damage to be recovered must always be the natural and proximate consequence of the act complained of;' vol. ii. p. 210. The same rule is concurred in by the latest and highest authority on this matter—Sedgwick on Damages, 3d ed., p. 161.

[442] On 2d November 1859 the Sheriff-depute pronounced an interlocutor, in which he "finds that the defender has committed a breach of his obligation, in consequence of which he has subjected himself in damages to the pursuer: Finds that the amount to be allowed in the name of damages must be merely nominal, the pursuer having failed to establish that the failure of the crop of which he complains was, in point of fact, produced by the defender's refusal to harrow in the grass seeds as aforesaid: In respect of which findings, recals the interlocutor appealed against, repels the defences, and decerns the defender to pay to the pursuer the sum of 40s. in name of damages: Finds neither party subject or entitled to expenses, and decerns."[1]

Both parties advocated, and the Lord Ordinary, on 14th February 1860, conjoined the advocations, and reported the same under the statute to the First Division.

At advising,—

LORD PRESIDENT.—The interlocutor of the Sheriff cannot be sustained. It is clear that there was here an obligation to harrow as well as to roll, and it is also clear that there was a failure to fulfil that obligation. There was also a failure of the grass crop, and the question is, whether that is to be attributed to the failure to fulfil that obligation? It is not very easy to say with perfect precision what is the cause of failure of a crop. It is more or less matter of opinion. But still if it appears that the crop has failed, and that no reason perfectly clear and satisfactory for such failure is made out, and that there was a failure to prepare for that crop in the way that was stipulated, I think it follows in law and in logic that the party who neglected so to prepare for it must be responsible. The failure of the crop must be ascribed to the failure to fulfil that stipulation; otherwise a party might get off all claim against him for breach of obligation by attributing the result to something else—nobody can tell what. The evidence here does not in the least support the view that the failure of the crop is attributable to a departure from what is called good farming. Therefore I think the pursuer's case is established.

The rest of the Court concurred.

The Court pronounced the following interlocutor:—"Advocate the cause: Recal the interlocutor of the Inferior Court submitted to review—(here followed the findings above quoted): Find that in these circumstances the failure of the grass crop is to be ascribed to the defender's breach of his obligation to harrow the grass seeds, and that he is responsible for the loss and damage thereby sustained by the pursuer: Find that the pursuer did sustain damage thereby, to the **[443]** extent of L.150 sterling: Decern against the defender for payment by him to the pursuer of that sum: Find the defender liable to the pursuer in expenses of process, both in the Inferior Court and in this Court; allow an account thereof to be given in, and remit," &c.

"So far the case is clear enough, but the difficulty that exists is this,—that while the pursuer has certainly led some evidence to connect the loss of crop with the want of harrowing, the defender has brought a very large amount of agricultural evidence, of the highest description, to show that the failure of the crop was owing to a vicious system of rotation, adopted by the pursuer, in insisting on sowing grass on a field of wheat, preceded by a crop of beans, and that the non-harrowing was a perfectly immaterial circumstance.

"The Sheriff-substitute does not think it necessary to go minutely over the evidence. After repeated perusals, the impression left on his mind is that the cause of failure is more likely to have arisen from this source than from the want of harrowing, and that, therefore, the pursuer has failed to prove his case."

[1] "NOTE.—The Sheriff being of opinion that wherever there has been a breach of contract, damages must be awarded against the party committing the breach, damages have accordingly been awarded in this instance. But being also of opinion that, unless where direct loss has been shown to have resulted from the breach of contract, the damages must be nominal, nominal damages have only been awarded.

"A regard to this twofold rule has also determined the question of expenses. The pursuer has not been allowed his costs, because of his having failed in the substance of his pursuit. On the other hand, he has not been subjected in costs to the defender, as, but for the wrong of the latter, that pursuit would not have been entered on."

No. 71. **XXIII. Dunlop 443.** 6 Feb. 1861. 1st Div.—Lord Mackenzie.

JOHN PARK FLEMING, Pursuer.—*Lord-Adv. Moncreiff—Fraser.*

The Rev. JOHN CALDWELL COCHRANE BROWN and Others (BROWN'S Executors), Defenders.—*Watson.*

Legacy—Discharge—Receipt.—Held (*aff.* judgment of Lord Mackenzie), that on payment of a legacy of specific amount, the legatee is not bound to grant a formal discharge, and to pay the executor's agent an *ad valorem* fee for preparing it; a simple receipt is sufficient.

Observed, the case of a residuary legatee is different, because receiving the residue implies adoption of the administration of the trustees.

The late John Ferguson, by codicil or deed of instructions, dated 22d September 1855, appointed his trustees to pay a legacy of L.50,000 to Hugh Brown, which was duly paid on 11th September 1856. On that occasion he was requested to sign a discharge to the trustees, which had been prepared by their law-agent, the present pursuer, Mr. Fleming, writer in Glasgow, and the expense of which, being L.125, 18s. 7d., was retained from the legacy so paid to Mr. Brown. Mr. Brown signed the discharge under protest that he was not liable for the expense thereof, and that the discharge should only be held as delivered to the extent of the sum actually paid. He having died, this action was brought by Mr. Fleming against his trustees for payment of the amount of L.125, 18s. 7d., which he stated was in accordance with the charges approved of by the Society of Writers to the Signet, and also with the table of fees of the Procurators of Glasgow. The rule is laid down as follows in both of said tables:—

"DISCHARGE OF LEGACIES.

"*Charge.*—One-half per cent of the legacy if not exceeding L.200. If above that sum, one-half per cent for the first L.200, and one-fourth per cent for all above.

"*Pro. Rule.*—To be prepared by agent for testator's successors, and paid for by legatee."

The pleas in law for the defenders were:—1. The sole legal obligation incumbent upon the late Mr. Hugh Brown, on receiving payment of the legacy, was to subscribe such a written receipt as would constitute a valid discharge in their favour. 2. The legacy being a specific bequest, a receipt or discharge therefor, in common form, as for money received, was sufficient in law to exoner the trustees, and a formal deed, in the terms and to the effect of that prepared by the pursuer, was unnecessary. 3. The pursuer has not relevantly averred, and there does not exist, any usage or authoritative rule whereby the defenders are bound to make payment of the sums concluded for. 4. In any view the charge is excessive.

On 6th March 1860 the Lord Ordinary pronounced the following interlocutor:—"Finds that the legacy left to the late Hugh Brown, being a specific bequest of L.50,000, a duly attested receipt was sufficient in law to discharge the trustees of Mr. Ferguson, and that a formal deed in the terms and to the effect of that prepared by the pursuer was unnecessary, and could not be legally demanded by the trustees at the expense of Mr. Brown: Finds it is not alleged by the pursuer that the said deed was prepared by him on the employment or under the instructions of Mr. Brown: Finds that when the deed of discharge was laid before Mr. Brown for his signature by Mr. Smith, as factor for the trustees, it was subscribed and delivered under protest that the said discharge was unnecessary, and that Mr. Brown should not **[444]** be held liable for the expense of preparing it: Finds it admitted that, in consequence of that protest, the sum of L.125, 18s. 7d., being the amount of the account claimed by the pursuer, was retained from the legacy by Mr. Smith, the factor, till the question of liability should be determined, and that this balance still remains in the factor's hands: Finds that the defenders, as executors of the late Mr. Brown, are not liable in payment of the account

sued for: Therefore sustains the first, second, and third pleas in law for the defenders; assoilzies them from the conclusions of the action, and decerns: Finds the pursuer (liable) in expenses," &c.[1]

The pursuer reclaimed, and pleaded;—That when trustees pay a legacy, they were certainly entitled to be discharged. If so, they were entitled to [445] have the discharge prepared by their own agent; and the question was, whether he was entitled to an *ad valorem* charge? In practice, an agent might either charge according to the length of the deed or by its value. It is said that a receipt was sufficient. But a receipt, though it proved payment, did not necessarily prove a discharge, because there might be claims over and above the amount of what was paid, for interest and otherwise; therefore a discharge was what the trustees were entitled to.[2]

The respondents were not called on.

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[1] "NOTE.—As the legacy left to Mr. Brown was a specific bequest of L.50,000, the Lord Ordinary thinks that, on making payment of that sum, the trustees of Mr. Ferguson were only entitled to require from the legatee a duly attested receipt on a penny stamp. This is not like a bequest of the residue, or of a sum of uncertain amount requiring liquidation, and depending on the result of an accounting or inquiries as to the actings and intromissions of the trustees. Here the trustees were simply directed to pay a specific pecuniary legacy, free of Government duty; and the trust-funds being amply sufficient to meet all the obligations and purposes of the trust, all that they required to do, in settling with the legatee, was to take from him a probative receipt or legal voucher sufficient to prove the payment of the legacy. In the circumstances which occur here, where there is no deficiency of funds, a direction to pay a specific legacy is substantially the same thing as a direction to pay a specific debt; and if a duly attested receipt would be a sufficient legal voucher for payment of the debt, it is difficult to see why it should not be held equally sufficient for payment of the legacy.

"In this action the pursuer claims payment of an account for preparing a formal deed of discharge of the legacy, amounting to L.125, 18s. 7d. This includes 8s. 6d. as the expense of extending the deed and 1d. for the stamp, but the principal item is an *ad valorem* fee of L.125, 10s., charged for drawing the deed. It is said that the account here claimed is made out in accordance with the Glasgow table of fees, which allows one-half per cent for the first L.200, and one-fourth per cent for all above —the discharge, according to the professional rule, being prepared by the agent for the testator's successors, and paid for by the legatee. The Edinburgh table of fees for 1856 contained similar regulations in reference to the discharge of legacies; but, under the existing table, the *ad valorem* rate of charge has been reduced to one-eighth per cent for all sums above L.1000.

"Where a regular and formal discharge, containing the full complement of clauses, is necessary, and the employment of the agent by the granter of the discharge is admitted, he may be liable to pay the full fees according to the table. But the defenders maintain that they are not liable in payment of the pursuer's account in this instance, for two reasons:—1st, Because a formal deed of discharge, such as that contemplated by the table, was unnecessary, a simple attested receipt being sufficient; and, 2dly, Because Mr. Brown never employed, and was not bound to employ, the pursuer to prepare such a deed, and consequently was not liable to bear the expense of it.

"In treating of the expense of the discharge, Mr. Duff observes (Treatise on Deeds, 274), '1st, The debtor may, as a matter of course, at his own expense, demand a regular and formal discharge, containing the full complement of clauses, which a creditor receiving his money has no interest to refuse; 2d, But he can require, at the expense of the creditor (unless the contrary has been stipulated), such a discharge only as is essential for proving the fact of payment, and placing him in the same situation in respect to such proof as the creditor maintains in relation to the evidence of the debt.' If, then, a duly attested receipt was a sufficient legal voucher for payment of the legacy, as the Lord Ordinary thinks it was, this was all that the trustees were fairly entitled to require, and Mr. Brown was not bound to grant a formal deed of discharge, or to bear the expense of it, although, of course, he could have no interest to object to sign such a discharge if the trustees were willing to pay for it."

[2] Bayne *v.* Belshes, quoted in Bell on Testing Deeds, p. 207.

LORD PRESIDENT.—There was here a specific sum directed to be paid to Mr. Brown as a legacy, and all that the trustees had to do was to pay that sum, and get a receipt in the same way as on payment of any other debt, in acknowledgment of the money having been paid. That is all that is required. The difficulty as to the discharge does not affect me. It is said there may be other interests besides the particular sum of money that is paid, and which must therefore be provided for by a discharge. Still, where there is nothing but money to be paid, a receipt completes the transaction. There is then an end of it. I do not express any opinion as to what might be the case with a residuary legatee. He is not in the same position as a party who receives a definite legacy of say L.50, because the residue depends on the administration of the trust, and the parties may then require exoneration as trustees in reference to the management of the trust, which is a totally different thing from a receipt of a sum of money, and therefore I do not at present see that this case can rule the case of a residuary legatee. This is a case of payment of a specific sum of money, and if the doctrine pleaded to us be sound, it would apply to a legacy of any amount. If there was a legacy of L.5, the agent for the trust might have been entitled to charge according to the length of the discharge, which might be equally long with the discharge in the present case, and in the hands of some agents a great deal longer. Therefore the L.5 legacy might be exhausted, and go to the agent for the testator instead of to the legatee. The case quoted does not bear upon the question;—why should the receipt not be holograph, if the party choose to grant it? Therefore, I think that the interlocutor is quite right.

LORD IVORY.—I am of the same opinion. There is an important distinction between an ordinary legatee who has got a specific sum, and a residuary legatee who is to grant exoneration to trustees of their actings. If trustees under a deed granting legacies refuse to pay them when the legatees come with holograph receipts in their hands, were the legatees to bring the trustees into Court, decree would pass against them, and they would find it difficult indeed to resist it.

LORD CURRIEHILL.—I am of the same opinion. The trustees were entitled to a discharge. But then I think that a receipt is a discharge, and that nothing more was necessary to discharge them. Every man who owes a debt when he pays it is entitled to a discharge. That is the case even with payment of shop accounts. I see no distinction in principle between such payment and that now in question.

LORD DEAS.—I agree with your Lordships that the trustees are not here entitled to demand from the legatee a document containing a clause of registration, which would make it of the nature of a deed requiring a deed stamp. The pursuer did not contend that, if the receipt is to be in the short form proposed, the *ad valorem* fees are nevertheless exigible in the same way as if there were a regular discharge. The question, therefore, simply is, whether an ordinary receipt, on a penny stamp, would be a good discharge for the money? I think it would. I can see no necessity for a regular discharge with a registration clause. I give no opinion whether it is necessary that the receipt should be holograph or tested. But assuming that it is to be tested, there is nothing to prevent this being done on a common receipt stamp. I am therefore of opinion that the interlocutor ought to be adhered to.

The Court pronounced the following interlocutor:—"Adhere to the interlocutor of the Lord Ordinary submitted to review, and refuse the desire of the note: Find additional expenses due, and remit," &c.

No. 74. **XXIII. Dunlop 465.** 8 Feb. 1861. 1st Div.—Lord Kinloch.

JAMES HUTCHISON SUTTER and Others, Pursuers.—*Patton—Skelton.*

THE ABERDEEN ARCTIC COMPANY and Others, Defenders.—*Lancaster—Monro.*

[4 Macq. 355; 10 S.R.R. (H.L.) 526.]

sued for: Therefore sustains the first, second, and third pleas in law for the defenders; assoilzies them from the conclusions of the action, and decerns: Finds the pursuer (liable) in expenses," &c.[1]

The pursuer reclaimed, and pleaded;—That when trustees pay a legacy, they were certainly entitled to be discharged. If so, they were entitled to [445] have the discharge prepared by their own agent; and the question was, whether he was entitled to an *ad valorem* charge? In practice, an agent might either charge according to the length of the deed or by its value. It is said that a receipt was sufficient. But a receipt, though it proved payment, did not necessarily prove a discharge, because there might be claims over and above the amount of what was paid, for interest and otherwise; therefore a discharge was what the trustees were entitled to.[2]

The respondents were not called on.

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[1] "NOTE.—As the legacy left to Mr. Brown was a specific bequest of L.50,000, the Lord Ordinary thinks that, on making payment of that sum, the trustees of Mr. Ferguson were only entitled to require from the legatee a duly attested receipt on a penny stamp. This is not like a bequest of the residue, or of a sum of uncertain amount requiring liquidation, and depending on the result of an accounting or inquiries as to the actings and intromissions of the trustees. Here the trustees were simply directed to pay a specific pecuniary legacy, free of Government duty; and the trust-funds being amply sufficient to meet all the obligations and purposes of the trust, all that they required to do, in settling with the legatee, was to take from him a probative receipt or legal voucher sufficient to prove the payment of the legacy. In the circumstances which occur here, where there is no deficiency of funds, a direction to pay a specific legacy is substantially the same thing as a direction to pay a specific debt; and if a duly attested receipt would be a sufficient legal voucher for payment of the debt, it is difficult to see why it should not be held equally sufficient for payment of the legacy.

"In this action the pursuer claims payment of an account for preparing a formal deed of discharge of the legacy, amounting to L.125, 18s. 7d. This includes 8s. 6d. as the expense of extending the deed and 1d. for the stamp, but the principal item is an *ad valorem* fee of L.125, 10s., charged for drawing the deed. It is said that the account here claimed is made out in accordance with the Glasgow table of fees, which allows one-half per cent for the first L.200, and one-fourth per cent for all above —the discharge, according to the professional rule, being prepared by the agent for the testator's successors, and paid for by the legatee. The Edinburgh table of fees for 1856 contained similar regulations in reference to the discharge of legacies; but, under the existing table, the *ad valorem* rate of charge has been reduced to one-eighth per cent for all sums above L.1000.

"Where a regular and formal discharge, containing the full complement of clauses, is necessary, and the employment of the agent by the granter of the discharge is admitted, he may be liable to pay the full fees according to the table. But the defenders maintain that they are not liable in payment of the pursuer's account in this instance, for two reasons:—1st, Because a formal deed of discharge, such as that contemplated by the table, was unnecessary, a simple attested receipt being sufficient; and, 2dly, Because Mr. Brown never employed, and was not bound to employ, the pursuer to prepare such a deed, and consequently was not liable to bear the expense of it.

"In treating of the expense of the discharge, Mr. Duff observes (Treatise on Deeds, 274), '1st, The debtor may, as a matter of course, at his own expense, demand a regular and formal discharge, containing the full complement of clauses, which a creditor receiving his money has no interest to refuse; 2d, But he can require, at the expense of the creditor (unless the contrary has been stipulated), such a discharge only as is essential for proving the fact of payment, and placing him in the same situation in respect to such proof as the creditor maintains in relation to the evidence of the debt.' If, then, a duly attested receipt was a sufficient legal voucher for payment of the legacy, as the Lord Ordinary thinks it was, this was all that the trustees were fairly entitled to require, and Mr. Brown was not bound to grant a formal deed of discharge, or to bear the expense of it, although, of course, he could have no interest to object to sign such a discharge if the trustees were willing to pay for it."

[2] Bayne *v.* Belshes, quoted in Bell on Testing Deeds, p. 207.

LORD PRESIDENT.—There was here a specific sum directed to be paid to Mr. Brown as a legacy, and all that the trustees had to do was to pay that sum, and get a receipt in the same way as on payment of any other debt, in acknowledgment of the money having been paid. That is all that is required. The difficulty as to the discharge does not affect me. It is said there may be other interests besides the particular sum of money that is paid, and which must therefore be provided for by a discharge. Still, where there is nothing but money to be paid, a receipt completes the transaction. There is then an end of it. I do not express any opinion as to what might be the case with a residuary legatee. He is not in the same position as a party who receives a definite legacy of say L.50, because the residue depends on the administration of the trust, and the parties may then require exoneration as trustees in reference to the management of the trust, which is a totally different thing from a receipt of a sum of money, and therefore I do not at present see that this case can rule the case of a residuary legatee. This is a case of payment of a specific sum of money, and if the doctrine pleaded to us be sound, it would apply to a legacy of any amount. If there was a legacy of L.5, the agent for the trust might have been entitled to charge according to the length of the discharge, which might be equally long with the discharge in the present case, and in the hands of some agents a great deal longer. Therefore the L.5 legacy might be exhausted, and go to the agent for the testator instead of to the legatee. The case quoted does not bear upon the question;—why should the receipt not be holograph, if the party choose to grant it? Therefore, I think that the interlocutor is quite right.

LORD IVORY.—I am of the same opinion. There is an important distinction between an ordinary legatee who has got a specific sum, and a residuary legatee who is to grant exoneration to trustees of their actings. If trustees under a deed granting legacies refuse to pay them when the legatees come with holograph receipts in their hands, were the legatees to bring the trustees into Court, decree would pass against them, and they would find it difficult indeed to resist it.

LORD CURRIEHILL.—I am of the same opinion. The trustees were entitled to a discharge. But then I think that a receipt is a discharge, and that nothing more was necessary to discharge them. Every man who owes a debt when he pays it is entitled to a discharge. That is the case even with payment of shop accounts. I see no distinction in principle between such payment and that now in question.

LORD DEAS.—I agree with your Lordships that the trustees are not here entitled to demand from the legatee a document containing a clause of registration, which would make it of the nature of a deed requiring a deed stamp. The pursuer did not contend that, if the receipt is to be in the short form proposed, the *ad valorem* fees are nevertheless exigible in the same way as if there were a regular discharge. The question, therefore, simply is, whether an ordinary receipt, on a penny stamp, would be a good discharge for the money? I think it would. I can see no necessity for a regular discharge with a registration clause. I give no opinion whether it is necessary that the receipt should be holograph or tested. But assuming that it is to be tested, there is nothing to prevent this being done on a common receipt stamp. I am therefore of opinion that the interlocutor ought to be adhered to.

The Court pronounced the following interlocutor:—"Adhere to the interlocutor of the Lord Ordinary submitted to review, and refuse the desire of the note: Find additional expenses due, and remit," &c.

No. 74. **XXIII. Dunlop 465.** 8 Feb. 1861. 1st Div.—Lord Kinloch.

JAMES HUTCHISON SUTTER and Others, Pursuers.—*Patton—Skelton.*

THE ABERDEEN ARCTIC COMPANY and Others, Defenders.—*Lancaster—Monro.*

[4 Macq. 355; 10 S.R.R. (H.L.) 526.]

No. 75. **XXIII. Dunlop 493.** 8 Feb. 1861. 2nd Div.

THE MAGISTRATES and NINE INCORPORATED TRADES OF DUNDEE, Pursuers, Petitioners.—*Patton—Thoms.*

JOHN MORRIS and Others, Defenders.—*Macfarlane—Clark—Badenach Nicolson.*

Will—Construction.—In a will, by which the testator directed that an hospital should be founded "in the town of Dundee, in the shire of Forfar, for the education of boys, the inhabitants born and educated in Dundee to have the preference of the towns of Forfar, Arbroath, and Montrose," *held* (1), That the bequest was intended for the benefit of sons of persons in the working classes; (2), That the benefit was limited to the children of persons born and educated in the four towns specified, those born and educated in Dundee to have the preference.

Charitable Bequest—Nobile Officium.—Scheme adjusted by the Court for the management of an hospital for the education of boys under a bequest for that end, but which provided no machinery for the purpose.

See *ante*, vol. xix. p. 918, and vol. xx., H.L. p. 9.

The House of Lords having on 11th May 1858 pronounced a judgment reversing the interlocutor of the Court of Session in this case, and held that the testamentary writings of the late John Morgan contained a valid legacy and bequest of so much of his personal estate as was necessary to found an hospital in the town of Dundee to accommodate one hundred boys, it was ordered that the Court of Session should make such further interlocutors and orders, and give such directions as should be necessary for the purpose of framing a scheme for establishing an hospital for one hundred boys, and lodging, maintaining, and educating them therein, in fulfilment of the testator's intention, and for ascertaining the amount of the estate of the testator necessary for carrying into effect such scheme, and applying the same. The case was remitted back to the Court of Session to proceed farther as shall be just and consistent with the judgment. The Court pronounced an interlocutor applying the judgment. On resuming consideration of the petition for application of the judgment, the Court, on 20th July 1858, found and declared in terms of the judgment of the House of Lords, repelled the defences so far as inconsistent therewith, and before answer appointed the parties to lodge schemes for establishing an hospital for one hundred boys, and maintaining and educating them therein. Schemes were lodged accordingly, the pursuers giving two estimates for the expense—the one at the rate of L.40, 5s. per boy, the other at the rate of L.37, 10s. per boy; while the defenders lodged a scheme estimating the expense at L.11, 9s. 4⅘d. per boy.

The Court ordered parties to give in a statement of the revenues and expense of management of other hospitals; and on 17th June 1859 remitted to Professor Swinton "to consider the said scheme, objections, and statements, and, if necessary, hear parties thereon, and to frame and report a scheme for the erection and endowment of an hospital in Dundee for the education, lodging, boarding, and clothing of one hundred boys, the sons of tradesmen, mechanics, and persons of the working-class generally, whose parents stand in need of assistance to enable them to educate their families, or who are orphans in need of such assistance, having regard to the following considerations:—1st, That the property did not, at the testator's death, exceed in value L.82,000; and that, by the judgment of the House of Lords, it is declared that, by the testator's will, the bequest is 'of so much of the personal estate of the said testator, John Morgan, as is necessary to found an hospital in the town of Dundee to accommodate one hundred boys;' 2d, That the will of the testator does not authorise unnecessary expenditure on architectural structure or decoration, or internal fittings and furnishings; 3d, That the mode of administration of the hospital should be as economical as is consistent with the right conduct of the establishment; 4th, That the [494] education of the boys should be such only as is suited to the sons of tradesmen, mechanics, and persons of the working-class generally, and that their lodging, board, and clothing should be of a corresponding kind: To take such assistance from architects, managers of educational institutions and hospitals, accountants, and other persons of skill, as the reporter may find to be requisite; and thereafter, along with

the said scheme, to report how much of the personal estate of the testator is necessary to carry out the scheme, and to erect and endow the hospital."

Professor Swinton reported a proposed scheme, with plans and estimates, for the erection of the hospital. The scheme he adopted was generally that proposed by the pursuers; but he suggested that a body of visitors should be appointed to superintend the management of the governors; and on the subject of the proper objects of the charity he reported as follows:—"The parties in the cause are not agreed on the question, what children are to be admissible to the hospital? The only words in Mr. Morgan's bequest applicable to this subject are contained in the following provision:—'The inhabitants born and educated in Dundee to have the preference of the towns of Forfar, Arbroath, or Montrose, but inhabitants of any other county or town are excluded.' The scheme prepared by the pursuers seems to interpret these words so as to confine the benefit to the sons of inhabitants of Dundee, Forfar, Arbroath, and Montrose. Some of the defenders, on the other hand, contend that the bequest is not limited to inhabitants of these four towns, but extends to the whole county of Forfar, excluding merely the other towns therein. The reporter is of opinion that on this point the sound construction of the bequest is that which seems to be adopted by the pursuers, and that the places intended to be favoured are the four towns named, with a preference on behalf of Dundee. It appears to him, however, that in regard to the children to be admitted to the hospital, there exists a further limitation, which does not seem to have occurred to the parties in the cause. When it is said that inhabitants born and educated in Dundee are to have (for their children) the preference of the other towns, it must be meant that they are to have the preference of inhabitants born and educated in these towns. On this ground, the reporter submits, that the boys admissible to the hospital must be, in the first instance, the sons of persons who are (or if they are dead, were) inhabitants of, and born and educated in Dundee; and that if at any time there are not a sufficient number of applicants of this class possessing the requisite qualifications, the number may be supplied by the sons of persons who are or were inhabitants of, and were born and educated in, Forfar, Arbroath, or Montrose. This view, as well as that which confines the benefit to the four towns, seems to be strengthened by the opinions delivered by the Lord Chancellor and Lord Cranworth in the House of Lords, when disposing of the question, whether the bequest was void on the ground of uncertainty?"[1] The opinion of the reporter was given effect to, in the following section of the proposed scheme reported. Section 18th:—"In order to the admission of any boy, it shall be necessary that it be established, to the satisfaction of the governors, that either the father or mother of such boy is (or if dead, was) an inhabitant of and born and educated in one or other of the towns of Dundee, Forfar, Arbroath, or Montrose; but the sons of persons, inhabitants of and born and educated in Dundee, shall have the preference."

On the matter of the education to be given to the boys, it was reported:—It appeared the branches to be taught ought nearly to coincide with those which formed the usual subjects of general instruction in a well regulated parish school. With this view, the higher branches of education, such as Latin, Greek, Mathematics, and Algebra, should not be taught, except to **[495]** such boys as displayed superior talent. On the other hand, some of the disadvantages which have been supposed to attach to the hospital system might be obviated, by requiring that at least the majority of the boys should receive instruction in some branch of industrial employment. The trades which afforded the greatest facilities for this purpose were those of the tailor, the shoemaker, and the carpenter. The experience of existing institutions proved that these trades could be taught without incurring any expense, the proceeds of work done being fully sufficient to meet both the payment of teachers and the cost of materials.

The whole cost of the erection and maintenance of the hospital, and of the support of the boys, was carefully estimated; and it was stated that, in the opinion of the reporter, the portion of the testator's personal estate necessary to carry out the scheme was L.72,000, and should be invested in feu-duties, and that two acres of ground should be acquired for building on.

Both parties objected to the scheme reported. The pursuers objected, *inter alia*, to the proposal (involved in the scheme) to capitalise the fund necessary for the

[1] 3 M'Queen's Reports, pp. 156, 165, 166.

endowment at the rate of four per cent; to a proposed direction to the governors that the fund should be invested in feu-duties; and to the limited extent of ground proposed to be acquired for the erection of the hospital.

After hearing parties, the Court made a new remit, and a second report was given in, according to which the endowment, being capitalised at 3½ per cent, the sum reported as necessary was stated at L.73,500, and it was proposed that three acres of ground should be acquired for the erection of the building.

Various objections were stated to this report; *inter alia*, the pursuers claimed interest from the testator's death on the capital found to be required for the hospital. Most of the objections were withdrawn, and both parties concurred in a joint minute, to which the Court interponed its authority, fixing "the sum of L.73,500 as the full amount payable under the bequest, and necessary for the erection, establishment, and endowment of an hospital for 100 boys in terms thereof."

There then remained to be disposed of the two following objections to the reporter's scheme still insisted in by the pursuers:—

(1.) The reports assume that the benefits of the hospital shall be confined to the sons of tradesmen and mechanics, and persons of the working-classes generally, contrary to the terms of Mr. Morgan's settlement.

(2.) The proposed interjection of a body of visitors between the governors and the Court will deprive the governors of the immediate access to the Court enjoyed by all other judicial officers, and would amount to a permanent delegation of judicial functions, which was unprecedented and incompetent.

The Court refused to give effect to the first of these objections, but gave effect to the latter.

An amended scheme was then prepared and lodged, and

The Court pronounced the following interlocutor, of this date:—"The Lords having resumed consideration of the petition of the pursuers to apply the judgment of the House of Lords, of date 11th May 1858, with the reports of Professor Archibald Campbell Swinton, and objections thereto by the parties respectively, Approve of the amended scheme, No. 82 of process, authenticated of this date as relative hereto; and find and declare that the said amended scheme is and shall be the scheme for the erection and endowment of the hospital in the town of Dundee, to be called in all time coming the Morgan Hospital; and ordain the said scheme to be recorded in the Books of Council and Session for preservation, and for this purpose authorise the clerk to the process to transmit the same to the keeper of records: Appoint the first meeting of the governors of the hos- **[496]** -pital to be held on Thursday, the 28th day of March 1861, within the Town Hall of Dundee, at noon, and appoint the pursuers to give notice thereof, by advertisement, once in the 'North British Advertiser,' and in two newpapers published in Dundee, in one published in Arbroath, and in one published in Montrose: Appoint and fix the 22d March 1861 as the date on or prior to which the Sheriff of Forfar may name one of his Substitutes, and the seven bodies mentioned in Article 4 of the scheme may elect representatives to act as governors, in terms of that scheme, and decern accordingly."

No. 76. **XXIII. Dunlop 496.** 8 Feb. 1861. 2nd Div.—Lord Kinloch.

WILLIAM HOOD and Others, Pursuers.—*Macfarlane—D. M. Smith.*

GEORGE WILLIAMSON and JOHN WILLIAMSON, Defenders.—*Patton—Millar.*

River—Alteration of Course—Interest of Heritors—Proof—Onus probandi.—Held, that a superior heritor, withdrawing from its natural channel water passing through his land, is bound to return it within his own land, except in so far as consumed for primary uses, such as drink for bestial; and (altering judgment of Lord Kinloch) if he withdraw water to a point from which, owing to the fall of the ground, it could not be returned within his own property, the *onus* lies on him to prove that it is all consumed for primary uses, and a party challenging his proceedings is not bound to

prove that there is surplus water wasted, after satisfying the uses to which the superior heritor is entitled.

Process—Proof—Trial before Lord Ordinary on Issues—Verdict—Stat. 13 & 14 *Vict. c.* 36, *sects.* 46, 47.—On a reclaiming note against an interlocutor on issues tried by a Lord Ordinary without a jury, containing special findings in fact and in law, and a general finding for the defender, the Court recalled one finding in fact, as proceeding on an erroneous view of the law, and recalled several findings in law as unnecessary. *Observed*, 1. Under the provisions of the Court of Session Act 1850, allowing trials on issues before a Lord Ordinary without a jury, such issues only should be tried as are likely to result in special verdicts, and not such as raise proper jury questions. 2. That such trials should proceed continuously, and in the same way as jury trials. *Question*, Whether a Lord Ordinary, trying an issue without a jury, should pronounce special findings in law, or find generally for one or other of the parties?

This action was raised by William Hood, the proprietor of the lands of Sunnyside, in the parish of Coldingham, in Berwickshire, and Hector White, James White, and Robert White, joint tacksmen of these lands, against George Williamson, the proprietor of the neighbouring lands of Swansfield, and John Williamson, residing at Swansfield. The object of the action was to prevent the defenders from diverting water from a stream which rose in the lands of Swansfield, and which, in its course through the pursuers' lands, was used for driving a thrashing-mill. The conclusions of the summons were—1st, For declarator, that the constructing of certain obstructions erected in the course of the burn, and also an artificial channel, in the lands of Swansfield, whereby the water was intercepted from following its course, according to its natural fall, through the lands of Sunnyside, were illegal and unwarrantable acts, and to the loss, injury, and damage of the pursuers. 2d, That the defenders should be ordained to remove the obstructions, and stop the artificial channel. 3d, That the defenders should be prohibited and discharged from diverting the stream. 4th, That the defenders should be decerned to pay to the pursuer Hood L.100 as damage for the loss and injury sustained by him by the diversion of the stream, until the whole crop of the year 1857 was thrashed out, the lands during that crop having been in his natural possession,—for payment of the sum of L.75 to the other pursuers, the joint tacksmen of the lands, for the loss sustained by them up to the date of raising the action, 28th February 1859, and L.100 for each year thereafter, until the issue of the action. The pursuers pleaded;—1. The natural run of the stream being through the lands of Sunnyside, the defen- **[497]** -ders were not entitled to divert it, so as to prevent it from following its course through these lands; and 2. The stream having followed its natural course for upwards of forty years, the pursuers were entitled to have their right to its use maintained and protected.

The case made for the defenders was, that the stream being an artificial supply obtained by draining operations in the defenders' lands, the pursuers had no right to participation therein; or, at any rate, they could claim participation only in what remained after the defenders' wants were supplied; and the use of the water enjoyed by the defenders having been continued for forty fears, they were entitled to continue in the possession thereof, and ought to be assoilzied.

The case was tried before the Lord Ordinary, without a jury, on the following issues, which were prefaced by admissions, that the pursuer Hood was proprietor of Sunnyside, and that the other pursuers had been tenants thereof subsequent to Whitsunday 1858:—

"1. Whether, for forty years, or for time immemorial prior to the year 1857, there was a natural stream of water flowing from the lands of Swansfield, now belonging to the defender George Williamson, into the pursuer's said lands of Sunnyside; and whether, in or about the latter part of the said year, the defenders, or either of them, by embankments and cuttings, or other artificial operations, wrongfully intercepted and diverted the water of the said stream, to the loss, injury, and damage of the pursuers, or any of them?

"2. Whether, for forty years, or for time immemorial prior to the year 1857, the pursuer William Hood, and his predecessors in the said lands of Sunnyside, used, for the purpose of driving a thrashing-mill, and for the other purposes of the said

lands, a stream or run of water flowing by a channel leading from west to east, from the lands of Swansfield, belonging to the defender George Williamson, into the said lands of Sunnyside; and whether, in or about the latter part of the year 1857, the defenders wrongfully diverted the water of the said stream, in whole or in part, from its accustomed channel, to the loss, injury, and damage of the pursuers, or any of them.

"Damages claimed by Hood, in respect of crop 1857, laid at L.75:—Damages claimed by the other pursuers previous to 28th February 1859, laid at L.75:—Subsequent damages claimed by them until the date of trial, L.100."

The trial commenced on 26th January 1860. After leading evidence, further procedure was adjourned, of consent of parties, till 3d February, when, after hearing counsel in part, the case was adjourned till next day. The argument having then been concluded, the Lord Ordinary made avizandum. On 10th February 1860, the following interlocutor was pronounced:—"The Lord Ordinary finds, in point of fact—(*First*), That, for upwards of forty years prior to the year 1857, there was a natural run of water flowing in a defined cut or ditch from the lands of Swansfield into the lands of Sunnyside, of which the former were at that point on a higher level than the latter: (*Second*), That the said run of water, after being received into the lands of Sunnyside, was conducted in a cut or ditch to a dam at or near the farm-steading on the said lands, in which, with water otherwise received, it was collected and stored, and used as occasion served for driving a thrashing-mill, and other farm purposes: (*Third*), That, during the whole of the same period, the occupant of the farm of Swansfield was in the practice of taking water from the said natural run, in its passage through the lands of Swansfield, for the purposes of that farm; and, amongst others, for the purpose of watering cattle in the field under pasture at the time: (*Fourth*), That, more particularly, water was so taken by means of a conduit from the said natural run, for the purpose of watering the cattle in the field immediately adjoining on the north; and after the said field was divided into two, which took place not later than the year 1823, the said water was carried through the said conduit, and, by means of a ditch therewith connected, into a watering-place or pool in the northmost of the said two fields: **[498]** (*Fifth*), That in order to force the water through the said conduit and ditch, when this was necessary to gain a supply, the method commonly employed was to place a piece of turf across the run of water below the mouth of the conduit, and by means of this operation, to fill the watering-places or pools so far as water was required therein: (*Sixth*), That the water thus carried into the watering-place or pool in the northmost of the two fields aforesaid, did not, to any extent, return into the run from which it was taken, the natural slope of the land being at that point in an opposite direction; but the pursuers have not proved that any more water was carried into the watering-place than was required by the necessities of the cattle, or that any wilful waste of the water was made by the occupant of Swansfield; or that, after supplying the cattle, there was surplus water which might have been available to the lands of Sunnyside, but was led from the said watering-place or pool into another direction, by operations performed by the occupant of Swansfield: (*Seventh*), That during the said period, and at least after the said year 1823, complaints were from time to time made by the occupant of Sunnyside of the use of the water made by the farm of Swansfield, and attempts were occasionally made by him to prevent the water flowing into the conduit aforesaid, by removal of the piece of turf; but the same was forthwith replaced, and the occupant of Swansfield continued all along to enjoy the benefit of the water for the purposes of the farm as aforesaid: (*Eighth*), That the pursuers have not proved that in or about the latter part of year 1857 the defenders, or any of them, performed any new operations, by embankments, cuttings, or otherwise, with a view to any new or enlarged use of the water; or did otherwise than continue the use thereof for the same purposes, and by the same means as before: Finds, in point of law, that the occupant of the farm of Swansfield was entitled to use the water in the said run, in its passage through the lands of Swansfield, in a fair and reasonable manner for the ordinary purposes of the farm, and to take the water for these purposes by any fair and reasonable mode of supply; and that the right to have the water sent down into the lands of Sunnyside, competent to the proprietor or occupant of these lands, was subject to such prior use; and finds that the pursuers have not established that any other use of the water has been taken by the occupant

of Swansfield than was competent to him at law: Finds, on the whole matter, that the pursuers have failed to prove that in or about the latter part of the year 1857 the defenders, or any of them, wrongfully intercepted or diverted the water of the said run; and finds for the defenders on both issues."

The pursuers brought this interlocutor under the Lord Ordinary's review.

Having heard parties, the Lord Ordinary, on 8th March 1860, pronounced an interlocutor refusing the note, and adhering to his former interlocutor.[1]

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[1] "NOTE.—On carefully reconsidering the evidence, the Lord Ordinary has not found sufficient grounds for altering the findings in his interlocutor. As regards the main point of controversy, he cannot accept a vague statement (made almost exclusively by the defenders' witnesses) that the water went down to the Eye, as equivalent to distinct proof by the pursuers of an actual available surplus, after supplying the cattle at the pool, which might have been returned to the run in question, but was led, by operations of the defenders or their predecessors, in a different direction, and was made to run into another stream. And however much he may desire that this matter had been better cleared up, or regret the consequences of its having been left in obscurity, he cannot allow a new trial, merely because something might now be established which was previously left unproved, though sufficiently obvious in itself. He cannot allow considerations, applicable to a particular case, to induce the sanction of a principle which, in practical operation, would be most injurious to the general administration of justice.

"It was maintained, in point of law, by the pursuers, that seeing that the defenders and their predecessors had not simply taken the use of the stream as it ran past, but had used it by means of a conduit and ditch, which carried the water to the watering-places, this amounted, *prima facie*, to a diversion of the stream; which threw the *onus* on the defenders of justifying the proceeding, by proving that no surplus water was abstracted, and that the inferior lands were not more injured than if the cattle had been supplied by drinking in the stream itself. The inference was, that in place of its being found that the pursuers had not proved the abstraction of an available surplus, the Lord Ordinary should have found that the defenders had not proved that no available surplus was abstracted; and not having done so, the verdict should have gone against them, as in the sense of the issue, having 'wrongfully intercepted and diverted the waters of the said stream.' The pursuers contended that this followed from the nature of the common right held in a running stream by the proprietors on its banks.

"The Lord Ordinary could not assent to this view. As regards the matter of general right, he is of opinion that although the phrase 'common right'—or, perhaps more correctly, 'common interest'—may be properly applicable in a general sense, it is by no means an equal right which is held by all the proprietors. If, for instance, there be not enough of water for both the upper and lower heritor, the Lord Ordinary conceives it cannot be held that the lower heritor is entitled to demand from the upper that the rations, so to speak, of both should be reduced so as to give a participation to each, either equal, or according to some other defined proportion. Such a division of the water has, so far as the Lord Ordinary knows, never been sanctioned; and, practically, any attempt at apportionment would lead to disputes of daily occurrence, and disputes probably interminable, as the proportion between the respective lands could not be defined by any satisfactory ratio, or any which would not be liable to incessant fluctuation. In the view of the Lord Ordinary, the upper heritor has a preference over the lower, arising from the nature of his position—but a preference which is limited to the use of the water for primary purposes. And, in taking this supply, he may lawfully employ the instrumentality of a conduit or pipe to fill his cistern or watering-place. The lawfulness of this mode of supply the Lord Ordinary considers to be settled. Ogilvie *v.* Kincaid, 25th Nov. 1791, Hume, 508; Ritchie *v.* Johnston, 15th Feb. 1822, Fac. Coll.

"In the view which the Lord Ordinary takes of the proof in the present case, the defenders, and their predecessors in Swansfield, are shown to have used the water for primary purposes exclusively. That they filled the watering-places by means of a conduit, appears to the Lord Ordinary to have been not more unlawful than if they had done so by carrying the water in pitchers, or driving it in barrels. It was, besides,

[499] The pursuers reclaimed, and argued;—There was no ground for holding that, prior to 1857, the defenders had any right to divert the course of the stream in question. There was no doubt that the owner of land through **[500]** which a stream flowed was entitled to use the water for the primary purposes of supplying drink to man and bestial, and for cooking and washing. It had been held that an heritor was entitled to take the water for domestic purposes in any way most convenient for him; but that was only on condition that the surplus should be returned, or that there should be no waste. It was only on that condition that, in the cases cited by the Lord Ordinary, proprietors had been allowed to divert water. Though there could be no doubt that a proprietor was entitled to take water by means of a pipe for domestic purposes, the extent of his right to divert a stream in order to water cattle was a different matter, and always must depend, to a certain extent, on the size of the stream. In a stream of the size of that in question, it was to be doubted whether there existed a right to divert it at all for watering cattle; for if the water was led to each of the defenders' fields, the whole stream would be taken away. Plainly the Lord Ordinary had been mistaken in finding that the *onus* lay on the pursuers to prove that the water taken from the stream, and not used by the cattle, was not returned, seeing it was carried to a point whence, owing to the natural slope of the ground, it could not flow back.[1]

LORD JUSTICE-CLERK.—This reclaiming note raises several questions, some of form and some of substance, and some of them at least by no means unattended with difficulty. And the remarkable thing is, that these questions should arise in the course of a case which, as originally brought into Court, raises nothing but one of the most simple questions which any tribunal could be asked to try.

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proved that the conduit had been in existence and operation for more than forty years—at first for supplying water to a single watering-place, and from 1823, when the field was divided in two, for supplying a watering-place in each field. The Lord Ordinary considered that in this the defenders and their predecessors were simply exercising their legal right, and, therefore, that the usual *onus* lay on the pursuers of proving something else which should amount, in terms of the issue, to a wrongful interception and 'diversion.'

"The defenders contended that, in order to prove the issue, it was necessary that the pursuers should establish 'embankments and cuttings, or other artificial operations,' made for the first time, 'in or about the latter part of the year 1857.' They argued that the action was not one for regulating the use of the water, or restraining an excess of use, but was raised for removing alleged new embankments, or other obstructions before unknown. When it turned out on the evidence (as the defenders argued, and the Lord Ordinary agreed with them, was the case) that no new embankments or other obstruction had been erected, nor any other use taken of the water than what had previously prevailed, the defenders maintained that the pursuers had failed to establish their issues. It might still be open to them, in some other judicial proceeding, to complain of any waste or undue excess in the defenders' use of the water; but, meanwhile, they were bound to submit to a verdict against them on the case as sent to trial; which implied, by the terms of the issues, something done in the year 1857, in the way of intercepting the water, not previously experienced.

"The Lord Ordinary was of opinion that the natural reading of the issues, and that which best tallied with the statements on record, and the conclusions of the action, was that maintained by the defenders; and, in that view, he thought the inference drawn by them well founded. At the same time, as he conceived that there were sufficient materials for disposing of the question on more general grounds, he considered himself bound to embody these materials in his findings. He was unwilling, when the question was capable of being determined on principles of legal right, to limit the ground of decision to a narrow, if not doubtful technicality."

[1] Stair Inst. l. i. t. vii. sect. 12; Bell's Pr. sects. 1100, 1102, 1104; Kelso *v.* Boyds, 1st July 1768, Mor. p. 12,807; Lord Glenlee *v.* Gordon, 10th March 1804, Mor. p. 12,834; Cruickshanks & Bell *v.* Henderson, 17th Nov. 1791, Hume's Decis. p. 506; Melville *v.* Dennison, 21st May 1842, *ante*, vol. iv., p. 1231; Easton *v.* West, 4 Weekly Reporter, p. 324.

My Lords, looking to the issues, I confess I never saw a case more entirely suitable for jury trial, and I cannot imagine what the parties meant by taking the case away from the ordinary tribunal, and adopting the form provided by the 46th section of the Act of 1850. If this case had been tried in common form, it is impossible that a jury could have hesitated to return a verdict for the defenders; and that would have been an end of the case, and any attempt to get a new trial would have been hopeless. But the parties have chosen to subject themselves to an amount of trouble, anxiety, and expense, which would have been obviated by simply allowing the case to go in the ordinary way to trial before a jury. This is very much to be regretted, and it seems to have arisen from a misapprehension of the Act of 1850. It was thought by the framers of that Act, that there was a class of cases in use to be tried by jury, in which the jury might well be dispensed with—cases involving questions of law, and likely to issue in special verdicts—cases in which special verdicts are the best mode of raising the questions of law between the parties, and in which, though it might be necessary to take evidence, the parties and the judge would probably adjust a special verdict, the presence of the jury being a mere matter of form. For such cases this section was intended; and it was well adapted and calculated to enable the Court and the parties to do, without the jury, and with less expense and trouble, that which the jury would otherwise have [501] been summoned to do. To hold that section as providing for the trial of what are ordinary jury questions is an entire mistake. The difficulty in which we are placed arises from the circumstance that not only the parties, but also the Lord Ordinary, has apparently misunderstood the enactment on which he was proceeding. It seems to me that the 46th section in substance directs the Lord Ordinary to make a special verdict, because the provision is, that after evidence is led, the Lord Ordinary "shall hear counsel thereon, and otherwise the proceedings shall be conducted continuously" (that being an imperative provision of the Act), "and, as nearly as may be, as in an ordinary jury trial. And then, within eight days after the proceedings at the trial are concluded, such Lord Ordinary shall pronounce an interlocutor, in which he shall state specifically what he finds in point of fact." That is, he shall make a special verdict; and it is not contemplated that he shall find anything else but the facts, or put anything else in his interlocutor, or that by that interlocutor he shall bring the case to a conclusion, or pronounce decree in terms of the conclusions of the summons. But these findings are, in the first place, subject to review before the Lord Ordinary himself, and then the only other review to which they are subject is a review by the Inner-House, on the ground that the findings in fact are based on erroneous views of law. There is no provision whatever in the 46th and 47th sections for reviewing the interlocutor as an interlocutor finding or determining points of law.

What, then, has happened in this case? I see the trial began on 26th January, and did not conclude till 4th February—that is, nine days. One does not suppose that the trial was going on all that time; but there were three days on which the trial was going on, and these were not three continuous days, which was a clear violation of the Act of Parliament; and then, when the trial was brought to a conclusion, instead of issuing in special findings, it issues in this interlocutor, containing findings in fact and in law. The difficulty does not arise as to the substance of the case, because as to that I have no doubt. It was clearly a case for a verdict for the defenders; for the question is, whether in or about the latter part of the year 1857, the defenders wrongfully diverted the water from the stream in question. Now, it is clear from the notes of the evidence that such a thing never was done in 1857, and therefore it was impossible under any circumstances for the pursuers to prove their issue. But we are limited to the interlocutor of the Lord Ordinary, and we have now to see what we can do under the 47th section to put the case into proper shape.

As regards the first five findings in fact, whether they are necessary to the decision of the case or not I do not inquire; but as I cannot see that any of these proceed on erroneous views in point of law; and as no attempt was made to raise in regard to them any question of law on the notes of evidence, your Lordships cannot touch them, because I cannot detect any false law involved in them, or any erroneous views of law on which they proceed.

But when I come to the sixth finding, I am in a different position, because that

finding does proceed on an erroneous view of the law. That sixth finding is unquestionably a finding in fact, and, on the grounds which I shall shortly explain, I think it proceeds on erroneous views of law.

The upper heritor had undoubted right to use the water as it passed through his lands for all ordinary purposes, and among others, for the purpose of watering his cattle; and in using it for the purpose of watering his cattle, he chose, instead of bringing the cattle to the natural channel of the stream, to conduct the water out of the stream, by a channel or duct, to the place where the cattle were. This was done at first in regard to one field only, immediately adjoining the stream. But in 1823 that field came to be divided into two parts, the one adjoining the stream, and the other portion lying further from the stream; and he then increased the length of the duct, so as to carry the water to a greater distance from the ordinary channel into the northmost of the two fields. And the Lord Ordinary has found that the place to which the water was conducted by the artificial channel in 1823 was of a lower level than the ordinary channel of the stream, and that the slope of the ground being in an opposite direction, it was impossible that the water could be returned.

Now, *prima facie*, and as a general rule, no proprietor on the banks of a running water is entitled to divert a portion of the stream without returning it to its chan- **[502]** -nel within his own grounds. That is clear as regards the use of water for machinery, and we are all familiar with the ordinary case of a mill, and no man is entitled, within his own ground, to divert a portion of a stream for a mill except under the condition and obligation that he shall return the water within his own ground to the ordinary channel. I do not dispute that water may be diverted for the ordinary primary purposes for which water is used. It may be taken by means of an artificial channel or pipe to some distance from the ordinary channel within the ground of the proprietor for the purpose of being consumed, by drinking, by man or beast. But that is under the obligation that what is not consumed shall be returned into the ordinary channel before the stream leaves the ground of the proprietor. He cannot be obliged to return it all, for the exercise of his right infers the consumption of a part of it.

If that be so, when I find a proprietor diverting water to a point from which nothing can be returned by the natural flow of the water, and when, in point of fact, nothing ever is returned, the question arises, whether the party has exercised his right subject to these legal conditions? If he carries away that water, and consumes only part of it, and allows a part to escape in the opposite direction, he is doing what is unlawful; and when any one avails himself of his power, I do not say his right, over the stream that runs through his lands, to the effect of diverting a portion of it out of the ordinary channel, he must show that he does so in a lawful manner, and is not diverting without returning any water which he does not use for primary purposes.

It seems to me that the view of the law on which the sixth finding proceeds is just the reverse of that proposition, viz., on the assumption that the upper heritor is entitled to divert and carry the water to a place from which it cannot be returned, and that the burden lies on the party challenging the operation to prove that there is a surplus. Now, I think there is no such burden on the party challenging; the burden seems to me to be exactly the other way. I dissent from the law in the sixth finding, and therefore I think that we should, under the 47th section of the Act, recal the sixth finding.

I cannot say that the seventh and eighth findings in point of fact proceed upon erroneous views of the law. They may not be necessary to the case; as to that I do not inquire, because the Court is not entitled to touch them. What follows these findings are findings in point of law. Although I am not prepared to say that such findings are absolutely incompetent, and ought therefore to be recalled,—I am of opinion that they are entirely unnecessary, and not called for by the Act of Parliament in the 46th section, which concerns findings in fact only; and as it appears that these findings, if not unsound, are ambiguous, I propose that they should also be recalled. They have none of the protection which the statute throws round findings in fact.

If I were quite sure of the meaning of these findings I am not sure that I would

differ from them. But, taking them in connection with the law involved in the sixth finding, I have the greatest doubt as to their meaning, and therefore I think they should be recalled. Then that leaves one other finding only, and that is—"Finds on the whole matter, that the pursuers have failed to prove that in or about the latter part of the year 1857, the defenders, or any of them, wrongfully intercepted, or diverted the water of the said run; and finds for the defenders on both issues."

If I am right in the view which I have taken of the meaning of section 46, the finding is not altogether correct, and particularly the last part of it is an incompetent finding, because that is a general verdict; and whenever a general verdict is returned on an issue, all special findings are useless. But the statute contemplates that the Lord Ordinary shall make special findings, and not a general verdict. But as regards the first part of the finding, I think it may be defended as a special finding, and I think it is a finding conclusive of the case, and I propose to leave that finding as it stands, with the exception of the words "and finds for the defenders on both issues." The Act provides that the Lord Ordinary shall pronounce an interlocutor, stating what he finds in point of fact, and these findings in point of fact fall afterwards to be applied.

The course which I suggest is to recal the sixth finding in fact, and the findings in law which succeed the eighth finding.

[503] LORD WOOD.—I am of the same opinion. It strikes me that this is a case which was more suitable for trial by a jury than for trial under the 46th section of the Act 1850, looking to what is put in issue. The questions embraced by the issues relate solely to alleged operations by the defenders in 1857. The case to be tried is confined to that—and had the Lord Ordinary not been induced, contrary, as it appears to his own opinion, to allow the pursuers to go into other matters, I cannot help thinking that a good deal of the evidence led would have been excluded, and several of the findings in his Lordship's interlocutor omitted. The eighth finding would have itself been all that was required as an answer, in point of fact, to the issues. As to what your Lordship has observed with respect to the course of procedure to be followed when a case is tried by the Lord Ordinary without a jury, it rather appears to me that that which was contemplated by the Act was, that the Lord Ordinary should, in the first place, find what was proved in point of fact, and then, the facts being ascertained, proceed to apply the law by a separate interlocutor. His functions no doubt are not exhausted till both these things are done; but that is the way in which I should say it was intended that they should be performed. At the same time, I cannot hold that it is incompetent for the Lord Ordinary, after finding the facts, then to apply the law, and find a verdict for the party in whose favour a verdict would fall to be returned, as a consequence of the facts found.

With regard to the interlocutor we have now to deal with, I think it cannot stand as it is. Several of the findings are unnecessary, and, although they may be purely findings in point of fact, I am doubtful whether the Court has not power to recal them in respect of their being contrary to law, or erroneous in law—in this way, that they do not apply to the matter embraced by the case as defined by the issues—and so are truly findings out of the case. Now, I should be disposed to hold it an error in law to find facts not relevant to the case, and that such findings the Court had power to recal.

Still, as regards the first five findings, and the seventh finding in fact, although they may be, and as I conceive are, unnecessary and irrelevant, they may, as proposed by your Lordship, be allowed to remain. But not so the sixth finding, which, or a part of which, in my opinion, proceeds upon and involves error in point of law; it ought therefore to be recalled. For the reason already given, the eighth finding must of course be left untouched; and the last finding in law may also stand as following from the eighth finding in fact, but omitting the preceding finding in law, which does not apply to the matters embraced by the issue.

LORD COWAN.—This case is of much practical importance, and it is very desirable that there should be no difference of opinion as regards the procedure in such cases before the Lords Ordinary.

When a trial on issues takes place without a jury before a Lord Ordinary, in terms of the 46th section of the statute, his Lordship is to pronounce an interlocutor, "in

which he shall state specifically what he finds in point of fact;" and by the 47th section it is enacted, that unless it shall appear that such findings in fact proceed on some erroneous view of the law as to competency of the evidence or otherwise, his findings in fact shall be final. In this case the Lord Ordinary's interlocutor contains various findings in fact, against which the reclaiming note is presented; and the first question for consideration is, whether any of these findings proceed on erroneous views of the law?

The issues adjusted to try the case were in these terms (reads issues), and were adjusted in consonance with the conclusions of the summons, and the object of the action. There may be findings by the Lord Ordinary which do not materially affect the result of the cause and the ultimate verdict on the issues as for the pursuers or defenders. These may remain in the interlocutor as not objectionable on legal grounds, although of no material value in the final result of the cause. Or they may be objectionable in law, and therefore requiring to be disregarded or struck out of the interlocutor, and yet the resulting effect be innocuous. I make this observation, because it seems to me that this is the precise position of the present case. There are various findings in fact, some of which are unnecessary, having regard to the terms of the issues, but which I do not think we are called on or entitled for that reason only to touch. There must be some **[504]** error in law lurking in the finding in fact to justify our interference with it. Now, the only finding in fact in the interlocutor to which any solid objection in law can be stated is the sixth finding. It is erroneous as to the *onus* of proof being with the pursuers in the particular matter with which it deals. I adopt all that your Lordship in the chair has said on this legal question. I concur therefore in holding that this finding of the interlocutor should be withdrawn from it, as proceeding on an erroneous view of the law applicable to the state of facts to which it relates. The Court have full power so to deal with this finding in fact. It is then for consideration whether the remaining findings in fact justify the ultimate view at which the Lord Ordinary arrived on the issues, or whether the matter of this sixth finding entered so essentially into the case as to require the recal of the whole interlocutor, and the appointment of a new trial.

There are in the interlocutor findings in point of law which are not necessary or properly applicable to the matter for trial under the issues. To me it would seem that when the question under an issue is of such a nature as to require specific findings in law towards the just application of the facts proved in the decision of the cause, the interlocutor of the Lord Ordinary should be confined at this stage to findings in fact, as by special verdict, leaving the law to be afterwards found and declared,—the facts as fixed by the issues and verdict being settled. When the issue, however, raises nothing but matter of fact, then, after the special findings in fact, the Lord Ordinary may competently enough, as I think, follow these with a general finding on the issues for the one party or the other. In this way the cause on the issue is properly exhausted, as it would be before a jury. Here the issues raised nothing but questions of fact, and there was no necessity for the findings in law contained in the interlocutor. I am therefore for recalling those findings in law, for this reason, that they are not required towards reaching the verdict on the issues. But besides, the last finding in law, to which the first is introductory, is ambiguous, and seems rather to proceed on the same error as to the *onus* which led to the sixth finding in fact.

Taking the interlocutor thus curtailed, I am of opinion that, on the special facts found by it, the Lord Ordinary did right in finding generally on the issues for the defenders. That finding is the necessary result of the special findings in fact, to which no legal objection lies, and which, therefore, are by the statute final. The general finding is exposed to no objection in point of law. On the issues it is the necessary sequence of the special findings in fact, and its application to the final decision of the rights of parties under the record will remain for consideration under the remit of the cause to the Lord Ordinary.

LORD BENHOLME.—While I concur in the result at which your Lordship has arrived, I cannot refrain from expressing some doubt as to your Lordship's observations in regard to the meaning of the 46th section of the Act of Parliament. The object of this section of the Act was, as I conceive, to put the Lord Ordinary in the place of the jury, under this limitation, that he is to state specifically what he finds in point of fact, so as to separate the findings in fact (which are to be final) from the

legal conclusion by which, on the issue, he finds for the pursuer or defender. I hesitate to say that he is merely to pronounce such an interlocutor as amounts to a special verdict returned by a jury, because my idea of such a verdict is, that the questions of law are in such a verdict reserved for the Court. But I think the duty of the Lord Ordinary is not only to make special findings in fact, but also to apply the law by a finding on the issue, which may either be a general finding, or may be prefaced by special findings in law. In the present case, had the diversions and embankments alleged to have been made in 1857 been proved, the Lord Ordinary would have been bound, not only to have found in point of fact that these things had been done, but also to have found that they had been wrongfully done. That would have been matter of law within his function in disposing of the issues. I do not think he ought to have confined himself in his interlocutor to mere matters of fact, because then this Court in reviewing such interlocutor would have been under the necessity of considering these findings as to fact, without knowing the Lord Ordinary's mind as to their bearing on the issue by his application to them of the law of the case. I think the Lord Ordinary, in trying these issues, was bound to find for the one party or the other. He must make special findings as to facts, but I think he must also exhaust the case as to law.

[505] I quite agree with your Lordships as to the findings proposed to be struck out.

Had the Lord Ordinary in this case kept clearly in view that the issue rendered it necessary to the success of the pursuers that they should prove that certain operations took place in 1857, I think he would not have gone into all these findings in fact. The eighth finding would have been quite enough. His Lordship's note seems to indicate that these findings were introduced at the desire of the parties, rather than from his Lordship's own views of the true construction of the issue. While I make these remarks I concur in the proposal made by your Lordship as to the mode in which the interlocutor ought to be dealt with.

The Court pronounced this interlocutor:—"Having advised the reclaiming note for Mr. Hood, &c., against Lord Kinloch's interlocutors of 10th February 1860 and 8th March 1860, and heard counsel, Recal the sixth finding in the interlocutor of 10th February, as proceeding on an erroneous view of the law: Also recal so much of the said interlocutor as finds in point of law that the occupant of the farm of Swansfield was entitled to use the water in the said run in its passage through the lands of Swansfield, in a fair and reasonable manner, for the ordinary purposes of the farm, and to take the water for these purposes by any fair and reasonable mode of supply, and that the right to have the water sent down into the lands of Sunnyside, competent to the proprietor or occupant of these lands, was subject to such prior use; and finds that the pursuers have not established that any other use of the water has been taken by the occupant of Swansfield than was competent to him at law: *Quoad ultra* refuse the prayer of the reclaiming note, and find the respondents entitled to expenses since the date of the last interlocutor reclaimed against, and remit," &c.

No. 78. **XXIII. Dunlop 526.** 8 Feb. 1861. 2nd Div.—Lord Mackenzie.

JAMES MIDDLETON, Suspender.—*Patton—Paterson.*

ANDREW RUTHERGLEN, Respondent.—*C. Smith.*

Trust—Proof—Stat. 1696, *c.* 25.—The suspender of a charge on a bill, at the instance of the assignee of an indorsee, averred that the charger's right was obtained in trust for a party who had since discharged the suspender of all claims, including the amount of the bill charged on. *Held*, that proof of the suspender's allegations of trust was not limited to writ or oath under the Act 1696, c. 25.

This was a suspension of a charge on a bill for L.68, drawn upon and accepted by the suspender, James Middleton. The bill had been indorsed **[527]** to the Western Bank. The liquidators of the bank assigned it and the diligence on it to the charger.

The suspender averred that the assignation to the charger was taken on the

employment of and in trust for John Beith, against whom the suspender had certain claims, for recovery of which he had raised an action in the Sheriff-court of Bute; that when an advocation of the Sheriff's judgment in that action was in dependence, the suspender and Beith settled their claims, and it was agreed that the suspender should be discharged of the sum due under the bill charged on.

The suspender pleaded;—The writs produced sufficiently proved his averments, otherwise he was entitled to a proof *prout de jure.*

The respondent averred;—The bill and diligence had been assigned to him in part payment of a debt of L.150, due to him by Beith; the compromise between Beith and the suspender was a device to defeat his right to enforce payment of the sum in the bill. He pleaded (*inter alia*);—That the reasons of suspension could only be established in a declarator of trust, and could be proved only by the writ or oath of the charger, under the Act 1696, c. 25.

The Lord Ordinary, on 19th June 1860, pronounced this interlocutor:—"Finds that the bill charged on for L.68, 10s. was drawn by James Brown upon and accepted by the suspender, and indorsed to the Western Bank: Finds that when the bill fell due, it was dishonoured and protested for non-payment at the instance of the bank: Finds that the suspender, having raised an action in the Sheriff-court against John Beith, residing in Rothesay, obtained decree against him on 27th October 1857, for L.60 sterling in name of damages, besides the expenses of process, whereupon a note of advocation was presented to this Court by John Beith, for the purpose of bringing the interlocutors under review: Finds that the Western Bank, as holders of the bill charged on, used arrestments in the hands of Beith of all sums due by him to the suspender, on 5th February 1858: Finds that, on 15th March 1858, Beith purchased from the bank, for the sum of L.10, the bill and diligence against the suspender, evidently for the purpose of being used as a set-off against any sum for which he might ultimately be found liable to the suspender in the process of advocation which was then in dependence: Finds that on this occasion the bank granted a receipt in favour of Beith for the sum paid by him, with an obligation to grant an assignation in his favour to the debt and diligence, at any time when required, at his expense: Finds that the charger acted as agent for Beith in negotiating this purchase from the bank: Finds that in the cash-account, No. 6 of process, the charger, under date 22d March 1858, credits Beith with the sum of L.10, which had been paid to the bank; while, in the business account of the charger, No. 17 of process, he makes professional charges against Beith for his time and trouble in carrying through this transaction: Finds that, on 14th June 1858, Mr. Ferguson, the Edinburgh agent for Beith, wrote to the charger, suggesting that the assignation to the bill and diligence should not be taken in Beith's name, but in the name of a third party: Finds that, in consequence of this suggestion, which was communicated by the charger to Beith, he authorised the bank to grant the assignation in name of the charger, who then acted or professed to act as his agent: Finds that an assignation to the debt and diligence was accordingly granted by the bank in favour of the charger, on 28th September 1858, being No. 13 of process: Finds that, in the business account of the charger, No. 17 of process, he charges Beith with the whole expenses of the assignation; and also on the 8th December 1858, with 'writing Mr. Ferguson with registered protest to have the warrant to charge written thereon, and postage:' Finds that, on 25th December 1858, an agreement was entered into between the suspender and Beith, whereby they compromised the action of damages then depend- **[528]** -ing in this Court, on certain conditions; and, among other things, Beith discharged all claims competent to him under the bill and diligence charged on, and became bound to deliver up the same cancelled to the suspender, who, on the other hand, abandoned his claim for damages and expenses: Finds that the charger was made aware of this settlement, and was applied to by Beith or his agent to deliver up the bill and diligence; whereupon the charger addressed a letter to Beith on 11th January 1859, declining to comply with his request, not on the ground that the bill and diligence had been assigned to him to liquidate or secure any debt due to himself, as alleged by him on the record, but solely on the ground that he was entitled to retain the documents till he received payment of an account of expenses, amounting to L.4, 14s., said to be due to Mr. Ross, who had been Beith's agent in the Sheriff-court, and for whom the charger had been appointed *curator bonis* by this Court: Finds that, although the assignation, No. 13 of process, is taken in name of the charger, it is

sufficiently instructed by his letters, and the entries in his accounts, and other circumstances of real evidence, that he is not a *bona fide* holder of the bill and diligence for his own behoof, and that he acted in the transaction merely as the agent or trustee of Beith: Finds that Beith having discharged all claims under the bill against the suspender, the charger is not entitled to proceed with the diligence thereon against him: Therefore sustains the reasons of suspension; suspends the charge and diligence *simpliciter*, and decerns; and finds the suspender entitled to expenses: Allows an account,' &c.[1]

A reclaiming note was presented for the respondent.

No interlocutor of circumduction had been pronounced, and parties refused to renounce probation.

It was contended for the reclaimer that the Act 1696 applied, but if it did not, he was entitled to proof *prout de jure*.

LORD JUSTICE-CLERK.—I am unwilling to recal this interlocutor, in which the findings are most logically and satisfactorily deduced. But if this be a case in which the proof is limited by the Act 1696, then the interlocutor is wrong, past all doubt. I am of opinion that the party here is not at all limited by the provisions of the Act 1696, because this is not a question between a truster, or one in his right, and a trustee, or one in his right; but between an alleged trustee and a third party who was a debtor of the truster, and has been discharged by the truster. The statute does not apply to this case in its terms, nor has it ever been extended to such a case by any decision of this Court. The suspender not being in the position of deriving right from the truster, but referring to the transactions between the truster and trustee only as making out quite clearly his discharge by the truster, I am not moved by the reference to the Act 1696.

When we are out of the Act, the question comes to be a mere question of fact, to be determined by a proof at large. That question is, whether Rutherglen is in right of the debt and of the diligence following on it, or whether his representation that he is personally interested in it is a fraud on his part. Such being the nature of the case, I cannot resist the conclusion that the Lord Ordinary has made a miscarriage in the case, by dealing with it as a case depending on evidence, without circumduction or renunciation of proof. We must allow the parties a proof *prout de jure* of their averments on record.

The other Judges concurred.

The Court allowed parties a proof of their averments.

[Cf. Bills of Exchange Act, 1882, section 100.]

No. 80. **XXIII. Dunlop 532.** 9 Feb. 1861. 1st Div.—Lord Jerviswoode.

JANE DAVIES, Reclaimer.—*D. M. Smith.*

ROBERT DUNCAN, Respondent.—*Gifford—J. C. Smith.*

Meditatio Fugæ—Petition—Arrestment—Diligence—Suspension and Liberation.—A woman presented a petition praying for incarceration of a man, to whom she alleged she was pregnant, and who, she said, was *in meditatione fugæ*, in order to avoid her claim for inlying expenses and aliment. After she had emitted her oath, she lodged a minute specifying the amount of the claim. After a proof, the man was incarcerated until caution should be found *de judicio sisti* in any action for the amount in the minute. In a suspension,—*Held* (*alt.* judgment of Lord Jerviswoode) that the

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[1] "NOTE.—The Lord Ordinary is of opinion that the documents produced, taken in connection with the statements on the record, are sufficient for the determination of this case, without the necessity of allowing farther proof. The grounds upon which the judgment proceeds are fully embodied in the findings in the interlocutor."

lodging of the minute was a competent proceeding, and interlocutor granting liberation *recalled.*

Question, Whether it is necessary to specify the amount of such a debt?

Jane Davies, domestic servant in Glasgow, presented a petition to the Justices of the Peace for Lanarkshire, setting forth that she was with child to Robert Duncan, mason in Blantyre, who, she believed, was *in meditatione fugæ*, in order to avoid her claim for inlying expenses and aliment when due, and praying for a warrant to incarcerate him "until he find sufficient caution *de judicio sisti* in any action for payment of the said inlying expenses and aliment and consequents which may be raised against him at the instance of the petitioner within seven months." On 17th November, the Justices, after considering the petitioner's oath, granted warrant to apprehend Duncan, for examination; and of date, 17th December 1860, "the petitioner supplements her petition by craving that the defender be ordained to find caution for inlying charges of L.1, 10s. sterling, for the child to be born as referred to in the petition, and aliment at the rate of L.5 sterling yearly, for the period of seven years from the date of the birth of such child."

The Justices, on 17th December 1860, "having resumed consideration of the petition, with the oath of the petitioner, minute for the petitioner, and declaration of the defender Robert Duncan, in respect of the pointed denial of the defender of any intention to leave the kingdom, allows the petitioner a proof *prout de jure* of the whole facts and circumstances in support of her petition and oath that the defender is *in meditatione fugæ*, and allows the defender a proof in the same way of all facts and circumstances in opposition to that statement, and allows both parties conjunct proofs: Grant diligence against havers and witnesses, and appoint said proofs to proceed forthwith."

On 17th December 1860,—"Having resumed consideration of the peti-**[533]**-tion, the deposition of the petitioner, the minute of the petitioner on the petition, the declaration of the defender, and proof adduced, Circumduces the term for proving; find the complaint proved; grant warrant to apprehend Robert Duncan within designed, and to commit him to the Tolbooth of Hamilton, therein to be detained until he find sufficient caution, acted in the books of Court *de judicio sisti*, in any action for payment of the debt mentioned in said petition and minute thereon, to be brought against him at the petitioner's instance in any competent court, within six months from this date, and decerns."

Duncan having been apprehended and imprisoned, presented a note of suspension and liberation, and pleaded;—1. The whole proceedings complained of, and the warrant of incarceration, ought to be set aside in respect (1) that there was no specific sum of debt in the original petition; (2) that there was no sufficient evidence that any debt was ever likely to become due; (3) that the interlocutor of 17th December 1860 contains no warrant to cite witnesses for both parties, and no warrant to detain the complainer; and (4) that said interlocutor did not allow the complainer time to prepare for his defence. 2. The complainer was not *in meditatione fugæ*.

On 21st January 1861, the Lord Ordinary "passes the note, and grants warrant for immediate liberation of the complainer Robert Duncan, as craved."[1]

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[1] "NOTE.—This case was fully argued before the Lord Ordinary on all the grounds stated in the note. But as it appears to him that there is one marked irregularity in these proceedings, he considers it unnecessary to deal with the other questions raised. The Lord Ordinary refers to the mode in which the petitioner was allowed to add to her petition what is described in the 8th article of the note of suspension as a minute, and whereby, according to its own terms, the petitioner 'supplements the petition, craving that the defender be ordained to find caution for inlying charges of L.1, 10s. sterling for the child to be born, referred to in the petition, and aliment at the rate of L.5 sterling yearly for the period of seven years from the date of the birth of such child.'

"Now, what was this but an amendment of the prayer of the petition, made, so far as the record shews, without leave of the judge, and after warrant had been granted to apprehend the suspender.

"Further, the amendment was in itself unwarrantable, and out of form, in so far as,

Jane Davies reclaimed;—She admitted that the amendment to the petition had been made after the deposition was issued; but pleaded, that no harm was thereby done to the respondent. If any harm was done at all, it was to herself, as she might have two children, whereas she had restricted her application for aliment to one,—she having been under no obligation to do so.[1]

Replied;—There is no authority for an application for aliment for an unborn child. Further, it is settled law, that a specific sum of debt must be set forth in the petition.[2] The petitioner could not swear to the verity of the debt, when the amount was not stated.

[534] LORD PRESIDENT.—I think that the ground on which the Lord Ordinary has gone is too critical. A competent interpretation of the minute is, that it was intended to specify the amount of the debt, in respect of which caution *de judicio sisti* should be granted, and it was so interpreted, and cannot be interpreted any other way now. In reference to the necessity for specifying the debt, I do not know that it is very necessary for us to go into that matter at all. I think the debt is specified here. But a debt of this kind it is very difficult for a party to specify, because it does not depend on the result of an accounting, or on matters as they exist at a particular date, but, in some degree, on a certain discretion of the Judge in reference to the condition of the defender, as well as the condition of the pursuer, which may be materially altered when the claim comes to be disposed of,—that is to say, according as the defender is a poor man, or a man of wealth, who is bound to maintain his child in a different position.

Then, as to there being no precedent for such diligence being applicable to such a debt, I think it is an error to say it is not applicable; and I have a strong impression that there have been precedents in the Court to which the writer of the Book of Styles, to which we have been referred, belongs; for I once had difficulty in the matter in a case where there were two children born, and while it was being discussed whether the cautioner was bound in regard to both children or not, one of them died, and then the question arose, whether his caution applied to the dead child or to the living.

In regard to the evidence, I think there is enough to make out all that the complainer was bound to make out, in order to give her the benefit of this branch of the law; and, therefore, I think we should recal this interlocutor.

The rest of their Lordships concurred.

The Court pronounced the following interlocutor:—"The Lords having advised the reclaiming note for Jane Davies, and heard the counsel for the parties thereon, and the counsel for the respondent on his whole grounds of suspension, recal the interlocutor submitted to review, and remit to the Lord Ordinary in the Bill-Chamber to refuse the note of suspension for Robert Duncan, now respondent in the reclaiming note, with expenses."

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instead of craving that the suspender should be ordained to find caution *de judicio sisti*, the craving is, for caution for sums of inlying expenses and aliment, as therein stated, themselves, a demand which it is not competent to make in such an application; and although it may be true that the ultimate judgment and warrant of the Justices does not in exact terms grant the craving of this minute, still, it bears to proceed upon the minute as if it formed a competent portion of the application.

"Therefore, and on the whole, in a case of this character, in which personal liberty is interfered with, and where, as the Lord Ordinary thinks, it is necessary that the utmost precision of procedure must be observed, he has felt it his duty to pass the note, and liberate the complainer."

[1] Drummond's Style Book, ed. 1824; Souter's Style Book, ed. 1859.

[2] Pratt, 30th June 1826; Campbell, 20th November 1847, *ante*, vol. x. p. 125.

No. 81. **XXIII. Dunlop 534.** 9 Feb. 1861.[1] 1st Div.

VISCOUNTESS STRANGFORD, Pursuer.—*A. B. Shand.*

THE HURLET AND CAMPSIE ALUM COMPANY, Defenders.—*A. R. Clark.*

Process—Expenses—Modification.—In this case, the pursuer having been successful in a discussion upon issues, in obtaining the issue proposed by her, the Court allowed her the expense of the day's discussion, and "modified" the same to L.5, 5s. The pursuer afterwards gained her case on the merits, with expenses. At taxing, the Auditor disallowed all the items relative to the adjustment of issues, amounting to upwards of L.20. The pursuer now objected to the Auditor's report, on the ground that she was entitled to these expenses, under deduction of the L.5, 5s. paid, otherwise the Court, in imposing a penalty on the defender for improperly opposing her issue, would inflict upon the pursuer a much more serious injury. *Replied.*—The Court by modifying the expenses of the day's discussion had finally disposed of that matter.—The Court continued the case in order to ascertain the practice,—which it was now stated had always been in accordance with the Auditor's taxation in this case. The Court, by a majority (Lords President, Ivory, and Curriehill, *diss.* Lord Deas) were of opinion that the objection must be repelled, this being an ordinary case of modification, and it not being a necessary result that when interim expenses are awarded they shall exclude all further claim for expenses for that particular matter, if the word "modify" be left out of the interlocutor.

No interlocutor was pronounced, it being arranged at the bar that parties were to act on the views expressed by the Court.

No. 82. **XXIII. Dunlop 535.** 9 Feb. 1861.

CAMERON and WATERSTON, Pursuers.—*Pattison.*

MATTHEW MUIR and SONS, Defenders.—*Sol.-Gen. Maitland—A. Moncrieff.*

Process—Expenses.—*Held* that an interim award of expenses, but without "modification," was to be regarded as payment to account only.

No. 85. **XXIII. Dunlop 544.** 15 Feb. 1861. 2nd Div.—Lord Jerviswoode.

PETER DUNCAN, Appellant.—*Young—N. C. Campbell.*

WILLIAM DON (Trustee in LESLIE'S Sequestration), Respondent.—*Gordon—Clark.*

Ship—Mortgage—Possession—Freight.—Under a charter-party the freight of a ship was payable to the captain by the consignee of the cargo at Valencia. On reaching that port the captain received a letter from a mortgagee, stating that he took possession of the ship in that character, and directing the freight to be remitted to him. The mortgagee's agents at Valencia exhibited to the captain a notarial copy of the mortgage, but did not in any way interfere with the ship. The captain received the freight, and, under the directions of the trustee for the creditors of the owner, who had become bankrupt, remitted the freight to the trustee. *Held* (*aff.* judgment of Lord Jerviswoode), that the mortgagee had not taken possession of the ship before the cargo was discharged, and, therefore, had not acquired right to the freight.

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[1] Advised 5th February.

In the sequestration of Robert Leslie, shipowner in Dundee, Peter Duncan, merchant in Dundee, claimed to be preferably ranked on the freight of the "Achilles" (amounting, after deducting disbursements, to L.771), for carrying a cargo to Valencia, on the ground that, before the cargo was discharged, he had obtained possession of the vessel under a mortgage. The trustee rejected the claim.

[545] Mr. Duncan appealed to the Lord Ordinary on the bills.

On 4th December 1857 a mortgage was granted in favour of Duncan, in security of a loan of L.1000, declared payable on 4th December 1858. A prior mortgage for L.1600 had been granted by Leslie, which Duncan acquired right to on 4th December 1858. At the date of the mortgage, the "Achilles" was on a voyage from Leith to Adelaide, in South Australia, under charter; but before leaving Leith she had been chartered by Messrs. Anthony Gibbs and Sons of London to proceed from Adelaide to the Chincha Islands, near Callao in Peru, to load a cargo of guano for Valencia. She loaded her cargo, and sailed from the Chincha Islands in April 1858. Leslie declared his insolvency on 26th October 1858. Mr. Duncan, on 28th October, addressed a letter to the charterers, intimating his mortgage, and requesting them to retain L.1000 of the freight, subject to his orders. They replied that the freight was to be paid by Messrs. Trenor and Company of Valencia, the consignees of the cargo. Mr. Duncan, on 30th October, wrote to Messrs. Trenor and Company, enclosing a copy of his letter to Messrs. Gibbs, and of their reply; and requesting Trenor and Company to remit to him L.1000 of the freight, or to remit that sum to Messrs. Gibbs, subject to his order.

On 2d November Mr. Duncan addressed a letter to Captain Ovenstone of the "Achilles," intimating the mortgage; that he considered the freight was included in the mortgage; and requesting that, in making remittances of freight to parties in this country, his (Duncan's) rights as mortgagee might be reserved. Messrs. Trenor and Company having stated, in reply to Duncan's letter, that they could not refuse to pay the freight to the captain of the "Achilles," as per charter party, Duncan wrote to Captain Ovenstone, on the 17th November, that he had received information from Messrs. Trenor and Co. that the freight would be paid by them to the captain, and requesting the captain, after deducting all necessary charges, such as wages, &c., to remit the balance of the freight to him as mortgagee. This letter was sent through Messrs. White, Llano, and Morand, Mr. Duncan's agents at Valencia. On 20th November Mr. Duncan again wrote Captain Ovenstone:—"Having taken possession of the 'Achilles' as mortgagee, I now recal my letter to you of the 2d instant, regarding the freight due at Valencia, and you will now follow out the instructions contained in mine of 17th instant. On your arrival at Valencia I shall expect advice from you, so that I may forward instructions for your future guidance. You will receive a telegraph message through Messrs. White, Llano, and Morand of Valencia, as well as this letter, and these gentlemen are empowered to act for me." On the same date Mr. Duncan sent this telegram to Captain Ovenstone:—"Obey my orders, as mortgagee of 'Achilles,' whereof at take possession."

The "Achilles" arrived in the Bay of Valencia on 7th December. On that day the captain received Mr. Duncan's letters of 2d, 17th, and 20th November, and his telegram of 20th November; and sometime after his arrival, Captain Ovenstone saw a notarial copy of Mr. Duncan's mortgage in the hands of Messrs. White, Llano, and Morand. After lying a fortnight in the Bay of Valencia, a part of the cargo was discharged by lighters, in order to enable the vessel to enter the harbour of Grao (the port of Valencia). On 8th January 1859 she entered the harbour, and the rest of her cargo was discharged. The captain, acting on Mr. Duncan's orders, then took the vessel to Dundee in ballast—the expenses of the voyage being defrayed by Duncan.

Leslie was sequestrated on 8th December 1858.

On 21st December 1858 Mr. Don sent a telegram to Captain Ovenstone, intimating his appointment as trustee on Leslie's estate, and directing the captain to uplift the freight, and remit it to Mr. Don for behoof of all con- **[546]** -cerned. Mr. Leslie's creditors, with the acquiescence of Mr. Duncan, instructed Mr. Don to communicate with Captain Ovenstone, and direct him to transmit the freight to Don, "reserving the rights of all parties." Captain Ovenstone accordingly remitted to Don L.771.

Duncan averred that he had taken possession of the ship on her arrival in the Bay of Valencia, and so acquired right to the freight, which, subject to his orders, Captain

Ovenstone had uplifted and remitted of consent to Don, under reservation of his (Duncan's) rights, in order to save a litigation in a foreign court. He pleaded;—Having intimated his mortgage to the charterers of the ship and consignees of the cargo, and having duly entered to possession of the vessel before the date of the sequestration, and before the vessel entered the harbour of Valencia, or delivered her cargo, he was entitled under his mortgage to be preferred to the freight, in terms of his claim.

The trustee averred;—Duncan did not take possession of the "Achilles" until after her cargo was discharged. Duncan's letters of 2d, 17th, and 20th November 1858, and his telegram of 20th November, were not received by Captain Ovenstone till the "Achilles" had reached her port of destination, and the freight due under the charter party had been earned. The letters were written before 4th December 1858. The captain held the vessel for the owner, and subsequently for the trustee for his creditors, and did not in any respect act for Duncan, or recognise any right on his part to the vessel.

It was pleaded for the trustee;—2. In respect that the master received the freight on behalf of the respondent, and remitted the same to him, the appellant had no right thereto, and had no right or title to maintain any claim therefor. 3. Further, the present appeal, and the claim of the appellant, were unfounded—(1.) Because the appellant, as only a secondary mortgagee, was not entitled to take possession of the vessel; (2.) Because the appellant did not intimate his mortgage to the master, or take possession of the vessel, or perform any act equivalent thereto; and, (3.) Because the letters and telegram founded on were issued before the appellant, under his mortgage, had any right to or over the said vessel.

The Lord Ordinary, having considered the closed record and heard counsel, allowed both parties a proof of their averments.[1]

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[1] Captain Ovenstone, who was examined as a witness for Duncan, deponed,—He received Duncan's letters of 2d and 17th November, and telegram of 20th December, by some one connected with the house of Trenor and Company, on his going ashore the day he reached Valencia Bay. "I did not see Messrs. White, Llano, and Morand, until some days after my arrival at Valencia, and I did not on that occasion see any notarial copy of Mr. Duncan's mortgage. About the 1st of January 1859, to the best of my recollection, I saw for the first and only time what I was told was a notarial copy of Mr. Duncan's mortgage over the ship 'Achilles.' I do not know that it was a notarial copy, as I had not before seen such a copy. It was at Messrs. White, Llano, and Morand's that I saw it. I did not take any notice of the document, as I was told by Mr. White that the notarial copy was not sufficient, according to the law of the place, to enable them to go on board and take possession of the vessel." It was further deponed,—When the "Achilles" arrived off Valencia, a pilot was signalled for, and the vessel was taken as near the harbour as possible, and anchored. Three hundred tons of the cargo were discharged there. The whole cargo consisted of 555 tons. Witness drew, within a day or two after his arrival at Valencia, L.400 on account of freight. So far as the witness observed, all the vessels that discharged cargoes at Valencia discharged in part in the Bay, where the "Achilles" commenced discharging, before going within the mole. Smaller vessels than the "Achilles" did so. "Messrs. White, Llano, and Morand acted as agents of Mr. Duncan at Valencia. Mr. White of that firm stated that they could not force me to act upon the documents, because the law of the country would not compel me to acknowledge notarial copies. Neither Messrs. White and Company, nor any person in their behalf, nor any person acting as agent for Mr. Duncan, took possession of the ship at Valencia. Neither Messrs. White and Company, nor any person acting as agent for Mr. Duncan at Valencia, interfered in any way in my receiving the freight. I received the L.400 before I saw the notarial documents at Messrs. White and Company's."

No other witness was examined.

The correspondence between Duncan and Captain Ovenstone was produced. In none of the captain's letters did he acknowledge himself as acting for Duncan, or bound to obey his instructions, further than as regarded the disposal of the vessel after the cargo was discharged.

The charter party of the "Achilles" for the voyage to Valencia was produced. It provided that the freight should be at the rate of L.4, 10s. per ton on the cargo

[547] On 8th January 1861 the Lord Ordinary pronounced this interlocutor:—"Finds, in point of fact, that the appellant did not take, and was not in possession of, the vessel 'Achilles,' mentioned in the record, as mortgagee, in virtue of the mortgage held by him over the same previous to the 8th day of December 1858, the date of the sequestration of Robert Leslie, the owner and mortgager of the said vessel, or at any time previous to the date of the discharge from the vessel of the cargo of guano, to the freight of which the present question relates; and with reference to the foregoing finding, finds, in point of law, that the appellant did not, as mortgagee of the said vessel, acquire right to the freight in question, or to any portion thereof; and therefore dismisses the appeal against the deliverance of the trustee, which is complained of, and decerns: Finds the appellant liable to the respondent in the expenses incurred by the latter under the appeal."[1]

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delivered, and be payable thus—L.400 on the arrival of the vessel at Valencia, and the balance on the cargo being discharged.

[1] "NOTE.—The question here raised has on two occasions been argued before the Lord Ordinary—first, before proof was allowed under the interlocutor of 10th March last, and more recently since that proof has been reported.

"The matter is one of considerable pecuniary importance, and the facts, as now proved or admitted, present features which have afforded scope for much subtle and ingenious argument. But the Lord Ordinary, after giving that argument his best consideration, and after examining the authorities to which he has been referred, has come to the conclusion that the deliverance of the trustee ought to be supported, and his right as trustee on the sequestrated estate of Leslie to the sum of freight here in question sustained.

"In the view which the Lord Ordinary takes, the question at issue may be briefly stated. It appears to him clearly established under the authorities, that a mortgagee, holding a mortgage over a ship, the property of his debtor, the mortgager, may acquire right to draw freight upon a cargo contained in the vessel over which his mortgage extends, by entering into possession of that vessel. The statute 6 Geo. IV. cap. 110, sect. 45, for the first time enacted 'that the mortgagee of a ship shall not, by reason of the mortgage, be deemed owner of the vessel;' and a question appears to have arisen how far that enactment operated so as to affect the rights of the mortgagee of a ship in the freight carried by the vessel.

"It has, however, been decided in the Courts of England that the enactment referred to, which is in substance repeated in the existing Merchant Shipping Act 17 and 18 Vict. cap. 104, sect. 70, does not injure the rights of a mortgagee in this respect. This is laid down as law in Shee's Abbott, p. 31; in Smith's Mercantile Law, 4th ed., p. 179; in the case of Kerswell *v.* Bishop, 2 Crompton and Jervis, p. 529; in Cato *v.* Irving, 5 De Gex and Small, 210; and in other cases to which it may be unnecessary to refer, as the Lord Ordinary did not understand the proposition to be controverted on the part of the appellant.

"The question which, therefore, truly remains for decision here regards the matter of fact, whether or not the appellant took possession of the vessel, the 'Achilles,' over which he held a mortgage, so as to entitle him to the freight payable for the cargo contained in that vessel, and which was discharged at the port of Valencia.

"On this point it was conceded, as the Lord Ordinary understood, on both sides of the bar, that there is no statutory or other settled rule by which it is to be arbitrarily and solely solved; that there is no recognised *actus legitimus*, which is alone evidence of possession, and no symbolic act which can be held to be equivalent to or a substitute for actual possession.

"In the case of Russel *v.* Baird, June 13, 1839, 1 D. p. 931, a question arose under an advocation, whether Russel, who held a vendition in security over a vessel, had entered into possession of the vessel so as to be subject to a liability for certain furnishings made thereto by Baird and Day. The Lord Ordinary (Fullerton) on a consideration of the facts, as established by a proof which had been taken in the inferior Court, held that he had not done so. His Lordship's judgment as to the matter of fact was altered by the Court on a reclaiming note; but there does not appear to have been any expression of doubt on the part of the Court as to the principle

[548] The appellant reclaimed, and argued;—There could be no doubt that the appellant was entitled to the freight claimed, if he took possession of the **[549]** vessel under

on which the question was to be determined, or that the inquiry as to whether or not Russel was to be held as in possession of the vessel, was otherwise than 'properly a question of fact,' to be deduced from the proof led.

"So far as the Lord Ordinary can discover, the question is dealt with in the Courts of England on the same footing. The inquiry there is also, whether or not the mortgagee has in fact entered into possession. The modes in which possession is taken vary in the minor details in the different cases. But in all those cases to which the Lord Ordinary has had access, it appears to him that the broad features are the same, and that the acts of possession founded on are of an overt positive character, done by an agent for, or a servant of the mortgagee, acting independently of, and in some respects in opposition to the master of the vessel who holds the same under the orders, and for behoof of the owner or owners. Thus, in the case of Brestow *v.* Whitmore, 28 Law Journal (Chancery), p. 801, the mortgagees are said to have seized the ship in the Thames. In Kerswell *v.* Bishop, 2 Cr. and J., p. 529, the mortgagee, by an agent, took possession of the ship and papers. In Dean *v.* M'Ghie, 4 Bing. 45, a captain employed by Chance (assignee of the owner for debt) took possession of the vessel on her return home about seven miles below Gravesend; and in the case of Cato above quoted, Cato and others took possession of the ship, then in the London Docks, 'by placing a man on board.' The defendants also took possession by placing persons on board.

"It is true, as was pointed out on the part of the appellant, that in the case of Cato it was remarked by one of the Judges, that in a case where a mortgage extends only over a part interest in a ship, and is therefore insufficient to warrant exclusive possession, the mortgagee may, without formally taking possession, give notice to the part owner in possession, and require payment to himself of the share of the freight belonging to his mortgaged share of the ship.

"There is apparent equity in this view, and there seems to be nothing in principle to bar the effect of the notice, in a question at least with a party who receives such notice, or with those deriving right from him. But, as it appears to the Lord Ordinary, the case supposed has little bearing here, where the mortgage affected the whole ship, and where the property of the ship was solely in the bankrupt.

"It is stated in the Juridical Styles, 3d edition, vol. ii. pp. 547-548, under the head of Maritime Writs, that it was formerly the custom to insert in the vendition of a ship a procuratory empowering an attorney to give possession to the purchaser, and that after possession was given, a regular instrument was drawn out; and it is added, 'this form is, however, now in disuse, and all that is necessary is for the vender, when he is in actual possession of the vessel, to deliver it to the vendee, or, where it is under the charge of a master, to write the master a letter, desiring him henceforth to follow the orders of the vendee. If the vessel is abroad, the delivery of the letter is sufficient in the meantime, but the vendee should take possession upon her return to this country.'

"The Lord Ordinary has quoted the passage, not as in any respect authoritative, but as showing what has been understood in practice as essential towards taking possession of a vessel under a vendition, and as probably coming more nearly to the case made here by the appellant than anything to be elsewhere found.

"The Lord Ordinary has also made the quotation with a view to the distinction which exists between the mode of intimating the transfer as there contemplated—and that which the appellant actually adopted in intimating here to the master of the 'Achilles,' that he took possession of the ship. There was in the present case no intimation by the owner to the master. The intimation, such as it was, was given to the latter by the appellant himself as mortgagee.

"In dealing with the question, whether or not the appellant took possession of the vessel, it appears to the Lord Ordinary, that if it be conceded to that party that he intimated to the master in command, by means of his telegram, of date 20th November 1858, and by the letters referred to in the seventh article of his condescendence, that he took possession of the vessel, he obtains the fullest concession to which he can, consistently with the evidence, lay claim. For, in the opinion of the Lord Ordinary, no

his mortgage before the freight was earned. The freight was not earned till the "Achilles" had completed the discharge of her cargo in January 1859. There was no doubt that the appellant was entitled to take possession, and the only question was whether he had effectually taken possession before the freight was payable. There was no authority for holding that any particular form was necessary in taking possession of a ship by a mortgagee. Though ships were moveable property, the mortgagee of a ship was not in the position of the pledgee of moveables. The mortgage of a ship was a statutory proceeding, and to be effectual, the deed of mortgage required to be registered. That being done, the transaction was complete, even though at the time the ship might be at sea. The mortgage was completed by its registration; but in order to make his right effectual [550] to secure the freight then being earned, it was necessary for the mortgagee to take possession of the ship. It had been held that it was enough if the mortgagee put a man on board. That might be a mode of intimating the mortgagee's right, but that mode of doing so was not required by any statute. By far the most sensible mode of taking possession was to intimate the right to the master, and direct him to hold the ship for the mortgagee. The master was not merely the servant of the owner; he was a public officer; his name was registered as master, and was stated in the ship's papers. He held the property of the ship for the owner so long as he continued to be the owner, and afterwards the master held for whoever was entitled to the ship—it might be a purchaser, or the trustee for the creditors of the owner, or the mortgagee. Putting a man on board was a mere idle ceremony. It was not maintained that he required to say why he came on board, or to do anything when he came on board, or that he required to be a skilled seaman, and able to take the charge of the ship from the master, or that he required to be a seaman at all. Sending a man on board was merely a means of intimating the mortgagee's right, which would be much better intimated by writing to the captain, and desiring him to hold the ship subject to the orders of the mortgagee. That had been done here by Duncan;

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conclusion can be drawn either from the letters or from the evidence of the master (Ovenstone) that he, as master, admitted to the appellant, or to any one acting on his behalf, that the appellant had taken possession of the ship, or that he, the master, held the vessel for him, as mortgagee, in possession.

"The Lord Ordinary thinks it unnecessary to refer here more particularly to the communications or evidence of the master, which must of course be read in detail. The result at which he has arrived is that which he has now stated.

"Could, then, the appellant take possession of the vessel, and thus acquire right to the accruing freight in the way here attempted, by mere intimation of his own purpose or resolution so to do? The Lord Ordinary thinks not. No decision has as yet recognised this as sufficient actual possession as that which law requires. Mere intimation is not enough. The possession of the vessel remains unaffected by it. Intimation to the master without overt act cannot, it is thought, be sufficient. The master is the servant of the owner in possession for him, and intimation to the master by the creditor of the owners can scarcely convert the possession which he has for the owner into possession for his creditor. If this were in law enough, so simple a procedure would, it is thought, ere this have been adopted and recognised. But the Lord Ordinary has been unable to see a trace of it, and the appellant, ably as his cause was supported in argument, failed to adduce an instance.

"Here, as already said, the master never admitted that he had ceased to hold for the owner, and had become the servant of the mortgagee, and therefore the Lord Ordinary has not, as he thinks, to decide as to what effect such an admission might have. But the leaning of his opinion is, that it would have been unavailing. If a mortgagee intends to enter into possession, it would appear that he must do so either by means of his own agent, or by virtue of an authority from the owner, debtor in the mortgage, instructing or permitting the master to hold the vessel for behoof of the mortgagee.

"It may, in conclusion, be right to remark, that the appellant might, without difficulty, so far as the Lord Ordinary can see, have here authorised and directed his own agents at Valencia to have taken possession of the vessel for his behoof; so that he can scarcely use an argument, which otherwise might have had weight, to the effect that the course which he actually adopted was that which was alone open to him."

and thereby having done all that was necessary to take possession of the ship, to which he had clearly right under his mortgage before the freight was payable, he was entitled to the freight. Affirming the judgment of the Lord Ordinary was just equivalent to deciding that the ceremony of putting a man on board a ship was the only way of taking possession under a registered mortgage, for which there was no statutory or any other authority.

LORD WOOD.—The sum of freight of the "Achilles" for the cargo delivered at Valencia—which is in question—is L.711, 13s. 2d. It is not now disputed that this sum represents the freight of cargo not delivered at the date that the master of the vessel received the notice or notices of the mortgage founded on by the appellant, the mortgager. Therefore it was then only accruing freight.

The mortgage, which was granted by Mr. Leslie, the sole owner of the "Achilles," to the appellant, was complete in itself, and extended over the hull of the vessel and its appurtenances. But, on the one hand, it is provided by statute that, notwithstanding the mortgage, the person to whom the transference of the vessel is made is not to be deemed the owner of the vessel, nor is the person making such transfer to be deemed to have ceased to be the owner, except in so far as may be necessary for the purpose of rendering the ship transferred available by sale or otherwise for the payment of the mortgage debt. And, on the other hand, as regards the freight, the mortgage *per se* gives the mortgagee no right to it either as against the owner and his assigns, although, by means of his rights of real security over the vessel as mortgagee—(for the mortgage is no more than a security over the vessel)—and with no assignation to the freights, he may acquire right to the freight by taking the steps sufficient in law for that purpose.

What was done in the present case for that purpose was the sending those notices to the captain of the vessel, which are contained in the appellant's letters of the 17th November 1858, and later dates, and in the telegram of the 20th November, all which were received by the master before the 7th December thereafter; and, in some subsequent communications which reached him prior to the discharge of that part of the cargo, the freight, or balance of the freight of which is claimed, the appellant thereby, as in the telegram of the 20th November 1858, intimating to the master to obey his orders as mortgagee of the "Achilles" "whereof I take possession;" and again in his letter to the master, of the same date, stating,—"Having taken possession of the 'Achilles' as mortgagee, I now," and so on, requiring him to follow the instructions he, the mortgagee, had given in a prior letter of the 17th as to remitting the freight to him as mortgagee.

Now, upon the evidence, written and parole, I think the sound construction is, that the master refused to recognise or act upon the intimation given to him. He did not admit that possession of the vessel had been taken by the appellant or by him, the master, for the appellant; or that he, the appellant, had a right to any **[551]** part of the freight. And accordingly, neither in delivering the cargo or receiving the freight did he act upon that footing. What effect his having acted otherwise might have had, it seems unnecessary to inquire. If his doing so could have improved the right of the mortgagee to the freight (which I am disposed to agree with the Lord Ordinary in thinking it could not), it is enough that, in point of fact, he did not do it, but the reverse—thus leaving the case upon the notices and requisitions of the mortgagee uncomplied with. Consequently, the point presenting itself for decision is, Were these notices and requisitions,—made and received while as yet a part of the cargo was undischarged, and the freight for it only accruing,—sufficient to give the mortgagee a right to the freight or balance—after certain deductions not disputed—which is the sum in question?

The medium, apparently, on which it has been held that a mortgagee, although not by the mortgage to be deemed the owner of the vessel, and although he has thereby no right to freight, may acquire right to it, is the power which his security right by the mortgage over the vessel gives him to control the disposition of the vessel and the cargo on board, so as to prevent delivery of the cargo, except on condition of the freight being paid to him. Hence the step or act by which it might be anticipated it would be held—and by which it has been held—that the right to the freight may be made effectual to the mortgagee, is that of his taking possession of the vessel. There is admittedly

no statutory rule as to the mode in which this is to be done, and there is no recognised *actus legitimus* as the alone evidence of possession having been taken. It is a question of fact, not of technical form. It may be accomplished by the mortgagee putting a person on board while the cargo is undischarged, with authority to take possession for him. And other things or modes there may be by which it may be taken. But the putting a person on board is the one mentioned in the cases where the thing that had been done is specified; and in all the authorities the way by which the mortgagee can acquire right to the freight is stated to be by the mortgagee's taking possession of the vessel. What shall be held to be so it is not necessary to define. It is enough that, according to the authorities (apart from a case to be immediately adverted to), some act amounting to the taking possession of the vessel is essential to give the mortgagee a right to freight. It is not to be acquired by mere notice to the master sailing the vessel, or any other party, of the existence of the mortgage. For its existence does not confer any right to the freight. And there is no assignment of freight to be completed, as other assignations may be, by intimation. As already observed, it is not the fact of the mortgage, but the right which the real security thereby constituted over the ship gives to the mortgagee to order its disposition and the disposition of the cargo on board,—and which can only be exercised by an overt act amounting to the taking possession,—that enables the mortgagee to make the freight available for the payment of his debt, in addition to the vessel and her appurtenances over which the mortgage itself extends.

Now, in the case before us, I look in vain for anything of the kind. I find, indeed, the statement more than once made to the master of the "Achilles" by the appellant, that he has taken possession of the vessel as mortgagee, and there it rests. But this is only the declaration of an act of the appellant's mind. There is no overt act of taking possession, or anything of that character, although, no doubt, in addition to the intimation of possession having been taken, there is an intimation to the master requiring him, in respect of the appellant's having done so, to obey his orders in regard to the recovery of payment of the freight. Now, as far as I have been able to inform myself on the subject, there is no case in which the mortgagee has been found entitled to the freight, where there has not been some act of possession of an overt positive character done by the mortgagee, or by his agent, or servant—or where all that has taken place consists merely in (if it may be so called) a possessory resolution, with notice to the master, such as was given by the appellant. There is no notice by the owner to the master to hold possession for the mortgagee, supposing that could be of any avail, and I can discover no trace of its ever having been recognised that by notice by the mortgagee to the master, the master can be made the instrument of taking possession for the mortgagee, even if a direct requisition were made to him to that effect. He is not the servant of the mortgagee, but of the owners, holding the vessel for them; and, as far as I can gather from the authorities, it is not through him, but by the act of [552] the mortgagee himself, or of some person having authority from him, independently of the master, and to whose proper position and duties it may be adverse, that possession can be taken by the mortgagee.

It is true, as observed by the Lord Ordinary, that, in the case of Cato and others, the holders of a mortgage over the ship "Ajax" granted by the owner of 48-64th parts of that vessel, and where the other part owner of the remaining 16-64th parts was the master on board sailing the ship, and so in possession of her, the Vice-Chancellor, in giving judgment, after laying down the law that the owner is entitled to the freight, notwithstanding his having mortgaged the vessel, unless the mortgagee takes possession, observes that, "when the mortgage is of the entirety, the mortgagee can take exclusive possession, so as to entitle himself to the freight. But, when the mortgage is of a share only, he cannot effectually take possession so as to entitle himself singly to receive the freight." And he is reported to have then said, that in such a case he "would consider that the mortgagee, without formally taking possession, if he gave notice of his mortgage to the part owner in possession of the ship, and required payment to himself of the share of freight belonging to his mortgaged share of the ship, would at least entitle himself to receive such share of all freight accruing, and not actually due at the time of the notice." And he assigns as his reason for this, "that to hold otherwise would make it, in many cases, impossible for the mortgagee of a share of a ship to make the security available against accruing freight."

But, in the first place, the point to which this part of the Vice-Chancellor's opinion refers was not one which, in the circumstances, it was apparently necessary to decide in disposing of the cause, seeing that, as the report bears, the mortgagee, prior to the discharge of the cargo, "took possession of the ship, then lying in the London Docks, by placing a man on board," while, at the same time, the party in right of the other part owner, had also taken possession by placing persons on board.

In the second place, the fact of the mortgage being granted by a person who was only a part owner, and that the rights of the mortgagee might thereby be limited, so as to prevent entire possession of the vessel being taken by the mortgagee, to the exclusion of the other part owner and his rights in any question as to the right to the freight, could not, as far as I can see, create any obstacle to the mortgagee taking possession to the extent of his right in the vessel as constituted by the mortgage, although it may be, that in consequence of the divided possession that might thence arise, some arrangement might be necessary with regard to the receiving payment of the freight and its disposal in the meantime, till the claim made upon it should be adjusted. Accordingly, I see that, in the case of Alexander *v.* Simms, Beavan's Reports, vol. xxiii., p. 80, where the mortgage was by a part owner of 7-8ths, the mortgagee, as the report bears, "took possession of the 7-8ths of the ship and cargo;" and no objection was stated to this act of possession not being effectual, because it was not and could not be exclusive, and of the whole vessel. On the contrary, the question at issue was argued and disposed of upon the footing that the possession was effectually taken to the extent of the mortgagee's right in the vessel by his mortgage, that is, to the extent of 7-8th shares.

In the third place, the observations of the Vice-Chancellor are applied to the special circumstance which he mentions, and in particular to that of the other part owner whose share was not affected by the mortgagee being in the *de facto* possession of the vessel, and notice of the mortgage having been given to him. It is with reference to the special circumstances of the case that he states that he considers notice to the part owner might be sufficient, and for the reason assigned. There is no suggestion or indication in the opinion that, in a case where the mortgage is granted by a sole owner over the whole vessel, the Vice-Chancellor would have held that the right to freight can be acquired by the mortgagee except in the ordinary way recognised in all the authorities,—viz., by taking possession,—or that anything short of that will do, even where the mortgage is only of a part of the vessel, and the other part owner is not in the actual possession of the ship, and the notice is not given to him;—or that, in either of these cases, notice of the mortgage by the mortgagee to the master of the vessel, and of his, the mortgagee's, having taken possession, or even of his requiring the master to take and hold the possession for him, would be of any avail.

In the fourth place, the present case is in no particular an exceptional case of the **[553]** kind, to which the opinion of the Vice-Chancellor would in any view apply, or presenting any of the difficulties to the mortgagee's adopting the ordinary course for obtaining right to the freight, by which it appears that the opinion of the Vice-Chancellor had been influenced, from an impression that if, in the face of these difficulties, the taking possession were held to be essential, it might render it impossible for the mortgagee to make his security available against accruing freights.

For these reasons, it does not appear to me that the case of Cato and others can be founded on as of any weight in a case such as the present, or as at all affecting the application to it of the law, as it would be held to stand irrespective of that decision. And taking the law to be as I have stated it, I am of opinion that the appellant had not done that which the law requires to be done, to entitle him to the freight which he claims; and that, therefore, the interlocutor of the Lord Ordinary ought to be adhered to.

Lord Cowan.—I am of opinion that the grounds of judgment are satisfactorily stated in the note of the Lord Ordinary.

The appellant held a mortgage for L.1000 over the "Achilles," due on 4th December 1858, and he also acquired another preferable mortgage for L.1600. Leslie, the owner of the "Achilles," was sequestrated on 8th December 1858, and the respondent Don was elected trustee on his estate. The "Achilles" was on a voyage to Valencia, under a charter party by which L.400 of the freight was payable on the ship's arrival in the Bay of Valencia, and the remainder on right and full delivery of

the cargo in the harbour of Valencia. She arrived in the Bay of Valencia on 7th December 1858, where a portion of her cargo was discharged, and having got within the mole she finally discharged her cargo on 25th January 1859. In these circumstances, the question arises, to whom does the balance of freight belong, amounting, after deducting expenses, to L.771? Does it belong to the trustee and commissioners in Leslie's sequestration, or to Duncan, the appellant, as mortgagee. The sole question stated and argued has regard to the right of the mortgagee in respect of his having obtained possession of the vessel.

Now, the first and primary matter to be observed is, that the mortgage-deed in itself conferred upon the mortgagee no right to the freight. The mortgage contains no assignment of the freight; it confers certain powers on the mortgagee, such as a power to sell the vessel under the statute; but no power to uplift freight. The mortgagee is not owner of the vessel, but only the holder of an effective security. In this respect the mortgage of a ship is different from any other transfer. It is different from sale of moveables, for there it is specially contemplated that the party in whose custody they are, may, after intimation of an order for delivery, hold them for the buyer. But the mortgagee can resort to measures by which he can take possession of the ship, and thus become, on the one hand, responsible in liabilities resulting from being in the management of the ship, and, on the other hand, entitled to accruing profits, such as freight becoming due after he has entered into possession. Of his right then to accruing freight there can be no doubt. That right was recognised in Dean *v.* M'Elvie and other cases,—the cases generally, however, on the point, being as to questions concerning the liabilities incurred by the mortgagee. In this country, it is now settled by the provisions of the Registry Act that a mortgagee is not an owner simply as mortgagee. Still it is always a question whether possession has, by the act of the mortgagee, been taken of the vessel; and this is a question of fact. There is no recognised form of taking possession, that is true; but still some action or overt step behoves to be taken in assertion and prosecution of the right to take, and intention of actually entering into possession. This is recognised and stated by all the authorities, and in the cases referred to by the Lord Ordinary.

Then, was what was done by the mortgagee enough? All that it amounts to is intimation to the master of the vessel, and no more. The owner, or those representing him, did not authorise the steps taken by the mortgagee. On the contrary, the trustee and commissioners in the owner's sequestration persevered in resisting possession being taken by the mortgagee, and it was not till 22d January 1859 that the trustee intimated the resolution of the creditors not to interfere with the vessel; but the cargo was discharged, and the freight earned by the time that letter was received by the master.

Hence the mortgagee's right all rests on the telegram of 20th November, and [554] letter of that date, received by the master on 7th December 1858, when he arrived in the Bay of Valencia. But is that a possession which the law can recognise? The law in other matters gives a very different view of possession. It is by our best legal authority defined to be, "the detention of a subject with an *animus* or design in the detainer of holding it as his own property. It is made up partly of fact and partly of right; the fact consists in the detention of the subject which the possessor hath in his custody, the right consists in the view with which he holds it,—he holds it in his own name as his own property."—Ersk. Inst. ii. 1, 20. The fact here relied on is mere intimation, and not any overt act in prosecution of the mortgagee's undoubted right. But that is not enough, and the creditor has himself to blame for not taking other steps, for the master throughout refused to recognise the intimation to him as enough to transfer the possession of the ship.

That intimation may do in some cases of transference of right is true, as where the owner of goods in a bonded warehouse intimates to the holder of them his sale or purchase. It is of the very essence of the transaction, that, with the will of the seller, the holder shall on intimation be thenceforward the custodier of the purchasers. But this is entirely a different case. Here what is required is something that will place the holder of the right in a different position from what he occupies under his bare right. It is like the real diligence to which an heritable creditor or security-holder, as of a real burden, must resort, when he has no assignation to rents, to get into possession of the subject, and so draw its fruits.

The appellant in his argument was compelled to resort to this view of the master's position, that he was holder of the ship for all concerned,—in truth, the servant of all interested in the ship or cargo. But that is not his character: he owes certain duties to all having an interest; but he is the servant of the owner, and therefore, mere intimation to such a party by the mortgagee, can never operate a transference of the possession in the circumstances now stated.

As regards the case of Cato, I adopt the observations of Lord Wood, and, on the whole case, I consider that the interlocutor of the Lord Ordinary should be affirmed.

Lord Benholme concurred.

Lord Justice-Clerk.—The only question here is, whether the appellant, as mortgagee of this ship, took possession of the vessel before a certain date? In his plea in law he says, "Having intimated his mortgage to the charterer of the ship and consignees of the cargo, and having duly entered to possession of the vessel before the date of the sequestration, and before the vessel entered the harbour of Valencia, or delivered her cargo, the appellant is entitled, under his mortgage, to be preferred to the freight in terms of his claim." Now in one view, and perhaps the proper view, that plea raises a question of fact only; but it does involve legal principles of great importance, to which I intend to advert very shortly. A mortgage over a ship is a right in security, and nothing else. It is not a title of ownership; and while there are many rights in security known to the law that are made effectual by assignation to the rents or to the produce of the subject which is given in security, a mortgage of a ship neither contains an assignment to the freight, nor implies any such assignment. Therefore it appears to me that the intimation of a mortgage, either to the party in possession of the ship, or to the party who is to receive the cargo and pay the freight, is an unmeaning ceremony, because it is not an intimation of an assignation to the freight, but only of a right in security over the ship itself. Accordingly, it is quite settled in law, that an intimation of a mortgage is not what is meant by the law, when it says that a mortgagee may make himself master of the ship by taking possession of it. The very statement of the nature of the right leads to the conclusion, that taking possession must be something different from a mere intimation of a right to anybody. The law distinctly says that the mortgagee must put himself in the position of owner, and the question is, whether the appellant has done that by intimation of his right, and of his desire to use that right in the way most beneficial to himself? The whole averments are contained in the sixth article of the appellant's condescendence, and in that article I find nothing else relied on but writing three letters to the master, and the transmission of a telegram to him, and the exhibition at Valencia to the master of a notarial copy of the appellant's mortgage; and these, neither singly nor in combination, amount to entering into possession of the ship, which I look upon as something that must be **[555]** proved to have been done, either by the mortgagee or by some one on his behalf. The remarkable circumstance in this case is, that this mortgagee had agents at Valencia, and instructions were given to them to represent him. He says so himself in one of the letters which he relies on, viz., that of 20th November, to Captain Ovenstone, where he says, "You will receive a telegraphic message through Messrs. White, Llano, and Morand, Valencia, as well as this letter, and these gentlemen are empowered to act for me." What, then, did these agents do in the way of taking possession of the ship? If the mortgagee had been present at the port where the cargo had to be delivered, or if the vessel had arrived at a home port where the mortgagee was, he would have had no difficulty in finding out how to take possession of the vessel; and if the mortgagee had gone on board and demanded that the vessel should be put under his control, nobody can doubt that that would have been taking possession; and what he could do personally, he could do through the instrumentality of others, and that is the ordinary way of taking possession of a ship. What, then, did the agents do? That is brought out in the evidence of the master. He says, "Messrs. White, Llano, and Morand acted as agents for Mr. Duncan at Valencia. Mr. White of that firm stated that they could not force me to act upon the documents, because the law of the country would not compel me to acknowledge notarial copies. Neither Messrs. White and Co., nor any person on their behalf, nor any person acting as agent for Mr. Duncan, took possession of the ship at Valencia. Neither Messrs.

White and Co., nor any person acting as agent for Mr. Duncan at Valencia, interfered in any way on my receiving the freight." That stands uncontradicted, and it is not proved that Messrs. White and Co. did anything whatever equivalent to the taking possession of the vessel by them for the mortgagee. The absence of that fact seems conclusive, because, if a mortgagee, with agents on the spot, cannot say that these agents took possession of the vessel, it seems almost hopeless to endeavour to substitute an equivalent for that. Yet here no more is relied on than something as an equivalent for that which the agents on the spot were in a position to do, and did not do. They may have been acting under a misapprehension of the legal rights of the mortgagee; but we cannot help that error in law. Our only inquiry is, did they in point of fact do what was necessary to put them in possession? and that they did not is perfectly clear. I am of opinion that the intimation of the right and of the desire to take possession under the mortgage are not, and have never been held to be, equivalent to the act of taking possession. Therefore I agree with all of your Lordships in holding the interlocutor of the Lord Ordinary well founded.

The Court adhered, and found the respondent entitled to additional expenses.

No. 86. **XXIII. Dunlop 555.** 16 Feb. 1861. 1st Div.—Lord Ardmillan.

Sir JOHN MELVILLE (Lord Provost of Edinburgh), Pursuer.

The LORD PROVOST and MAGISTRATES of EDINBURGH, Claimants.—*Macfarlane—Gifford.*

WILLIAM POLLOCK, S.S.C., Claimant.—*Sol.-Gen. Maitland—Mure—Pattison.*

JOHN KENNEDY, Jr., W.S., Common Agent.—*E. S. Gordon—Hector—A. R. Dick.*

Statute 1663, *cap.* 6—*Sale—Consignation—Superior and Vassal—Expense of making up Title—Composition.—Held* (*aff.* judgment of Lord Ardmillan), that in the sale of a burnt tenement under the statute 1663, cap. 6, the Magistrates and Town Council were entitled, before consignation, to deduct from the price the expenses incurred for their valuation and sale; that upon the balance of the price the arrears of feu-duty formed a preferable claim; and (*alt.* judgment of Lord Ardmillan) that in the circumstances of this case the expense of the purchaser's title, as well as his composition for entry, formed also a proper deduction from the price.

In 1800 the Magistrates of Edinburgh feued to David Sutherland an area of ground at the south end of Greenside Street, upon which a large double tenement was built. This was divided into a number of houses, **[556]** held and possessed separately by a number of individuals, to whom Sutherland had from time to time conveyed the same. In 1836 this tenement was destroyed by fire, and for twenty years thereafter the area remained waste and ruinous. On 23d January 1856 the Lord Provost, Magistrates, and Council for the City of Edinburgh, under authority of the Act of King Charles II. (1663), chap. 6, applied by petition to the Court "to grant warrant to and authorise the petitioners to cause, warn, and charge the said parties above named, and all others that have or pretend right to the property of the said lands and buildings, or any annualrents furth thereof, to cause build and repair in a decent way, within year and day, the said houses and buildings, or otherwise to sell the same to others, to be builded within the said space of year and day; with certification to them, if they fail, that the petitioners, or their successors in office, shall cause the said lands and tenements to be valued by certain persons to be chosen and sworn by them to that effect, and shall sell the same to any person that will buy them, and pay the price to the owners, if they be known, and if they be not known will consign the price in the hands of the Lord Provost, or one of the bailies, or the Dean of Guild of the city of Edinburgh, to be forthcoming to those who have interest thereto, all in terms of the said statute; and in the event of the persons so warned and charged failing to obey the said charge

after year and day shall have elapsed, to resume consideration hereof, to grant warrant to, authorise, and ordain the petitioners, or their successors in office, to cause the said lands and tenements to be valued by certain persons to be chosen and sworn by them to that effect, and to sell the same to any person that will buy them, and pay the price to the owners, if they be known, and if they be not known will consign the price in the hands of the Lord Provost, or one of the bailies, or the Dean of Guild of the city of Edinburgh, to be forthcoming to those who have interest thereto."

On 18th July 1857 warrant was granted in terms of the above prayer, and the site was thereafter sold to Mr. W. Pollock, S.S.C., for the sum of L.1010. In order to obviate the practical difficulty of giving to the purchaser regular and valid titles from all the several owners and proprietors, many of whom and their heirs had not been ascertained, the title-deeds of various of the subjects having been lost, and the greater part of the subjects being in non-entry, the following condition was inserted in the articles of roup:—"The exposers undertake, on payment of the price, to grant, and the purchaser shall become bound by subscribing his offer to accept, and to take from them, a charter of sale and novodamus, setting forth the circumstances under which the same is granted, without warrandice of any kind, by the exposers assigning the purchaser in and to all right and interest conferred on a purchaser by the foresaid statute, and taking the purchaser bound to implement and perform all the ordinary obligations of a vassal, and specially the whole conditions and declarations specified and contained in the rights and titles to the said subjects," &c.

A charter of sale and novodamus was granted to Mr. Pollock, in accordance with this condition. In the proceedings taken for the purpose of realising the value of the site, the Magistrates and Town Council incurred accounts to their law-agent to the extent of L.191, 9s. 5d. The expenses of the charter of sale and novodamus amounted to L.13, 10s. 8d., and the composition or entry-money L.43. Mr. Pollock objected to pay these sums, as truly forming in the circumstances a proper charge against the proprietors of the site and others interested; but he granted an obligation to pay them, if they were successfully objected to as a deduction from the price. Upon 9th February 1858, the day when Mr. Pollock paid the price, the Magistrates and Town Council repaid themselves all these several sums, without interest, and the balance of L.761, 8s. 3d. they deposited, in terms of the above statute and Act and warrant, in name of Mr. Melville, the **[557]** then Lord Provost. This sum now formed the fund *in medio* in this multiplepoinding, in which all having interest in the burnt tenement were called as defenders. Claims for James E. Newton and various other parties having been lodged, Mr. John Kennedy Jr., W.S., was on 5th January 1859 appointed common agent. The competition then lay between him and the Magistrates. Mr. Pollock was allowed to appear for his interest.

The Magistrates claimed to be ranked for L.414, 0s. 2d. of arrears of feu-duty, which they pleaded formed a preferable burden on the subjects.

The common agent objected that the full price of the subjects sold ought to have been consigned. He pleaded;—That no expenses were chargeable against the price, no mention having been made of expenses in the statute, or in the petition or warrant of Court for sale. 3. *Separatim.* Even supposing that certain payments and expenses could be deducted from the price, the claims in question having been and still being illiquid, and various items being objectionable, ought not to have been deducted from the price, but should have been stated as claims in the present process. 4. If any expenses are due, the accounts charged are subject to taxation and modification as between the present objectors and the Magistrates. 5. No composition was exigible, either *ex lege*, or under the articles and conditions of roup; and neither the composition charged, nor the fees of the city clerks for the expenses of the charter, are charges that can competently be made against the price of the subjects. 6. The Magistrates' claim for arrears of feu-duties can only receive effect under deduction of the sum of L.249, 1s. 1d., retained by them, or part thereof, with interest thereon. 7. The Magistrates must instruct what arrears are due by each feuar, so that the parties bearing the burden of payment of such arrears may, if they think proper, claim an assignation to such arrears, in order to enable them to recover the same from the party or parties actually owing arrears.

On 20th March 1860 the Lord Ordinary pronounced the following interlocutor:—"Finds, 1st, That the Lord Provost and Magistrates of Edinburgh are entitled to

deduct from the price of the subjects sold the amount of the expenses incurred by them in the proceedings for valuation and sale of the subjects under the statute 1663, chapter 6, taxed on the footing of their acting as *quasi* trustees or *negotiorum gestores* for the parties interested, and remits the accounts to the Auditor of Court to tax and report: Finds, 2d, That the Lord Provost and Magistrates of Edinburgh are entitled also to deduct from the said price such part of the expenses of the charter to the purchaser, Mr. Pollock, as may, in the opinion of the Auditor of Court, be the proportion which would have been chargeable against the sellers, if the sale had been made by them otherwise than under the statute, and remits that account to the Auditor of Court to tax, and also to report thereon, on the footing above explained: Finds, 3d, That the Lord Provost and Magistrates are not entitled to deduct from the price of the said subjects the amount of the composition exacted by them as superiors from the purchaser on granting to him a charter of novodamus and sale, and are not entitled to deduct that part of the expenses of the charter which does not fall within the preceding finding; and to that extent sustains the objection of the common agent; and reserves the question of expenses."[1]

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[1] "NOTE.—The subjects to which this action relates were destroyed by fire in 1836. The owners of the subjects were numerous. No steps were taken towards the rebuilding or the disposal of the property; and accordingly the subjects remained in a waste and ruinous state for nearly twenty years.

"In the beginning of 1856 proceedings were taken by the Lord Provost, Magistrates and Council, under the Act of Parliament 1663, c. 6, for sale of the subjects, with the view to pay or distribute the price to the owners, according to their respective interests.

"A considerable price, L.1010, was obtained by a sale to Mr. Pollock, and that sum, under such deduction as may be just, falls to be distributed.

"The questions at present raised relate to the amount of the fund *in medio*, or, in other words, to the deductions to be made from the price.

"It is true that the statute is to some extent intended and calculated to promote the public welfare,—the municipal interests of the city; and it is also true that the statute does not provide for the expense of the procedure under its enactments. But the Lord Ordinary is of opinion that the proceedings under the Act are for the private benefit of the owners of the ruinous subjects, as well as for the public benefit of the city. That the Act facilitates and enables a sale of subjects not otherwise disposable, and therefore practically without available value, and in regard to which the owners would not, or could not take any steps. And that here the effects of the statutory procedure taken by the Magistrates has been to secure a sale, which could not otherwise have been accomplished, and to create a fund not otherwise attainable, for the benefit of the owners.

"The cost of a process of division and sale for the benefit of joint owners must fall on those who get the benefit and receive the price. The cost of creating a fund by procedure necessary to its creation must fall on those who get the fund, and who are thus the parties primarily interested. The indirect benefit which may accrue to the city does not affect this principle. To the city the Act gives, not so much a benefit as a remedy against injury. In proceeding under the Act, the Magistrates are seeking rather to escape from the evils of the continued ruinous state of the subjects, than to obtain a positive benefit. But to the owners, the Act affords the means, through the interposition of the Magistrates, of obtaining a positive benefit.

"The Lord Ordinary therefore thinks that the fund *in medio* must be the net price, or the price under deduction of the taxed expenses, on the footing of the Magistrates being *negotiorum gestores* or *quasi* trustees for all interested.

"The expense of the charter to Mr. Pollock must, to some extent, follow the expenses of sale, because the Magistrates, as representing or acting for the owners of the subjects, and apart from their interest as superiors, must have incurred expenses properly falling on the sellers. But in regard to the composition which the superiors exact from Mr. Pollock, and in regard to that part of the expenses of the charter which would not in an ordinary case fall on the sellers, these do not form proper deductions from the price, and to that extent the Lord Ordinary has sustained the objection of the common agent, and disallowed the deductions."

[558] The Lord Provost, with consent of Mr. Pollock for his interest, reclaimed, and prayed the Court to alter the interlocutor, "in so far as it finds that the Lord Provost and Magistrates are not entitled to deduct the composition for an entry, and in so far as it sustains the objection of the common agent thereto; and to find that the expense of the charter of novodamus, including the composition due and paid to the superiors, forms a proper deduction from the fund *in medio*, and to find the objectors liable in expenses," &c.

The common agent also reclaimed, and prayed the Court to alter the interlocutor, "in so far as the same is adverse to the reclaimer, the common agent, and the claimants whom he represents; and to disallow the claim of the Lord Provost and Magistrates of Edinburgh to the expenses deducted by them from the price of the subjects sold under the statute 1663, c. 6, and to find that they are not entitled to deduct any portion of these expenses from said price; and to find the said Lord Provost and Magistrates liable in expenses," &c.

The Court pronounced the following interlocutor:—"Recal the Lord Ordinary's interlocutor, and, 1*st*, Find that the Lord Provost and Magistrates were entitled to deduct from the price obtained for the subjects the expenses incurred by them in the statutory proceedings for their valuation and sale; 2*d*, In the particular circumstances of the case, and especially considering that no objection has been taken on either side to the form and mode in **[559]** which the title delivered to the purchaser had been made up, and that in no other form or mode could said title have been made up so economically on the whole for all concerned, find that the Lord Provost and Magistrates were entitled further to deduct out of the said price the expenses of the charter of novodamus and sale granted by them, as well as the account of composition in respect of the purchaser's entry—the whole expenses under both of the above findings being first taxed by the Auditor of Court; and remit the several accounts of expenses to the Auditor for his taxation and report accordingly: 3*d*, Find that, whatever the result of said taxation, the fund *in medio* cannot, as in a question with the raiser, be to any extent enlarged beyond the specific amount of L.761, 8s. 3d., the sum which was actually deposited in his hands on 9th February 1858, with such interest as may since have accrued thereon: But of consent find that, as in a question between the competing parties, and in case of too large deductions having been made in striking the amount actually deposited with the raiser, the difference may in this competition still be equalised between the said parties in adjusting and settling the several amounts to which they shall eventually fall to be preferred: Therefore, 4*th*, Rank and prefer the claimants, the said Lord Provost and Magistrates, *primo loco*, in terms of their claim, to the sum of L.414, 0s. 2d. of arrears of feu-duty, under deduction of such expenses (if any) which may turn out on taxation, as aforesaid, to have been previously overdeducted out of the price in fixing the amount of the fund as actually deposited in the hands of the raiser, and decern: Prefer, *secundo loco*, the other claimants according to their respective interests and shares therein, to the whole remainder of the fund *in medio*, as the same may be eventually enlarged by the correction and deduction (if any) to be made as above, from the claim of the Lord Provost and Magistrates, and decern: Appoint a state of claims as thus corrected and remodelled to be prepared and lodged *hinc inde*, and find the raiser entitled to his expenses; and also find the Lord Provost and Magistrates, as well as the purchaser, Mr. Pollock, entitled to their expenses in these proceedings, so far as yet gone, and that out of the first head of the fund: Remit the several accounts of expenses to the Auditor to tax and report; and finally remit the cause back to the Lord Ordinary to be further proceeded in and disposed of as accords, and to decern for the taxed amount of expenses hereby found due, and appoint the reports of the Auditor to be given to the Lord Ordinary."

[Cf. Burgh Police Act, 1892, section 201.]

No. 88. **XXIII. Dunlop 561.** 16 Feb. 1861.[1] 1st. Div.—Lord Kinloch.

JOHN INGLIS, Pursuer.—*Macfarlane—A. B. Shand—Anderson.*

T. DUNLOP DOUGLAS, JAMES BAIRD, GEORGE BURNS, JAMES DUNLOP, THOMAS M'CALL, THOMAS DOUGLAS GRAHAM, and THOMAS GRAY BUCHANAN, Defenders.—*Lord-Adv. Moncreiff—Sol.-Gen. Maitland—Patton—E. S. Gordon—Young—Horn—Hector—Fraser—Millar—Gifford—Clark—Lee.*

Bank—Partnership—Joint Stock Company—Relevancy—Averment—Fraud—Process—Issues—Absolvitor.—A shareholder of a joint stock banking company brought an action of damages against the directors and the deputy-governor, who had a seat at the board of directors, on the allegation that he had been induced to purchase shares by the false representations contained in the annual reports submitted by the directors to the shareholders, to the effect that the bank was prosperous, while it was the reverse, and that the representations were made fraudulently, and published for the purpose of misleading the pursuer and the public generally;—Ayerments *held* relevant against the directors who were present at the meetings at which the documents were prepared and approved of, and who signed the reports and the docquets at the ends of the balance sheets, and also against the deputy-governor, although he did not sign the documents; but not relevant against two directors who did not sign the documents, and were not present at the meetings, there being no special statement to connect them with the alleged fraudulent preparation of the documents, and their promulgation.

Held, with regard to these two defenders, that—the pursuer having had an opportunity of correcting a defective averment in a previous record in regard to all the defenders, and having now failed to set forth that which would create liability as regards these two—they were entitled to absolvitor, unqualified by the words "from the action as laid."

Issues adjusted to try the question as regards the other defenders.

Process—Jury Trial.—Motion by one of the defenders to have his case tried separately from the others, refused.

Appeal—Process.—The Court will not grant a certificate as to whether they agreed or differed in opinion in pronouncing an interlocutor on the mere motion of one of the parties, with a view to an appeal.

See *ante*, vol. xxii., p. 505.

This case now came before the Court on the new record, prepared in obedience to the interlocutor of 20th March 1860. In Articles 1 and 2 the pursuer set forth shortly the date at which the Western Bank was established, the amount of capital, and the purport of sects. 2, 17, 20, 25, 33, and 34 of the contract of copartnery, (quoted *ante*, vol. xxii., p. 451, *et seq.*) Art. 3, that the bank stopped payment on 9th November 1857, with a deficit of L.1,500,000, and was now in course of being wound up under the provisions of the Joint Stock Companies Act of 1857. In Art. 4, he stated that the defenders were ordinary directors of the bank from 27th June 1855 to 25th June 1857, and after stating the dates at which each was elected a director, he proceeded as follows:—"The defender Thomas Dunlop Douglas was, on the 6th day of June 1837, appointed by the directors to the office of deputy-governor of the company, with a seat at the board of directors, which appointment he accepted, and thereafter, down to the stoppage of the bank, he attended the meetings of the ordinary directors of the company. He took part along with them in superintending and managing the affairs of the bank, drew his share of the allowance payable and paid to them for their services, and in all respects acted and conducted himself as an ordinary director of the company. He took upon himself all the duties and responsibilities of an ordinary director, and was by the shareholders, and by the public generally, regarded as such. The reports

[1] For convenience of reference, this case, which was before the Court on the 18th and 25th January, 7th February, and 13th March, is reported along with the case of Cullen *v.* Johnston, finally advised of this date.

of the ordinary directors, after referred to, made up and submitted to the annual general meetings of [562] shareholders during his tenure of office, and more particularly in the years 1856 and 1857, were made up and submitted to the said meetings by him, or under his direction, and with his full sanction, knowledge, and authority."

In Mr. Douglas's answer to this statement, it was "denied that the present defender Mr. Dunlop Douglas was an ordinary director of the bank during either of these years, or at any period subsequent to the annual general meeting of the company on 14th June 1837, when his election to the office of deputy-governor of the bank by the ordinary directors (on 6th June 1837) was confirmed by the company. Admitted that, subsequent to 14th June 1837, the present defender frequently attended the board meetings of the ordinary directors, subject to the qualification that he did so only in his capacity of deputy-governor, and on the same footing as did occasionally some of the extraordinary directors of the company, but that he never, either at these meetings or otherwise, voted, or in any other way acted, or was recognised as entitled to act, as an ordinary director and member of the committee of management of the company. Denied that the reports here referred were made up and submitted by the defender, or under his direction, or with his sanction, knowledge, and authority."

(Cond. Art. 5) "A written report was adopted, approved of, and directed to be made, and was made and submitted by the defenders to the shareholders of the bank at their annual general meeting, held at Glasgow on the 25th of June 1856. That report represented that the affairs of the company were in a sound, satisfactory, and prosperous condition; that not only was the capital of the company intact, but that large sums belonging to the company, over and above the capital, stood at the credit of the rest-fund of the bank; and that large profits, available for a dividend, and admitting of a large sum being added to the said rest-fund, had been realised during the preceding year. Among others, the said report contained representations to the effect 'that the progress of the bank has been most satisfactory, and the results of its business eminently successful,' and that 'the net profits of the past year, after payment of all expenses and providing for bad and doubtful debts, are L.166,110, 15s. 10d., out of which the directors propose to pay a dividend of 9 per cent per annum. This dividend on the paid-up capital of one million and a half requires L.135,000, leaving a surplus of L.31,110, 15s. 10d. to be carried to the rest, which at last annual balance was L.184,840, 1s. 11d., and will now therefore stand at L.215,950, 17s. 9d.' The said report having been approved of by the said annual general meeting of shareholders, held in June 1856, the dividend proposed to be paid by the defenders was ordered to be paid, and the amount thereof was afterwards paid to the shareholders accordingly."

In article 6 a similar statement was made in regard to the report submitted to the shareholders at their annual general meeting of 24th June 1857. (Cond. 7) "The said defenders, by whom the foresaid reports were respectively adopted, approved of, and made and submitted to the shareholders of the bank as aforesaid, meant and intended that the same should become known to the public, and they knew that they would become known to the public, and especially to stockbrokers and others in the practice of dealing in the sale and purchase of shares in joint-stock companies; and that transactions in the sale and purchase of shares would take place on the faith of said reports, and of their being true and accurate. A summary or abstract of the said report for the year 1856 was published by the defenders, by whom it was made and submitted as aforesaid, or with their knowledge and approbation, in the Glasgow Courier newspaper on or about 26th June 1856; and a summary or abstract of the said report for the year 1857 was published by the said defenders, by whom it was made and submitted as aforesaid, or with their knowledge and approbation, in the said Glasgow Courier newspaper on or about 25th June 1857. A summary or abstract [563] of the said reports respectively was also published, on or about the said respective dates, in the Glasgow Herald and other newspapers in Glasgow, as well as in newspapers in other parts of Scotland; and by means thereof and otherwise, the import of the said reports, and the representations therein of and regarding the bank's affairs for the said years, and in particular the representations therein to the effect that the affairs of the bank were in a sound, satisfactory, and prosperous condition,—that its capital was intact,—that a large amount of profits had been made by the company,—that a dividend of 9 per cent out of the profits reported to have been so made had been ordered to be

paid, in each of the said years, on the capital stock of the company, and that a large surplus of such profits remained, after deduction of the amount required for payment of the said dividends, and fell to be added to the rest-fund of the bank,—became known to the pursuer and the public generally." (Cond. Art. 8) "The pursuer, in reliance on the truth and accuracy of the representations contained in the said reports, was induced to make purchases of shares in the said company as follows." . . . "At the time of making the said purchases the pursuer had no means of becoming aware of, or obtaining any knowledge in regard to the circumstances and position of the bank and its affairs, except through and by means of the said reports, and the representations therein, coming to his knowledge as aforesaid." (Cond. Art. 9) "The said reports were false, and grossly misrepresented the position of the bank and the state of its affairs. It was not true that the affairs of the bank, at the periods referred to in the said reports, and at the times when they were respectively made up and submitted as aforesaid, were in a sound, satisfactory, and prosperous condition, or that there were profits available for the payment of large dividends, as was represented by the said defenders, as before mentioned, in the said reports. On the contrary, the affairs of the bank were then in a state of great difficulty and embarrassment; there were no profits available for the payment of dividends, or out of which they were or could be paid; the capital of the company was wholly or for the most part lost; and instead of the dividends proposed by the said defenders to be paid, and declared and ordered to be paid as aforesaid, being paid out of profits available for that purpose, they were paid from monies which ought not to have been appropriated to the payment thereof." (Cond. Art. 10) "The report approved of, and made and submitted by the defenders to the shareholders of the bank at their annual general meeting in June 1856 as aforesaid, was founded upon a statement or abstract which they had, in or about the month of May of the same year, made up, or caused to be made up, bearing to give a view of the bank's affairs. The said statement or abstract professed, on the one side, to set forth the assets belonging to the bank, and, on the other side, to state its liabilities. Among the said liabilities were included the whole capital of the bank, amounting to L.1,500,000; the guarantee fund of the bank, amounting to L.117,110, 15s. 10d.; the rest-fund, amounting to L.215,000, and L.126,000 as the amount required to pay a dividend of 9 per cent on the said capital to the shareholders of the bank. The said assets of the bank were, in the said statement or abstract, represented as sufficient to meet the whole liabilities of the bank, including the said capital and other sums above mentioned, and were stated to include the following sums, viz.:—

"Credit Accounts, ...	L.1,844,096	2	9
"Bills protested, ...	123,116	8	5
"Sundry debtors, ...	380,498	5	8
"Balances due by the branches, ...	481,874	18	5

"To a large extent the said sums were in reality not assets, but were known to the defenders, at the time when the said statement or abstract was made up, or at and prior to the said annual general meeting of shareholders held in June 1856, to consist of bad and irrecoverable debts. In particular," &c.

[564] In Mr. Douglas's answer to this statement it was said to contain matter not embraced in the summons and original condescendence, with which it was averred to be inconsistent.

In condescendence 11 a similar statement was made in regard to the report of 1857. (Cond. Art. 12) "The said defenders, at the times respectively when the said reports were adopted, approved of, and made and submitted by them to the shareholders of the bank at their annual general meetings in June 1856 and June 1857, knew that the same were false; that they misrepresented the true position and state of the bank and its affairs; and that they stated as assets of the bank large sums which were not so in reality, but which were bad and irrecoverable debts, as above set out. Notwithstanding of this, the said defenders falsely, fraudulently, and in *mala fide* adopted and approved of, and made and submitted to the shareholders the said reports, and made known, and published the same, all as before stated—for the purpose of concealing the true condition and the actual state of the bank's position and affairs; of creating a false impression in regard thereto; of giving to the shares of the company a fictitious value in the market; of misleading and deceiving the pursuer and the

public generally, and of inducing them to believe that the said company was in a sound financial condition, and in a satisfactory and prosperous state—that large profits had been made by the company which were available for the payment of large dividends to the shareholders—and that the shares of the company were of great value and a safe investment. In making the foresaid false and fraudulent representations in regard to the bank's position, and the state of its affairs, the said defenders had a deep personal interest, all of them being proprietors of shares in the concern." (Cond. Art. 13) "By reason of the foresaid false and fraudulent misrepresentations, the shares of the company generally, as well as those belonging to the defenders, as individuals, acquired a fictitious value, and the price thereof in the market was not only kept up but greatly enhanced. The pursuer was deceived and misled by the said false and fraudulent representations, and in reliance thereon was induced as aforesaid to make the purchases of shares in the said company above mentioned. If the true position of the bank, and the state of its affairs, had been disclosed in the said reports, the shares of the company would have been worthless, or greatly depreciated in value; and if the said defenders had not falsely and fraudulently misrepresented the said position and state of affairs of the bank, the pursuer would not have been induced to purchase the foresaid shares." Condescendence 14 narrated the resolution of the meeting of shareholders, held on 30th December 1857, to wind up the affairs of the company, the appointment of liquidators, and the necessity of making calls. The price paid by the pursuer for his shares, and the amount of calls paid by him, with interest, was stated to be L.7,972, 5s. 11d. Condescendence 15 stated the pursuer's whole loss on price, calls, and interest, on these and other liabilities resulting from the purchase, at L.12,000.

The defender Baird throughout denied all knowledge of and responsibility for the reports and abstracts founded on, and in his separate defences stated that the "statement or abstract" referred to in condescendence 10 "was prepared by Mr. David Simpson Hamilton, the principal accountant of the bank, and was laid before a meeting of directors on 24th June 1856, being the day previous to the general meeting. The present defender was not present at the said meeting of directors on 24th June 1856. The sederunt of the meeting bears that the following persons were present, viz.—Messrs. Thomas Dunlop Douglas, dep.-gov.; Thomas Gray Buchanan; Thomas M'Call; James Dunlop; George Burns; John Taylor, manager. No other person was present."

The pursuer's answer was "not admitted."

[565] Baird further stated that the report referred to in condescendence 5 "was drawn up by Mr. Taylor, the manager of the bank, was submitted to and approved of by the directors at their meeting of 24th June 1856, already referred to. It is subscribed by the four directors who were present at that meeting, and by none others. The defender was not present at the said meeting of 24th June, and neither was he present at the general meeting on the following day. Neither the said report, nor any draft or copy thereof, was ever submitted to, seen, or approved of by him."

The pursuer's answer was "not admitted."

Baird averred also,—"The last meeting of the board of directors which the defender attended was that which was held on 2d January 1856, and subsequent to that date he never acted as a director in any way whatever. From January till July 1856, he resided generally in London, being a member of Parliament." To which the pursuer answered,—"Denied that the defender did not act as a director after 2d January 1856. *Quoad ultra* not admitted."

The pursuer pleaded that, having been induced to purchase the shares in question, in consequence of the false and fraudulent representations of the defenders, as condescended on, he was entitled to decree against them as concluded for.

The defenders pleaded the irrelevancy of the pursuer's statements.

On 18th January 1861 the case was called.

LORD PRESIDENT.—We have now a new record in this case; and as it now stands, the aspect of the case is somewhat limited from what it was when it first came into Court. Some parties are out of the case now, and certain conclusions are out of the case. The declaratory conclusions are out of the case, and there is a minute[1] also

[1] See vol. xxii. p. 508, and p. 520.

restricting the action in a certain sense. That minute is to the effect that the action is not maintained as founded upon violation or neglect of duty, apart from fraud. The case therefore now stands upon fraud, and the fraud is said to consist in false and fraudulent representations as to the state of the company's affairs, whereby the pursuer was induced to purchase certain shares, and has in consequence suffered loss and damage. These false and fraudulent representations as to the condition of the company are said to have been contained in a report by the directors to the shareholders, made and published in June 1856, and a certain relative abstract and balance-sheet giving a false and fraudulent view of the company's affairs, and also in a similar report, abstract, and balance-sheet made and published in 1857. It is through the instrumentality of these documents that the fraudulent representation is stated to have been made. These documents are referred to in the record. They are part of the pursuer's case, and, in fact, they are the grounds of the action. The record states also in what respect the reports, abstracts, and relative balance-sheets were false, and were calculated to deceive. The original record in the case was wanting in fulness of statement and specification on that point. I am inclined to think that the defect in that respect has now been removed by the additional information that is given.

It is stated that in the additional information which is given,—particularly in condescendence, article 10, there is a variation in some of the items, and that the sums are now somewhat larger in one or two instances,—that there is an exaggeration compared with the original and defective statement on the record, and that the pursuer is not entitled to introduce those additional matters which were not in the original summons. I am not of that opinion. The defenders are not called upon to pay over these sums. That is not what is meant. It is merely an explanation of the kind of mis-statement that is alleged, showing that there was mis-statement to a very large extent, and the more it is corrected and put right here, the better I think for the defenders. It is not at all for the sums there stated that the action is laid.

The parties called as defenders in this action are the deputy-governor and the ordinary directors for the time. All of these parties are said to have been parti- **[566]** -cipant in framing and publishing those false reports, abstracts, and balance-sheets. As regards four of the defenders, viz., George Burns, James Dunlop, Thomas M'Call, and Thomas Gray Buchanan, there does not appear to be any peculiarity in the case of one of these as distinguished from another, upon the statements on record, in the averments of the pursuer, or in the averments of the defenders. They were all four ordinary directors of the company; they are stated to have been, and they appear from the documents that are referred to in the record, and which are to be assumed as part of the statement, to have been present at the meetings at which the documents were prepared and approved of, and they sign the reports, and the docquets at the abstract balance-sheets. They attended the general meetings at which the contents of these documents were given forth, and in these respects the four gentlemen are all in the same position. Their presence at these meetings, and their signing the documents, is not denied by one, and admitted by another. I think there is not a denial of it by any one of them; and we have prints of the minutes and documents here which explain the nature of the averments in regard to the presence of these parties and their participation.

It is said that three other parties who were called are in positions different from these four gentlemen. These three are Mr. Thomas Dunlop Douglas, who was the deputy-governor of the bank, Mr. James Baird, who was an ordinary director in 1856, and Mr. Thomas Douglas Graham, who was an ordinary director in both 1856 and 1857. It is stated on behalf of these parties that whatever may be the position of the other defenders, the ordinary directors, they have special grounds on which they are entitled to resist this action, and to contend that there is no issuable matter as against them on this record. The specialties in the cases of these gentlemen are not all the same.

Mr. Dunlop Douglas was deputy-governor of the bank, and he denies that he had anything to do with the preparation of these documents, or the publication of them. He says that that was a duty by the contract devolved upon the ordinary directors of the company, of whom he was not one; and he denies that he had any share in the preparing of them. It appears from the statements made and admitted, and from the terms of the contract, that the deputy-governor had what is called a seat at the board

of directors. I presume that means something else than room to sit upon. It means not merely that Mr. Thomas Dunlop Douglas was there for ornament, but probably means, or is intended in this record to represent that he was there with a seat at the board, thereby meaning that he was entitled to take part in the deliberations of the board. What part he was entitled to take, and what part he did take, is a matter on which the parties are not agreed. It is not said on the part of Mr. Douglas that he did not avail himself of that privilege of the seat at the board, or that he was not present upon the occasion of the preparing of these documents. He does not say that he was not present at the general meetings at which they were promulgated. So far as we see from the documents which are here, it would appear that he was present in 1856; he does not say that he was not also present in 1857. I would infer from the documents as presented to us that he was not present in 1857, but he does not choose to say so. However, he was present in 1856, when these documents were prepared. It does not appear that he signed them. I can conceive a case against a party present at these deliberations, entitled to be present and to take part in these deliberations, which would render him responsible for the contents of these documents when published, especially if he was present, and concurred in the publishing of them. Now, that is the position of matters in regard to Mr. Dunlop Douglas, as alleged.

Then, in regard to Mr. Baird, who is the next in order, he was an ordinary director in 1856, and there is the same general statement in regard to him as in regard to the others, that he was a party to all these preparations and publications, &c. It is not stated upon the record in what particular manner he connected himself with these documents which contain the misrepresentations, and the publication of which is said to have induced the purchase of the shares. We see from the documents that he did not sign them, and he avers that he did not sign them. It is also stated on his part that he was not present at any of these meetings, and that is not denied. The answer is "not admitted;" but it is not denied that he was absent, as averred by him. Now, from that I infer two things; in the first **[567]** place, that it is not averred, or intended to be averred, that he signed them, and that the pursuers will not aver that; in the second place, that they will not aver that he was present, for they will not deny that he was absent. Now then, if he neither signed nor was present, what was the participation that he had in the framing of these documents? I find nothing in this record to explain that. It is something different from either the one of these things or the other that is to make him responsible for the contents of these papers; but what that something is we are not told, and that in a case in which the action is laid entirely upon fraud, and where each party must answer for his own fraud. What is the fraud? It is not that he was there; it is not that he signed the documents. What then is it? There is, I think, a total want of statement here to make any case of issuable matter against Mr. Baird.

Then as to Mr. Douglas Graham,—He was a director in 1856 and 1857. I observe that Mr. Baird was not a director in 1857, and he has nothing to do with that year; he was a director in 1856. Mr. Douglas Graham was a director in 1856 and 1857, but it is not averred, and it does not appear from the documents that he signed these alleged mis-statements. Mr. Douglas Graham denies that he was present at the meetings, and that is not contradicted. What then is the part which he took in this matter? What is the fraud that he committed? He is called upon to answer for his fraud—for the fraudulent misrepresentations contained in certain documents. He did not sign the documents; he was not present at the preparation of the documents, or at the promulgating of them. What then is the connection that is supposed to exist between him and these documents? I do not find any statement in this record that would warrant us in giving an issue against Mr. Douglas Graham. I do not know whether a case might not be made out in some way or other, or stated against parties who were even absent from the meetings, but it would require to be a very special case, and a party is entitled to know what is the alleged fraudulent acting on his part that he is called upon to answer for. That does not appear with reference to either of these two gentlemen.

I think, therefore, as regards Mr. Baird and Mr. Graham, there is here no issuable matter. I am not prepared to say the same thing as to Mr. Thomas Dunlop Douglas, or as to the other four directors, who are in the position I have mentioned. I am not prepared to say that there is no issuable matter against them, but I would like to see the

issue that is proposed to be taken as against them. The issue that is before us now is probably not the issue that the pursuers will ultimately stand upon, and we must have the issue that they propose, whatever it is, put into shape. On the whole, then, I cannot say that there is not issuable matter against the four directors and Mr. Thomas Dunlop Douglas, but I am satisfied that on this record there is not issuable matter against the other two defenders.

LORD IVORY.—So far as your Lordship's judgment proposes to find issuable matter, I entirely agree with you. I confess that I should not have disagreed if your judgment had gone a little farther, for it seems to me that upon the general statements in this record, it is not a record which the Court ought to be very much disposed to withhold from a jury. However, as I only entertain doubts in regard to this matter, and understanding that the rest of your Lordships are quite agreed as to the course which should be followed, I do not propose to dissent.

LORD CURRIEHILL.—I was prepared to have entered into this matter fully, but your Lordship has so entirely anticipated what I had to say, that I do not detain you by any further observations. I entirely concur.

LORD DEAS.—I had an observation or two to make on this case, but I am satisfied on hearing what your Lordship in the chair has proposed, that it will be better to reserve it till we see what the precise issue proposed is. If there is anything to be said, that will be a much more proper time to say it than the present. I quite agree with your Lordship as to the parties against whom there should be found to be no issuable matter here, and about seeing the issue in regard to the others.

The case was continued; and being again put to the roll, the defenders, Messrs. Baird and Graham, moved for absolvitor, with expenses, no special case having been made out against them.[1]

[568] *Replied*,—This is not a stronger case than that of Gillespie *v.* Russell,[2] where the defenders were only found entitled to absolvitor "from the action as laid."

LORD PRESIDENT.—I think the interlocutor should be one of absolvitor. I am pretty confident in my recollection that it was owing to a kind of alternative statement that the middle Torbanehill case was turned out of Court. Though I have not my papers here, I have a sort of *memoria technica* of the marking on my paper of the very passage that was the turning point of the case in the record. The view which I take of the point in this case as regards Mr. Baird and Mr. Graham is this: The action is laid on fraud, we examined the record and analysed it, and we came to this conclusion, that, in regard to them, there were not in this record such statements of fraud as would support the conclusions of the action, and that there was consequently no issuable matter against them. The record which was made up against them in the first instance was not satisfactory in point of specification. The second record was made more specific, and it was upon the consideration of that second record that we came to the conclusion that the averments made in regard to these two gentlemen were not averments of fraud, such as could sustain the conclusions of the action. It amounted to this, not that there was ambiguity or alternative statement, as in the Torbanehill case, but that the substance of the statements as set forth on the record was not such as would sustain the conclusions of the action. Now, then, if that be so, is the interlocutor to be pronounced an interlocutor of absolvitor, yea or nay? Is it a rule that, in cases which are designed for trial, in which an issue has been attempted to be extracted, and where the Court is of opinion that there are no averments to sustain the conclusions or to warrant any issue—is it a rule that in such cases there shall be no absolvitor of the party, but merely an interlocutor which will allow a fresh action to be brought? Is it necessary, in order to entitle a party to absolvitor, that he shall have a trial, when the pursuer will not state anything against him which warrants a trial? I cannot think that there is any rule of that kind. I think that, when a party has had an opportunity—a full opportunity—of stating his case, and of correcting a case that was imperfect (which he has had here, equally as if we had, as in the Torbanehill case, dismissed the action as laid, and he had brought a new one), and has in substance failed to set forth that which creates the liability that he asks, I think that in such a

[1] Finnie *v.* Logie, 18th May 1859, *ante*, vol. xxi., p. 825.
[2] Gillespie *v.* Russell, 28th Feb. 1856, *ante*, vol. xviii. p. 677.

case the defender is entitled to absolvitor. We do that every day in cases where we do not allow an issue, when we find that there is not a statement which will support the demand made at first. We grant absolvitor *simpliciter* without a trial. I can fancy that, in a case like the Torbanehill case—a very peculiar case—where there was merely a defect in the pleading, and we did not allow the party to correct the record, but phrased our interlocutor so as not to preclude him from bringing another action, that, in again considering the new case, the Court should hold that there was not *res judicata*. That is not the case before us here. This is a case where the party has made his full statement; he has alleged fraud, but he has not stated in what that fraud consists, so as to make it a matter in which issues can be granted at all. I confess I have no doubt that the proper judgment in such a case is a judgment of absolvitor.

LORD IVORY.—I confess I should have liked to look back on the precedents to which we have been referred, and to the grounds on which we went in the former case, for my memory does not entirely serve me as to any precise deduction from what has taken place in former cases at such a distance of time. The judgment in the Torbanehill case is to be looked upon as rather occurring under exceptional circumstances. There were great difficulties in reading the summons; there were alternatives in it, and, especially, there were great defects in regard to the element of knowledge, which was thought to be excluded; and I remember well the difficulty that the Court had in framing their interlocutor so as to exclude a general inference of *res judicata* upon the whole matter concluded for.

It is a familiar principle in process that a pursuer may have as many actions as he has separate *media concludendi;* and, if I recollect, one of the puzzles in the Torbanehill case was, whether the summons, which was sent out of Court under **[569]** absolvitor as laid, was so laid as to embrace every *medium concludendi*. Some discussion took place upon this, but the Court came to think that the safest course was to adopt a form which they found warrant for in Lord Stair, and to do that which would do perfect justice to the parties in the individual case, and leave all the rest open to be discussed if another form of action was tried—whether it was an action on a different *medium concludendi*, or whether it was so substantially on the same *media concludendi*, as to raise the plea of *res judicata*. And it was in that way that the Court came to think, that in place of granting general absolvitor, which would have created an equal ground for the plea of *res judicata*, they would make a precise application of their judgment to the particular case which they meant to deal with, and only assoilzie from the conclusions as laid in that particular case. When the other action was brought, the plea of *res judicata* was accordingly raised, and there was a very elaborate and able argument whether it was not a case in which the plea of *res judicata* applied; but the Court came then to hold that it was not a case in which *res judicata* either had been pronounced or was intended to be pronounced, and that the point had been saved by the words which had been employed, inasmuch as the new case was substantially upon a distinct and separate *medium concludendi*. If this case had been clearly a case of that sort, I think the same course should have been followed, and I am not sure that any great harm would be done to the defenders if the same course were followed; because, if they got a judgment assoilzieing from the case as laid, the question would come up again as it came up again in the Torbanehill case, and when the pursuer brought a new action on what he maintained to be a separate *medium concludendi*, it would be open to the defender to plead *res judicata* on the ground that there was no substantial difference in the *media concludendi;* and this without any danger of doing injustice to either party. I confess I am not moved by the statement that these are cases where there has been no trial of the case on its merits. It is hardly just so to represent it, because the shape in which this case is here, if we are to grant a general absolvitor, is this, that the party has brought his case upon the only statement which he has to make. The Court do not try the case which he so presents, because they do not think there is that within it which affords elements for a trial. But they do this: taking for granted that every word which has been said by the pursuer is true, they hold that he has no case against the defender, and so they assoilzie him. And it would be a perfectly good judgment if there was no reason to suppose that the case would ever be tried again in another shape. Now, competent and omitted might apply in circumstances such as these, if it was a

case claiming substantially the same results from substantially the same facts, though certain individual circumstances had not been set forth before. That is not what is meant by the expression *media concludendi;* and, accordingly, it would not matter in which form the interlocutor were to be pronounced here, unless the new case were to be brought forward in such a shape as substantially to rear a different *medium concludendi*. Now, it is a little difficult to see how the matter might come to be different between the two shapes. If the action is brought again on a new *medium concludendi* —if it is not an action like the other, having the same conclusion on the same precise grounds—is there any reason that the general principle, that the pursuer has as many different actions as he has different *media concludendi*, would not apply under any shape of interlocutor, however general it was made? And is there much more gain in the other case, except that you have the doubt of the Court more with the pursuer when you say, Assoilzie as laid? because, after all, it comes to this, that the new case must be substantially differenced from the old one before it can be entertained. If we take for granted, as I rather think there are elements here for doing, that the parties have exhausted their case, that they have no other case of fraud but what they have stated, that there are no other misrepresentations than those they have averred, that there are no other facts to be brought forward than those substantially included in this record, they are not to be allowed to make a more perfect representation of these facts, or to produce them in a new shape. They must make such representation of them as shall wholly distinguish the one case from the other; and I rather think, after all the opportunities which they have had, we are entitled to take for granted that they cannot do so, and do not mean to do so, and they do not tell us now in any intelligible words in what shape they could do so. If the case has failed in the view which your Lordships take—I was rather inclined to a different **[570]** opinion; the case has taken this turn, that, assuming everything the pursuers have said in this action—all their averments, both particular, which I think are defective, and general, which I think are not so defective; but assuming all their statements, particular and general, to be admitted, there would still be no action—then I think there is no probability that there will ever be a case with new *media concludendi* in it. On the whole matter, although I see great difficulty in laying down a general rule, and am not inclined to do so, I think we should grant the general judgment of absolvitor.

LORD CURRIEHILL.—I am of the same opinion. I think the rule followed in the administration of justice in this country is this, that, if a party do not make a statement which the Court can hold to be relevant, the defender is entitled to absolvitor. I think the Torbanehill case was eminently an exception from the general rule, and that no party can insist on it being followed as a precedent, unless he can bring himself within the exception. I do not refer to the opinions of the rest of the Court, but I remember very well that my own opinion went on this, that the facts as alleged did not import fraud. The action alleged fraudulent concealment and fraudulent representation, and I held that, assuming every word stated in the summons to be true, it did not amount to fraudulent concealment or to fraudulent representation, and that therefore the party was to be assoilzied. In that case the pursuers stated that they would amend their summons, so as to get rid of the objection, and accordingly I see the report bears that both parties reclaimed. In the course of the discussion the pursuers moved for leave to state more distinctly the purport of their averments on the record, but the Court were of opinion that the averments were so utterly insufficient that they did not grant it. In the present case the very reverse took place. In the original record there was such ambiguity and indistinctness in the statements that the Court gave the party that opportunity; and the record which we are now dealing with is one that was given in for the express purpose of obviating the ambiguity and indistinctness in the original record. And therefore I say, that being the case, this action does not fall within the exception. In the Torbanehill case the party brought a new action, stating distinctly the nature of the fraud and concealment, with a new set of facts altogether. In the present case the party had an opportunity of making his allegations as distinct as he could. He has availed himself of that opportunity, but he has failed to make out a case, and therefore I think it falls under the general rule.

LORD DEAS.—We cannot decide prospectively the effect of any interlocutor which we may pronounce. All we have to consider is, what is the appropriate form of inter-

locutor in this case. Now, it cannot be doubted that the usual form of an interlocutor upon a closed record, according to the practice of this Court, is absolvitor when the Court decide in favour of the defender. If that form is to be varied, it lies on the party asking the variation to show cause for it. Accordingly, the case of Torbanehill, I think, was the first case—certainly the first on consideration and discussion—in which your Lordships introduced these words,—"from the conclusions of the action as laid," and the construction which was put upon it when the new action was brought, particularly by the House of Lords, was, that it must have been intended to do something different from what was done in the ordinary case. We cannot, in any case, prevent a party from bringing a second action, if the nature and grounds of that action be different from the previous one. But in the construction put upon the interlocutor in the Torbanehill case by the House of Lords, they went a good deal on the introduction into the judgment of these words as a variation from the usual practice. That reduces the question here to this, whether the pursuers have shown any grounds why we should vary the usual form of interlocutor in this case. I agree with your Lordship that they have not. They have been two years and some months in making and unmaking this record. They have been allowed to make a new record. They have had all the advantage in making the new record which they could have had by bringing another action, and still the Court is of opinion that, against these particular parties, they have stated no case. I do not think that is a position of matters in which they are entitled to any exception from the general form of interlocutor in such cases. If they bring a new action of a different nature, and upon different grounds, nothing which we do can prevent that. But I see no reason here why we should pronounce a form of interlocutor which may be interpreted as giving some indulgence and some benefit which the law would otherwise not give.

[571] The Court pronounced the following interlocutor:—"Find, as regards the defenders, James Baird and Thomas Douglas Graham, that the matter contained in the record is insufficient to sustain the conclusions of the action against the defenders: Assoilzie the said James Baird and Thomas Douglas Graham from the whole conclusions of the libel, and decern: Find the said defenders entitled to expenses of process; appoint an account thereof," &c.

The pursuer now proposed amended issues, of which the second and third, which became subject of discussion, were as follows:[1]—"2. Whether the pursuer was induced to purchase said shares by false and fraudulent representations, made in or about the months of June 1856 and June 1857 respectively, by the defenders, Thomas Dunlop Douglas, George Burns, James Dunlop, Thomas M'Call, and Thomas Gray Buchanan, or any and which of them, to the effect that, besides the capital of said bank, there existed a fund belonging to the bank, amounting to upwards of L.215,000, called the Rest Fund, and also profits available for the payment of dividends to the shareholders at the rate of 9 per cent on the bank's capital stock,—to the loss, injury, and damage of the pursuer? 3. Whether the pursuer was induced to purchase said shares by false and fraudulent representations, made in or about the month of June 1857, by the defenders, or any and which of them, to the effect that, besides the capital of said bank, there existed a fund belonging to the bank amounting to upwards of L.226,000, called the rest fund, and also profits available for the payment of a dividend to the shareholders, at the rate of 9 per cent on the bank's capital stock,—to the loss, injury, and damage of the pursuer?"

The defenders contended that the issue should contain—(1.) that the false representations were made to the pursuer; (2.) that the defenders knew them to be false; and (3.) the fraudulent purpose the defenders were alleged to have had in making them.

LORD PRESIDENT.—The main thing is the style and essence of the second issue, which we propose should run thus:—Whether the pursuer was induced to purchase

[1] Tulloch *v.* Davidson, 17th July 1858, *ante*, vol. xx., p. 1319; Keith *v.* Leighton, 18th Feb. 1832, Macfarlane on Issues, p. 546; National Exchange Co. *v.* Drew and Dick, 16th Feb. 1856, *ante*, vol. xviii., p. 614; Dobbie *v.* Johnston, 4th March 1859, *ante*, vol. xxi., p. 624.

the said shares by false representations as to the affairs of the said bank, fraudulently made and promulgated, in or about the months of June 1856 and June 1857, by the defenders, or any of them, to the loss, injury, and damage of the pursuer? The case is now limited to a case of fraud, and I think the word "fraudulent" cannot be applied without a knowledge of the falsehood.

LORD IVORY.—That is my conception of the meaning of the issue; there must be something equivalent to a proof of "fraudulent." And my preference for the general shape in which the issue is now cast is, that the record seems to me to be the proper place for the limitations to the statements of the parties, and for giving the information so as to avoid surprise; and that the fraud being well set forth there, and the purpose, and knowledge, and everything else, this general form of issue goes in more general and satisfactory terms to the jury to deal with what is in their competency under the record, subject to the direction of the presiding Judge.

LORD CURRIEHILL.—I concur with your Lordship in thinking that knowledge of the falsehood is essential in this case—absolutely essential; so much so, that unless it had been put into the record, I would not have held that there was a relevant case of fraud set forth in the record, and I would have dismissed the action on that ground. But it is set forth on the record in explicit terms. We are now adjusting the issues, and having that notion of the meaning of the word "fraud"—that knowledge is essential to it—I think that by putting the word "fraud" into the issue, you put the falsehood to the jury. I entirely concur in the issue suggested.

[572] LORD DEAS.—There are two things which I think essential to the case of the pursuer. The one is, that it shall be made out by reasonable evidence that the defenders knew the misrepresentations to be false; or I would rather express it thus, that they did not believe them to be true. The second is, that they had some fraudulent purpose as affecting the pursuer—such as the keeping up the price of the shares, which was the thing here said to have misled him. I am rather inclined to think that it would have been better to have put both of these things into the issue, but more particularly the first. But any objection to leaving them out of the issue is very much diminished by the ground upon which your Lordships propose to leave them out. Your Lordships did not say anything particular about the second, which is of less importance in the mere adjustment of the issue; but, as regards the first, I understand that the reason why your Lordships do not think it necessary to put it into the issue is, that the knowledge of the falsehood, or something equivalent to the knowledge of the falsehood, is necessarily implied in the allegation of fraud. My view would rather have been, that unless you put in the knowledge, or the want of belief, and perhaps also the purpose, you were not expressing in the issue that in which the fraud consists. But that really becomes more a matter of form than of substance in the view which your Lordships take of it. It does not affect the substance of the case, but only the form of the issue. The second thing about the purpose, I have said, is at present less material. It is less material, for this reason also, that it is plain enough that if there was any purpose at all in the thing, it must have been a purpose to keep up the price of the shares, which is what the pursuer goes upon. Taking the view, therefore, which your Lordships do, I am not disposed to object to the issue. The only other observation which I wish to make is this,—that we are merely approving of the issue. We are not pronouncing any judgment upon relevancy one way or another, and I understand that the case goes to trial upon the footing of the principles laid down in three cases in particular; in the first place, I refer to the opinion which I delivered in the case of the Earl of Galloway *v.* Grant, on 20th June 1857; I likewise refer to your Lordship's opinion in the case of Guild *v.* Orr, Ewing, and Company, 16th January 1858; and to the case of Dobbie *v.* Johnston and Russell in the other Division, on 4th March 1859. I only wish to express my understanding that the case goes to trial, as regards these questions of law and relevancy, on the footing laid down in the opinions in these cases.

The issues, as finally adjusted against Mr. Dunlop Douglas, were these:—

"1. Whether the pursuer purchased, (1.) on or about the 15th day of October 1857, twenty shares of L.50 each of the stock of the Western Bank of Scotland, at the price of L.1492, 10s. sterling or thereby; and (2.) on or about the 16th day of October 1857,

other twenty shares of L.50 each of the stock of the said bank, at the price of L.1420 sterling or thereby?

"2. Whether the pursuer was induced to purchase the said shares by false representations as to the affairs of the said bank, fraudulently made and promulgated in or about the months of June 1856 and June 1857 by the defender Thomas Dunlop Douglas, to the loss, injury, and damage of the pursuer?

"3. Whether the pursuer was induced to purchase the said shares by false representations as to the affairs of the said bank, fraudulently made and promulgated in or about the month of June 1857, by the defender Thomas Dunlop Douglas, to the loss, injury, and damage of the pursuer?"

Separate issues were adjusted in similar terms, applicable to each of the other defenders.

The damages or sums claimed were,—

"Price of shares, . .	L.2912	10	0	and interest from 21st Oct. 1857.
First instalment of first call,	500	0	0	and interest from 1st March 1858.
Second instalment of first call,	500	0	0	and interest from 1st June 1858.
Second call, . .	4000	0	0	and interest from 1st Nov. 1858."

[573] The pursuer then moved for expenses.

The Court pronounced the following interlocutor:—"The Lords having heard counsel for the parties on the pursuer's motion for expenses, find the pursuer entitled to the expenses of the discussion on the relevancy of the amended record against the defenders, Thomas Dunlop Douglas, George Burns, James Dunlop, Thomas M'Call, and Thomas Gray Buchanan; and before further answer as to the amount, appoints the pursuer to give in an account of said expenses."

On 7th February the case was again put to the roll, on the motion of Mr. Thomas Dunlop Douglas, to have the case as against him tried separately from the other defenders. He founded his motion on the statement that his case was in some respects different from the others.

Lord President.—There is not sufficient ground for this motion. A separate trial would involve a very unnecessary waste of the time and funds of the pursuer, and there is nothing in Mr. Douglas' case which justifies this proceeding. It is quite clear that there is a distinction between his case and the others, but I give no opinion as to the value of it, which, however, may be stated at the trial. A separate motion might, with equal reason, be made by all these defenders to have each case tried separately, and the pursuer put to the expense of five or six cases.

Lord Deas.—If I were on the jury, I should wish nothing so much to enable me to do justice to all parties as to have them all before me at the same time.

The Court pronounced this interlocutor:—"Refuse the motion: Find the defender liable to the pursuer in the expense incurred with reference to said motion: Modify the same to L.8, 8s., and decern."

On 1st March the defenders moved for a diligence, which, after discussion, was granted. That interlocutor was appealed, and the case was thereupon put to the roll, on the motion of the pursuer, for a certificate from the Court that there had been no difference of opinion as to granting it.[1] The defenders did not oppose the motion, but maintained that there had been a difference of opinion as to granting the diligence. Both parties referred to the short-hand writer's notes of the discussion, which, with the concurrence of the Court, were printed and furnished to the Court.

On 13th March, after avizandum, the case was put to the roll.

Lord President.—The matter of appeal against interlocutory judgments is regulated by statute, and by an order of the House of Lords in 1812. By the statute, appeal against an interlocutory judgment is only allowed in the event of leave being given by the Court, or of there having been a difference of opinion among the Judges

[1] Johnstone, 3 M'Queen, 619, Aug. 9 and 10, 1859, and Jan. and Feb. 1860.

By the order of the House of Lords, two of the counsel in the case were required to certify that leave has been obtained, or that there has been a difference of opinion among the Judges. Now I suppose all that has been done in this case. The House of Lords has fixed its own mode of ascertaining whether the case is within the provisions of the statute, yea or nay; and if any difficulty arises, the House of Lords will take its own course in explicating that matter. The House of Lords may however be of opinion, that in this case it has enough information, or it may be of opinion that it shall get correct information in one form or another, or the information it desires may be directed to some special point. A precedent is cited, in which a difficulty of that kind was raised, and the course the House of Lords took in that case was, to remit to the Court to obtain from it a certificate or report upon the matter. It may in another case take a different course. I know of no case in which, by anticipation of what the House of Lords may require, and upon the mere application of one of the parties, such a certificate as is now moved for has been granted. If the House of Lords desires information from the Court, the Court will always be willing to aid the House of Lords in forwarding the administration of justice. But I do not think it is for the Court to move until that **[574]** application is made, if it ever will be made, and it may not ever grant this application. That is the opinion of the Court.

The motion being refused, the House of Lords were furnished with short-hand notes of the discussion, and on 16th March the House of Lords dismissed the appeal, without calling for a certificate.

[*Gordon* v. *Davidson*, 2 M. 764, 771.]

No. 89. **XXIII. Dunlop 574.** 16 Feb. 1861. 1st Div.—Lord Kinloch.

JOHN CULLEN, Pursuer.—*Young—Fraser—A. Moncrieff.*

SIR WILLIAM JOHNSTON, Defender.—*Moir—Gifford.*

WILLIAM THOMSON and Others (JOHN THOMSON'S Trustees), Defenders.—*A. R. Clark.*

CHARLES JAMES KERR, Defender.—*Patton—Millar.*

[4 Macq. 424; 10 S.R.R. (H.L.) 553.]

No. 92. **XXIII. Dunlop 594.** 19 Feb. 1861. 1st Div.—Lord Mackenzie and Lord Ardmillan.

GEORGE CHARLES HAY and Others, Pursuers.—*Logan—Millar.*

GRAHAM BINNY and Others, Defenders.—*Young—A. R. Clark.*

Trust—Removal of Trustees—Administration—Expenses.

See *ante*, vol. xxii., p. 183.

Two trustees under a marriage contract trust had advanced to a client L.2500 of the trust-funds on his promissory note, with a separate letter of guarantee by themselves and a third party. This transaction being challenged, the trustees at once replaced the money, and appointed an agent to arrange the future investment of the funds in concert with the beneficiaries; but the beneficiaries brought a process to have them ordained to denude of the trust, and the funds placed under a judicial factor. *Held* (by Lord Mackenzie), that though the trustees, in lending the money, had clearly acted in excess of their power, there were not, in the circumstances, sufficient grounds for removing the trustees.

The beneficiaries reclaimed, and the trustees resigned. The question, therefore, did not come judicially before the Court.

A farther question arose, and became the subject of a new action, as to the expense of the management of the trust, in which were included the law charges of the agent the trustees had appointed. The beneficiaries contended that the trustees were not entitled to employ a law-agent for the ordinary business of the trust, but were bound to transact it personally and gratuitously.

The Lord Ordinary repelled the objection, so far as founded on a general obligation on trustees to transact personally the business of a trust, and remitted the accounts for taxation.[1]

[595] The pursuers reclaimed;[2] but on 5th Feb. 1861, the Court, without calling on the respondents, adhered, on the ground that the account formed a proper charge against the trust-estate.

No. 94. **XXIII. Dunlop 600.** 20 Feb. 1861. 2nd Div.—Sheriff of Aberdeenshire.

WILLIAM BLACK and JOHN ROBERT FULLARTON UDNY, Petitioners.—*Sol.-Gen. Maitland—Fraser.*

THE FORMARTINE & BUCHAN RAILWAY COMPANY and Others, Respondents.—*Young—Millar.*

Railway—Process—Interdict—Statute 8 *&* 9 *Vict. c.* 33, *Railway Clauses Act.*—The proprietor and tenant of a farm applied for an interdict to the Sheriff against proceeding with the construction of a railway through the farm, on the ground that their claims for damages had not been settled, the necessary accommodation works had not been agreed on or constructed, and the land to be taken had not been fenced. *Held* that the petitioners failed to prove that the company had refused to settle their claims; that the proceedings for enforcing the construction of accommodation works being directed by sections 60 and 61 of the Railways Clauses Act, the petitioners were not entitled to interdict against proceeding with the construction of the railway till such works were agreed on, and interdict to that effect, granted by the Sheriff, recalled.

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[1] "NOTE.—The pursuers plead that these trustees are not entitled to employ any professional agent, but are bound to do the whole duties of the trust personally, except only when the trust is engaged in litigation. This is said to be a general rule applicable to all trusts. The Lord Ordinary cannot give effect to this plea, so broadly stated. There is no authority for it in the law of Scotland, and there is a well understood and established practice to the contrary.

"Here there had arisen some aberration of feeling among these near connections. Continued personal communication would most probably have led to increased irritation, and the appointment of a neutral agent does not appear to the Lord Ordinary to have been an improper step, and it was not complained of at the time. The pursuers' agent communicated with Mr. Kermack, as agent for the trust, after his appointment, of which the pursuers had received immediate intimation. There is in our own law no such general law as that contended for by the pursuers, and it would not be a salutary rule in the administration of trusts; and if the special circumstances of this particular trust are appealed to by the pursuers in support of their plea, then these circumstances must be considered, and the correspondence must be carefully attended to; and that correspondence amply explains and supports the appointment of an agent. The pursuers' letter of 18th November 1857 is of itself sufficient to show that the entrusting the management of the trust to a neutral professional agent was a prudent step.

"None of the decisions quoted by the pursuers from the law of England are opposed to the employment of an agent under such peculiar circumstances."

[2] Weiss *v.* Dill, 22d Jan. 1834, 3 Mylne and Keene, 26.

The Formartine and Buchan Railway Company took the statutory proceedings for acquiring the ground necessary for the construction of their railway through the property belonging to Mr. Udny of Udny and Dudwick, in the parish of Foveran. Under an award of arbiters, Mr. Udny was found entitled to the sum of L.1300, and an annual feu-duty of L.18, 15s. as compensation for the land taken. It was agreed that Mr. Udny should relieve the company of all claims at the instance of his tenants for abatement of rent in respect of loss of land and damage through severance, and that the railway company should settle with the tenants all their claims in respect of loss of profits during the currency of existing leases, loss of crops, if any, and unexhausted manures, and temporary occupation of land outside of the permanent fences.

On 26th July 1859 Skinner and Wilson, advocates in Aberdeen, sent to Messrs. Adam and Anderson, advocates in Aberdeen, the agents for the railway company, the claims of four tenants on the Udny estate, including those of George Stoddart, tenant of Cultercullen, and William Black, tenant of Monkshill. On 3d August Skinner and Wilson again wrote Adam and Anderson that the contractors for the construction of the railway had entered upon Stoddart's farm of Cultercullen, without any arrangement having been made for a settlement of his claim for compensation. On 4th August Messrs. Adam and Anderson wrote Messrs. Skinner and Wilson. After stating that a draft deed of nomination of arbiters would be sent for revision, along with answers to the claims of the tenants, sent on 26th July, "and in order to prevent any necessity for your applying for an interdict at the instance of the tenants, as threatened, we hereby become bound, on the part of the railway company, to pay whatever compensation may be found due to the tenants under said reference, of which Colonel Udny may not be bound to relieve the company. We can hardly believe that the contractors can have commenced operations on any part of the property, as alleged, without **[601]** fencing off the ground to be taken by the company, as they are bound to do in terms of the contract; and we have written them on the subject, holding them liable for all damages which such unwarrantable conduct may occasion." Messrs. Skinner and Wilson replied,—"We acknowledge your favour of to-day, to say that the proposals and guarantee made are to us in every way satisfactory, and we doubt not will be so to the various tenants."

After some further correspondence, Skinner and Wilson wrote on 26th August,—"It is advisable and necessary that the claims of the tenants should be arranged and settled before the works proceed farther; and we shall thank you to name a day (say next week) when you could meet them here for that purpose. We learn that the ground broken on has not as yet been fenced. We beg your attention to this." On 29th August Messrs. Adam and Anderson acknowledged receipt of Skinner and Wilson's letter of 26th August, and stated that they enclosed the answers to the claims of the tenants, that they had written the contractors as to the fencing, and that they were willing to meet Messrs. Skinner and Wilson and the tenants "any day this week convenient for you and them."

On 31st October Messrs. Adam and Anderson addressed Messrs. Skinner and Wilson regarding a proposal made by the latter on behalf of the tenants that an overbridge should be constructed across the railway, in place of certain proposed "cattle creeps," or under-level crossings. Messrs. Adam and Anderson made objection to the proposed substitution, on the ground that the feu-contract in favour of the railway company made the construction of the under-level crossings one of the conditions of granting the feu, and a subsequent heir of entail succeeding to the estate of Udny might compel the railway company to construct the under-level crossings in addition to the proposed bridge. Messrs. Skinner and Wilson, for their clients, continued to insist on the bridge being constructed, on the ground that in the decree-arbitral and relative conveyance there was a special reservation as to the erection and maintenance of "necessary bridges," &c.

This petition was presented on 26th November 1859, in name of Mr. Black, tenant of the farm of Monkshill, and Mr. Udny, the proprietor, setting forth that the railway company intended to construct their railway through the farm of Monkshill, and had begun to do so by entering upon and breaking up the land, without making the necessary statutory arrangements for acquiring the same, or for the accommodation of the petitioner's adjoining lands. The petition prayed that the railway company should be interdicted from further operations on, or from further breaking up, the lands of the

farm of Monkshill, until the necessary statutory arrangements should be made for acquiring the same, and for the accommodation of the adjoining lands.

The Sheriff-substitute (Watson) ordered the petition to be intimated, and granted interim interdict.

Appearance was entered for the railway company, and a record was made up by a minute of defence, setting forth that it was stated that the statutory arrangements for acquiring the ground had been made by the railway company, and the decree-arbitral and the conveyance in favour of the respondents were produced.

The Sheriff-substitute closed the record, and, in respect of the productions by the respondents, recalled the interim interdict, and dismissed the action.

On appeal, the Sheriff (Davidson) recalled the interlocutors of the Sheriff-substitute, and intimated in a note that it was necessary to make up a record by condescendence and defences.

[602] A record was made up. The petitioners averred;—That the railway company had declined to make the necessary accommodation works for the petitioner's farm, and particularly the overbridge referred to in the correspondence. Although certain communings had taken place in reference to Black's claim for damages, which was to be settled by arbitration, no nomination of arbiters had been made.

It was stated for the respondents;—They and the petitioners were not agreed as to the accommodation works necessary. As to the claim for damages, it consisted of six branches, four of these falling to be settled by the landlord, and the other two, falling on the railway company, being admitted by the company, the nomination of arbiters was unnecessary.

The petitioners pleaded;—1. The respondents were precluded from insisting in their preliminary pleas, in respect they were not urged in the minute of defence. 2. Interdict against a railway company entering on a proprietor's or tenant's lands, without a settlement of their claims, was a remedy competent not only at common law, but implied under the Lands and Railway Clauses Acts, and was not precluded by the alternative remedy afforded by the 61st section of the latter Act, which the respondents had it in their power to adopt.

The Sheriff-substitute pronounced an interlocutor dismissing the case, and sustaining preliminary pleas to the effect that the pursuers, having separate interests, could not sue in one libel; that the respondents were proprietors of the ground in question, in virtue of the deeds produced, and the petitioners had no title to sue; and that the prayer of the petition was not distinct and definite, neither the statutory arrangements nor the accommodation works being described. This interlocutor was recalled by the Sheriff.[1]

After hearing parties, the Sheriff-substitute pronounced this interlocutor:—"Finds that the petitioners pray for interdict until the necessary statutory arrangements are made by the respondents for acquiring the lands, and for the accommodation of the petitioners' adjoining lands: Finds that the respondents have acquired the lands as instructed by the feu-disposition and conveyance produced: Finds that the parties are not at one in regard to the accommodation works, and that the statute prescribes a certain mode for settling the difference between them, which has not been adopted: Finds, therefore, that there is no ground for interdict, and recals the same: Finds the respondents entitled to expenses of process."

The Sheriff recalled this interlocutor, and allowed a proof. The result of the evidence adduced is stated in the opinion of the Court, at advising in the advocation.

The Sheriff-substitute, after hearing evidence, pronounced this interlocutor:—"Finds, in point of fact, that the petitioner, Colonel Udny, never had any interest in this action, he having previously disponed the land in question to the respondents: Finds that the petitioner, William Black, never asked the respondents to fence,—that

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[1] "NOTE.—The petitioners—the proprietor and tenant of the land—have a joint interest in the subject-matter of this action; and although each of them may also have a separate interest of his own, they are connected by having a oneness of object.

"The petition states that the respondents have not made the necessary statutory arrangements for acquiring the lands, or for the accommodation of the adjoining lands, and it prays therefore that they be interdicted. The short but comprehensive statement of the petition is amplified in the condescendence."

his sole object was to obtain an overbridge, and if he had got that, he would have had no occasion to apply for interdict: Finds that the respondents were taken bound to construct two cattle-creeps and two private field-crossings on the petitioner's [603] farm of Monkshill: Finds that they were not bound to construct an overbridge on said farm, in addition to said cattle-creeps and field-crossings: Therefore finds, in point of law, that there was no ground for interdict: Recals the interim interdict: Refuses the desire of the petition: Finds the respondents entitled to expenses of process."

On appeal the Sheriff pronounced this interlocutor:—"Finds that the respondents, the Formartine and Buchan Railway Company, have not completed the necessary arrangements with the petitioners with reference to the works required for the accommodation of the lands of the petitioners adjoining the railway of the respondents: Finds that when this petition was presented sufficient fences for separating the lands to be taken for the use of the railway from the adjoining lands of the petitioners had not been made by the respondents: Therefore continues the interdict, and declares the same perpetual: Finds the respondents liable in expenses," &c.[1]

The respondents advocated, and put in the following pleas in law:—1. The Railway Company having purchased from the pursuer Mr. Udny, the proprietor, the lands in question which were required for the purposes of their work, and having, by an arrangement with the other pursuer Mr. Black, the tenant, under which he obtained security for the compensation to which he might be found entitled, obtained his consent to enter upon the possession of these lands, and having entered upon possession of the same accordingly, the application for interdict was groundless and incompetent, and [604] ought to have been refused. 2. The claim made on the part of the pursuer for accommodation works was, in the circumstances, unfounded, and, at any rate, the

[1] "NOTE.—There are two parties pursuers of this action, the proprietor of the lands through which the line of railway is to run, and the tenant. With the former, the railway company has, to a large extent, settled. But, in that settlement, certain obligations are undertaken by the proprietor with reference to the tenant, which entitle the proprietor to be made a party (as the respondents themselves suggested they should be) to any arrangement between the railway company and him; and, further, all claims under the Railways Clauses and Lands Clauses Consolidation Acts, as to the erection of bridges, &c., are specially reserved to the proprietor. In the decree-arbitral, the arbiters 'further find,' that certain cattle creeps and field crossings are to be constructed; but the specification of these accommodation works, as to which the arbiters had made up their minds, does not seem to limit the special reservation as to all claims for the erection and maintenance of other works. The decree-arbitral between the proprietor and the company did not fix the whole question of accommodation works even as between these parties. That that question is not yet settled is abundantly apparent; but it is only necessary to refer to the distinct statement of the respondents themselves on the record:—'The petitioners and respondents are not at one in regard to the accommodation works.'—(respondents' statement, revised defences, art. 2.) What these works should be is not here to be considered. There is much in the proof about the necessity of an overbridge, and as to the superiority or sufficiency of the cattle-creeps and level-crossings. But all that is beside the question involved in this case. The only question here is, had the respondents, before this petition was presented, completed an agreement with the petitioners as to the terms on which they were to get the land for the railway? They had not completed an arrangement even with the proprietor; but with the tenant they had made no arrangement whatever. There might have been correspondence and communings towards an arrangement, but the thing was not done.

"Then as to the fences, it is proved, and it is now admitted, that the lands of the petitioners were not fenced off in terms of the statute. They were not fenced in March 1860. It is said they are fenced now. But the case must be judged of as matters stood when the interdict was applied for. The interdict, as craved and granted, is, until the statutory arrangements are made for the respondents acquiring the lands, and for the accommodation of the adjoining lands. Until these things were arranged, and the adjoining lands fenced off, the respondents were not entitled to construct their railway."

existence of a dispute on that subject was neither, under the statute 8 and 9 Victoria, c. 33, nor at common law, a ground upon which the railway company could legally be interdicted from continuing their operations on the land upon which they had entered under the arrangements above mentioned.

The petitioners added the following pleas in law:—1. The advocators not having made the accommodation works which they were bound to execute for the benefit of the respondents, they were not entitled to enter upon the respondents' property, and the judgment of the Sheriff granting interdict was well founded. 2. The advocators not having paid or deposited in bank the purchase-money or compensation due to the respondents, they were not entitled to enter upon the property, and interdict was properly granted. 3. The feu-conveyance by Colonel Udny being granted with the special reservation of the respondent's claims, the advocators were not entitled to enter upon the property until these claims were adjusted and settled; and the execution of such conveyance did not deprive the respondent of any rights which he possessed under the statute.

The Lord Ordinary having made avizandum to the Inner-House, it was argued in support of the judgment of the Sheriff;—The 61st section of the Railway Clauses Act did not apply to this case. It provided, that where a difference arose as to the kind, number, dimensions, or maintenance of accommodation works, the same should be determined by the Sheriff or two Justices of the Peace; but no such difference existed here, and the petitioners had not the remedy provided by that section. The statute declared that fences should be made whenever the ground was broken. If these were not made, it was not a proper subject for a claim for damage. They were needed whenever the work commenced. It was declared by the statute that it was incumbent on the railway company to construct them; and the proprietor or tenant had certainly a right to interdict against further proceeding until they were completed.

Lord Justice-Clerk.—The interlocutor of the Sheriff cannot stand. It is put upon the very special ground that the railway company have not completed the necessary arrangements with the petitioners with reference to the works required for the accommodation of the lands of the petitioners adjoining the railway, and that when the petition was presented, sufficient fences for separating the lands to be taken for the railway from the adjoining lands of the petitioners had not been made. On that ground alone the Sheriff continues the interdict, and declares it perpetual; and in doing so, I think he has committed a grave error, because if proper accommodation works were not formed, there was a plain remedy in the section of the Railway Clauses Act specially applicable to this matter. That course they were bound to follow, but they declined to do so, and resorted to the remedy of interdict, and now ask that the whole operations of the railway company shall be suspended, and that they shall be interdicted not only from continuing any operations on the lands which they have entered, including apparently the erection of accommodation works, but that they shall be prevented from entering on any other lands owned or occupied by the petitioners until the accommodation works are erected and the petitioners' claims are settled. If this application for interdict could have been defended on the ground that the tenant's claims for compensation have not been settled or provided for, and if it could have been alleged at the same time that no consent to take possession had been given, these grounds might have been sufficient; but to say that the accommodation works are not agreed upon, is no reason for interfering to stop the operations of a railway company, when the statute provides an appropriate and sufficient remedy not attended with such serious consequences; and besides, that remedy is an alternative one, because, under the 61st section of the Railway Clauses Act, a party dissatisfied with the accommodation works may apply to the **[605]** Sheriff or Justices; and if he find that remedy too slow, he is entitled by the 62d section to execute the works ordered at his own hand, and to recover the expenses from the railway company. With that appropriate and satisfactory remedy open to the petitioners, I think it is out of the question to admit what I must call the extraordinary remedy of interdict. But, then, while I think the ground of the Sheriff's judgment insufficient, it remains for consideration whether there are, or are not, in the facts, enough to justify the interdict, on the ground that the railway company were not in a position legally to enter upon and take possession of the lands, in respect that

they never paid the price, nor made such arrangements with the proprietor and tenants as entitled them to enter upon the lands. As regards that ground, the case on the proof is a very simple one. As far as Colonel Udny is concerned, he chose to take the value in the form of a feu-duty, and he was to get besides L.1300; he has received that money, and granted a conveyance under which the railway company have, so far as he is concerned, a complete legal title to take possession of the land. As regards the claim of the tenants, they were in the hands of the same agents who acted for the landlord, and after some correspondence, in which there is a complaint about the land being taken possession of and broken upon without fencing the ground, we come to the letter of 4th August 1859, by the agents of the railway company, in which they say, "We can hardly believe that the contractors can have commenced operations on any part of the property as alleged, without fencing off the ground taken by the company, as they are bound to do in terms of their contract, and we have written them on the subject;" but in a previous part of their letter they say, "In order to prevent any necessity for your applying for an interdict at the instance of the tenants as threatened, we hereby become bound, on the part of the railway company, to pay whatever compensation may be found due to the tenants under said reference, of which Colonel Udny may not be bound to relieve the company." That was a guarantee tendered by the agents of the railway company which the tenants might have declined; and they might have refused to allow the possession of the lands to be taken without payment or consignation. But what do the agents of the tenants do? They write saying "that the proposals and guarantee made to us are in every way satisfactory; and we doubt not will be so to the various tenants;" and this was never retracted. The fair meaning is, that under the guarantee the application for interdict was to be given up, and the railway company were to be allowed to go on with their works. If, after that, the railway company were dilatory, and delayed to fix and liquidate the amount of the compensation, there might have been some cause of complaint; but how does that matter stand? The guarantee was given on 4th August 1859, then the tenant's claim was given in, and the answers were lodged on the 29th of August; and on the same day the agents for the railway company wrote the agents for the tenants saying, "we can meet you and the tenants any day this week convenient for you and them;" and by reference to the letter to which that is an answer, we find that meeting was to be for the purpose of settling the claims of the tenants. Now, the answers of the railway company, in so far as regards the pecuniary claims, consist of an admission of these claims; and as regards the claim for the value of the crops on the ground, that admission is made under a qualification which the railway company were plainly entitled to make—viz., under deduction of the claim for unexhausted manure, and the expenses of preparing the ground for that crop, which had already been admitted. Now, the labour and manure were not lost, if the crop was reaped, nor, even if the crop was not reaped, if the claim for the crop had been admitted and paid. After that admission the agents for the railway company were bound to make payment whenever it was demanded, but the tenants never applied for payment, and never afterwards proposed to go on with an arbitration, because nothing remained which could form the subject of an arbitration. Their own agent says—"I never applied to the railway company for the sums they admitted they were liable for;" and he gives as his reason that the questions of relief between the proprietor and the railway had not been adjusted (with which it is plain that the tenants had nothing to do), and that "they declined making the overbridge, and we preferred preventing them breaking on the tenant's farm to taking a partial settlement of his claim;" that is to say, they wanted to resort to the remedy of interdict to enforce the construction of this **[606]** bridge, which they clearly were not entitled to do; and, therefore, their refusal to make a settlement of their claim is merely a covert and disguised mode of endeavouring to enforce the erection of accommodation works. The ground on which the Sheriff puts his judgment is quite insufficient under the Railway Acts. That the accommodation works are not agreed upon is no ground for an application to prevent a railway company from entering on lands and continuing their operation; and the other ground, that the tenant's claims were not settled, has been refuted by the evidence led, and therefore I am for altering the Sheriff's judgment, and dismissing the application for interdict.

The other Judges concurred.

The Court pronounced this interlocutor:—"Advocate the cause: Recal the interlocutor complained of: Find that the advocators obtained lawful entry to the lands belonging to the complainer, Udny, and occupied by the other complainer, Black, in terms of the statute, after a full statement of the claim of Udny, and by the consent of the other complainer, Black: Find that the want of accommodation works complained of afford no ground for this application for interdict: Therefore recal the interdict formerly granted; sustain the defences; refuse the prayer of the original petition; and assoilzie the defenders (advocators), and find them entitled to expenses both in this Court and in the inferior Court, and remit," &c.

No. 96. **XXIII. Dunlop 606.** 27 Feb. 1861. 1st Div.—Sheriff-Court of Lanarkshire.

JOHN WYPER, Pursuer and Respondent.—*Gordon—A. B. Shand.*

JOHN and WILLIAM HARVEY, Defenders and Advocators.—*Sol.-Gen. Maitland—D. Mackenzie.*

Diligence—Arrestment—Sale—Sub-vendee—Delivery—19 & 20 *Vict.*, *c.* 60—*Mercantile Law Amendment Act* (1856), *sects.* 1, 2, *and* 3.—Goods were sold and the price paid, but they were allowed to remain in the custody of the seller. They were resold. The subsequent purchaser intimated the second sale to the original seller, but not till after (1) the first purchaser had become bankrupt, and (2) the seller had arrested in his own hands, in security of a general balance due by the first purchaser. The trustee in the sequestration made no claim to the goods;—*Held* by the whole Court (*diss.* Lord Deas), that the second purchaser was not entitled to demand delivery [607] of the goods. The whole Judges concurring in the judgment were of opinion that the seller's arrestment in his own hands, being prior in date, was preferable to the second purchaser's intimation. The majority held that the sequestration excluded all subsequent diligences, but that the seller's right of retention in security of a general balance as against the trustee in the sequestration was not cut down by the Mercantile Law Amendment Act.

Question—Whether an arrestment by a party in his own hands is a diligence falling under the general rules applicable when sequestration follows?

On 20th March 1857 Harvey and Company, the defenders, sold to Risk six puncheons of whisky, then lying in the bonded warehouse occupied by Harvey and Company, and the whisky was thereupon entered in the warehouse book in Risk's name. On the following day Risk resold the whisky to Wyper, the pursuer. Wyper paid the price of the whisky to Risk on 15th April following, and Risk paid the price due to Harvey and Company on the 27th of the same month. In May 1857 Wyper obtained delivery of one puncheon. The other five puncheons were allowed to remain in Harvey and Company's warehouse.

On 6th July 1858 Risk's estates were sequestrated. On 9th July Harvey and Company raised an action at their own instance against Risk, concluding for L.1113, 11s. 6d., being the amount of a general balance on account alleged to be due by him to them; and on the same day they, on the dependence of this action, caused an arrestment to be executed in their own hands of "all goods, gear, debts, sums of money, or other effects whatever lying in their hands, custody, or keeping, pertaining, or in any manner of way belonging, to the said John Risk."

Wyper immediately, or shortly after the date of the arrestment, gave notice to Harvey and Company of the subsale by Risk to him, and demanded delivery of the five puncheons of whisky. This intimation was verbal, and was subsequent to the arrestments by Harvey and Company.

Harvey and Company refused delivery, and the pursuer, on 26th August 1858, presented the present petition to the Sheriff, praying for an order and warrant for delivery of the five puncheons of whisky. He directed the petition against Harvey and Company, and the individual partners of the company, and called also as a party the trustee on Risk's sequestrated estate. The trustee entered appearance, but he

made no claim to the whisky, and offered no opposition to the application in so far as he was concerned.

On 14th January 1858 the Sheriff-substitute (Glassford Bell) pronounced an interlocutor, in which, after certain findings in fact, he "Finds that the defender Wylie, as trustee in Risk's sequestration, makes no claim to the whisky; and the question raised in this action is, whether, in the above circumstances, the pursuer, as sub-vendee of said five puncheons, is entitled to delivery of the same from the defenders, or whether they are entitled to retain the same as against the said balance due to them by Risk, as constituted by the extract registered decree, No. 7/3: Finds that the answer to this question mainly depends upon the interpretation to be put on the first,[1] [608] second,[2] and third[3] sections of the Mercantile Law (Scotland) Amendment Act: Finds that, previous to the passing of said Act, it was settled by a series of decisions, and particularly by the cases of Melrose, March 7th 1851, and M'Naughton, July 15th 1852, that where there had been no delivery of goods sold and paid for, and where the purchaser had subsequently resold and been paid, the original seller was nevertheless entitled, on the bankruptcy of the purchaser from him, to retain the goods as against a balance arising on subsequent transactions between him and said purchaser, and this in preference to the claim of the sub-vendee: Finds that, where there has been no subsale, there does not appear to be any provision in the said Mercantile Amendment Act, which interferes with this right of retention in the seller; but finds that, by section second of said Act, it is expressly enacted, that where there has been a second sale, the original seller, if the price has been paid to him, and the conditions of the contract implemented, is not entitled to a right of retention as against the second purchaser: Finds, that although under the provisions of section third of said Act, any seller of goods may attach them, while in his own hands or possession, by arrestment or poinding, at any time prior to the date when the sale of such goods to a subsequent purchaser shall have been intimated to such seller, an arrestment or poinding so used is entitled only to the same limited operation and effect in a competition as any arrestment or poinding by a third party, that is, by any other creditor of the original purchaser, and therefore does not in any way interfere with the absolute right given to the sub-vendee by section second, to demand delivery, and this, *a fortiori*, when the seller has not

[1] Section 1 enacts, that "from and after the passing of this Act, where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller, after the date of such sale, to attach such goods as belong to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser, or others in his right, from enforcing delivery of the same; and the right of the purchaser to demand delivery of such goods shall, from and after the date of such sale, be attachable by or transferable to the creditors of the purchaser."

[2] Section 2,—"Where a purchaser of goods who has not obtained delivery thereof shall, after the passing of this Act, sell the same, the purchaser from him, or any other subsequent purchaser, shall be entitled to demand that delivery of the said goods shall be made to him and not to the original purchaser; and the seller, on intimation being made to him of such subsequent sale, shall be bound to make such delivery on payment of the price of such goods, or performance of the obligations or conditions of the contract of sale, and shall not be entitled, in any question with a subsequent purchaser or others in his right, to retain the said goods for any separate debt or obligation alleged to be due to such seller by the original purchaser: Provided always, that nothing in this Act contained shall prejudice or affect the right of retention of the seller for payment of the purchase price of the goods sold, or such portion thereof as may remain unpaid, or for performance of the obligations or conditions of the contract of sale, or any right of retention competent to the seller, except as between him and such subsequent purchaser, or any such right of retention arising from express contract with the original purchaser."

[3] Section 3 enacts, that "any seller of goods may attach the same while in his own hands or possession by arrestment or poinding, at any time prior to the date when the sale of such goods to a subsequent purchaser shall have been intimated to such seller, and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party."

used arrestment till after the sequestration of the purchaser from him: Therefore, and under reference to the annexed note, finds that the defenders, J. and W. Harvey and Company, have no longer any right at common law to retain the five puncheons, for which they have been paid, against the pursuer, the second purchaser, who has also paid for them, and that the arrestment used by them on the 9th July 1858, though used before the resale was intimated to them, was not effective to cut down the pursuer's right to obtain delivery of said puncheons: Repels the defences, and decerns against the said John and William Harvey and Company, in terms of the prayer of the petition: Finds them also liable in expenses," &c. "And as regards the defender Wylie, in respect there are no substantive conclusions against him, he being [609] only called for his interest, and no expenses asked against him, except in the event of his offering opposition, which he has not done, dismisses the petition."[1]

[1] "NOTE.—The first section of the Mercantile Law Amendment Act provides that goods sold, but not delivered, shall no longer be attachable by creditors of the seller 'to the effect of preventing the purchaser, or others in his right, from enforcing delivery of the same.' It does not necessarily follow from this enactment that the seller's right of retention for a general balance against a purchaser who becomes bankrupt is cut off. On the contrary, if there be no resale by the purchaser, such right seems to continue. But by the second section of the Act, if there be a second purchaser or sub-vendee, this right of retention in the original seller is expressly taken away. The words are explicit. . . . It is thus clear that when a resale has taken place, and when the original seller has been paid the price charged by him, and had the other conditions of sale implemented, the right of a *bona fide* sub-vendee to demand delivery cannot be affected by any other transactions between the seller and first purchaser. The reservation of the seller's right of retention, 'except as between him and such subsequent purchaser,' is favourable to the view that the right continues as before where there is no subsequent purchase; but no words could make it plainer than those used in this section, that the seller cannot, in any question with a subsequent purchaser, retain the goods for any separate debt or obligation due by the original purchaser. The only question remaining therefore is, whether the terms of the third section enable the original seller to place himself in a more favourable position as regards a sub-vendee, and to get out of his obligation to deliver to him? The words of the third section are . . . Under this section, if an attachment be attempted by the seller after he has received intimation of a resale, such attachment is simply inept. If it be made before intimation, it is good to this limited extent, that the same effect will be allowed to it in a competition as an arrestment or poinding by a third party. Now it seems clear that it would be a good answer to an arrestment or poinding by a third party, that is, by any other creditor of the original purchaser, that before it was used there had been a *bona fide* sale of the goods to a second purchaser, who had acquired under section 2 of the Act the absolute right to demand delivery, a right which the said section declares shall not be defeated by the existence of any separate debt of the original purchaser, and therefore cannot be defeated by diligence done with a view to make the goods so resold available for payment of such debt. If the second sale could be shown to have been collusive or fictitious, the case would be different; but if a real transaction, the whole import of the Act is to secure its validity, and in this respect to assimilate the law of Scotland with that of England. It was unquestionably a hardship, as our law formerly stood, that although the original seller had been paid his own price for the goods, and although the sub-vendee had paid the price at which they were charged to him, yet when he came to demand delivery he could be met by a plea on the part of the first vendor that he was entitled to retain them against a separate debt,—it might be subsequently contracted,—of the first vendee. Our doctrine, that there was no *jus in re* until delivery had taken place, necessarily made this a good plea; but the provisions of the first and second sections of the Mercantile Law Amendment Act have altered this, and make the plea no longer available. But farther, it is not to be lost sight of that there is this specialty in the present case, that the arrestment founded on by J. and W. Harvey and Company was not used till after the sequestration of the purchaser from them. No diligence used after sequestration can affect the rights of parties as they stood at the date of sequestration. The sequestration did not carry to Risk's trustee the right to demand

On appeal, the Sheriff-depute (Alison), on 15th February 1859, "Adheres to the interlocutor complained of, in so far as the findings in point of fact **[610]** are concerned, and in so far as it repels the defences and decerns against the defenders, John and William Harvey, in terms of the prayer of the petition, and finds them liable in expenses, and dismisses the appeal, and adheres as to the defender Wylie." [1]

Harvey and Company advocated;—When the case was debated, the Court ordered renewed intimation to Risk's trustee, who thereupon lodged the following minute:—"*Patton*, for the trustee, stated that, having by the interlocutor above quoted, been allowed to see the process, he had carefully considered it, with a view to determine whether appearance should be made on his part as trustee on the sequestrated estate in

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delivery of goods which Risk had previously sold to the pursuer and been paid for. If that right was already out of the person of Risk, it could not be arrested by the Messrs. Harvey in their own favour as against him. If it was not out of Risk's person, then it must have passed to his trustee, and an arrestment against Risk attached nothing after his sequestration."

[1] "NOTE.—The late Mercantile Law Amendment Act has made so great and fundamental a change on the law of Scotland in regard to the transfer of moveables, that all questions regarding it are both difficult of decision, and of great importance in point of precedent. The difficulty in the present case arises from the seeming contradiction of the third section of the Act with the first two sections. The well known object of the Act was to assimilate the law of Scotland with that of England, in regard to the transfer of moveable goods, and with that view to validate the resale of goods sold to a first purchaser without their ever having been delivered to the first buyer. The first section of the Act declares that goods sold but not delivered, shall no longer be attachable by creditors of the seller, 'to the effect of preventing the purchaser or others in his right from enforcing delivery of the same'; and that by the second section it is 'declared, &c. (see *supra*, p. 608). If the matter had rested here, there could have been no doubt whatever of the present question. The second purchaser's right is by the Act declared absolute, though the original purchaser had got no delivery, and indefeasible against any right of retention by the first purchaser or the diligence of his creditors. But then the difficulty of the case arises here. The third section of the Act declares (see *supra*, p. 608). Passing by the anomaly here first introduced of an arrestment or poinding of goods by a party in his own hands, which is a novelty in the law of Scotland, it certainly does look very much as if the Legislature intended to make the intimation of the resale to the original seller the point of demarcation between the period when the arrestment or poinding of the goods in the seller's own hands shall be deemed effectual and when it shall not. It is expressly said that such arrestment or poinding shall in a competition have the same effect as an arrestment or poinding by a third party. This clearly shows that the Act contemplated a competition such as here arises. But supposing such a competition to have arisen, how is any preference awarded to such arrester or poinder, founded on debts due by the original purchaser, to be reconciled with the absolute right which, under the first and second sections of the Act, the second purchaser is declared to have acquired to the goods irrespective of delivery, or any intimation whatever?

"The Sheriff does not see how this difference is to be surmounted, and, if he were driven to decide the matter just now, he fairly confesses he does not know how he would do so. His view of the case, however, is that there is a specialty here which is sufficient to decide the case in the pursuer's favour,—and that is, that the arrestment founded on by Messrs. J. and W. Harvey, the defenders, was not used till after the date of the sequestration of the estates of Risk, the original purchaser of the whisky from them. But no diligence used after sequestration can affect the rights of parties as they stood at its date. The right to demand delivery had already been taken out of Risk's person and transferred to the pursuer before the arrestment, and therefore the goods could not be arrested by the defenders in their own hands effectually as against him. This consideration appears to the Sheriff sufficient to sustain the interlocutor under review in the pursuer's favour, without deciding the other and more difficult question, which he fairly confesses appears to present a difficulty almost inextricable, as the different sections of the Act appear to be contradictory of each other."

the proceedings, or other steps taken by him, as trustee, in reference to the whisky now in dispute. That as Messrs. Harvey were large creditors of the bankrupt, and had a right of retention over the whisky in a question with him for a sum greatly more than the value of the whisky, which right, as the trustee was advised, was [611] not taken away by the provisions of the Mercantile Law Amendment Act, it did not appear to him that he was in a condition to make appearance to the advantage of the sequestrated estate, and he consequently declined to sist himself as a party to the present litigation."

Cases having been ordered and lodged, the Court, on 12th December 1860, "In respect of the state of opinions of the Court, and importance of the points involved in the cause, Appoint copies of the printed papers in this cause, and of the present interlocutor, to be boxed to the Judges of the Second Division, and to the permanent Lords Ordinary, in order to obtain the written opinions of consulted Judges, with their earliest convenience, on the question whether the original petitioner, John Wyper, is entitled to delivery of the whisky in dispute?"

The following opinions were returned:—

LORD JUSTICE-CLERK, AND LORDS WOOD, COWAN, ARDMILLAN, MACKENZIE, AND JERVISWOODE.—This case raises questions on the construction of the first three sections of the Mercantile Amendment Act (1856), which are of considerable practical importance, because there is no class of statutes requiring more careful and delicate treatment, in their judicial interpretation, than those which interfere with the operation and effect of principles of the common law. On the one hand, great caution is requisite to avoid carrying the innovation on the common law further than the object and the words of the enactment justify. On the other hand, no regard for the strictness or consistency of the common law rule must be allowed to prevent full and fair scope being given to the legislative change.

The facts are these:—On 20th March 1857 the advocators, Harvey and Company, sold five puncheons of whisky to Risk, and Risk paid the price, but did not receive delivery of the goods sold, which were allowed to remain in the custody of the sellers. On the following day Risk resold the whisky to the respondent Wyper, and Wyper paid Risk the price stipulated by this subsale. In July 1858 Risk became bankrupt, largely indebted to Harvey and Company, on general account. The goods still remain, undelivered, in the hands of Harvey and Company.

In these circumstances the rights and liabilities of the parties, at common law, and before the statute, were clear and well defined. The property of the goods remained in Harvey and Company, the undivested owners, while Risk, and Wyper as deriving title from him, had no right higher than that of creditor in a personal obligation to deliver the goods. From this principle various practical results necessarily follow.

In the first place, the goods remaining undelivered in Harvey and Company's hands, were liable to be poinded, and so preferably secured, by creditors of Harvey and Company, and also to be carried off by the adjudication in favour of the trustee in a sequestration of Harvey and Company's estates, in the event of their bankruptcy.

In the second place, the personal right of Risk to the goods was attachable by the diligence of his creditors; for though the goods were not his, the seller's obligation of delivery to the purchaser was, like every other personal obligation to pay money or deliver moveables, a proper subject of arrestment.

In the third place, the sellers, Harvey and Company, were, notwithstanding the payment to them of the price of the goods, entitled to retain them against all the world, in security of the balance due to them by the buyer Risk on general account. This is not lien, as it is sometimes very inaccurately called, for no one can have a lien over his own property. It is the right of retention, the extent and effect of which are measured by the title of possession, and are greatest in cases like the present, where the title of possession is nothing short of undivested ownership.

On these rights and liabilities, so fixed by the common law, the statute makes the following changes:—

1. The statute excludes the diligence of the sellers' creditors, and the title of the trustee in a sequestration of the sellers' estates, in competition with the purchaser, or any one in his right, enforcing delivery in terms of the contract of sale.

2. Upon the sub-purchaser intimating his sub-purchase to the sellers, they are pre-

cluded from pleading against him their right of retention against the first pur- [612]
-chaser for a general balance, and are no longer entitled, on that ground, to refuse delivery to the sub-purchaser.

These are the only limitations or restrictions of the common law rights and liabilities of the parties introduced by the clauses under consideration.

The principle of the common law, that the undelivered goods still remain the property of the seller, is untouched by the statute; and its practical consequences remain unimpaired, except in so far as they are expressly taken away or modified by positive enactment. Therefore—(1.) The rights of the creditors of Risk, as first purchaser, remain unaffected. Indeed, the first section of the statute, to prevent all mistake on this point, declares that "the right of the purchaser to demand delivery of such goods shall, from and after the date of such sale, be attachable by, or transferable to, the creditors of the purchaser." (2.) The sellers' right of retention is not taken away or weakened, except in a question with a sub-purchaser after intimation of his sub-purchase, and only in so far as it is founded on a general balance due by the first purchaser. But it is as effectual as ever against the purchaser and the purchaser's creditors, or any one coming in his right except a sub-purchaser. All this would be clear enough from the limited terms of the leading enactment in the 2d section, but it is still further put beyond doubt by the express words of the proviso at the end of the section.

The question then comes to be, Whether, in this state of the legal rights of the parties, the sub-purchaser has made his statutory right effectual against the sellers, so as to be now entitled to demand delivery of the goods, or whether supervening facts have occurred, to interfere, as mid-impediments, with the completion of this right in his person?

The second section enacts, that "the seller, on intimation being made to him of such subsequent sale, shall be bound to make delivery on payment of the price of such goods, &c., and shall not be entitled, in a question with a subsequent purchaser, or others in his right, to retain the said goods for any separate debt or obligation alleged to be due to such seller by the original purchaser." It is obvious that the statute attaches importance to the intimation of the subsale, and contemplates that the seller's obligation will vary materially, as between the time before and the time after such intimation. Nor is this at all surprising; for until the seller knows of the sub-purchaser's right, he cannot be under legal obligation to regard or protect it. If the original purchaser sells the subject to two different sub-purchasers, either through fraud or by mistake, it is clear that, under the statute, the seller must, on intimation of either of these subsales, make delivery to the sub-purchaser who makes intimation, though it may afterwards appear that the other sub-purchaser's contract with the principal purchaser was prior in date; for this being unintimated and unknown to the seller, he was not interpelled from delivering to the sub-purchaser who first presented himself.

But there are other occurrences between the sub-purchase and its intimation, which may equally act as mid-impediments to the completion of the sub-purchaser's right, by intimation of his sub-purchase and consequent delivery of the goods.

The seller and buyer, of goods remaining undelivered in the custody of the seller, stand to one another in the relation of debtor and creditor in a personal obligation. The buyer is debtor to the seller for payment of the price,—the seller is debtor to the buyer for delivery of the goods; that relation is constituted by the personal contract of sale which, from its nature, can effect nothing more. If the buyer pay the price, then there remains only the obligation of the seller unperformed. But the performance of the one obligation does not, in the slightest degree, change the character of the other obligation which remains unperformed. It is still nothing but a personal obligation of delivery. No doubt, the subject of the contract of sale being moveables *in formâ specificâ*, the pursuer has what is called *jus ad rem*. But "*jus ad rem* is that indirect right which we have to a thing, in consequence of an engagement, express or implied, by the person holding the real right, to transfer or deliver it; and which entitles us only to an action directed personally against him, for enforcing his obligation, and compelling him to deliver the thing if in his possession, or to indemnify us for the loss of it, if it is gone." . . . . "He whose right is of the latter species" (*jus ad rem*) "is a personal creditor, entitled only to demand pay-

ment of his debt, or satisfaction for it, as far as possible, out of the general mass of the debtor's funds."

When, therefore, the buyer makes a subsale of a specific subject or *corpus* left **[613]** in the hands of the original seller, what does he give or contract to give to the sub-purchaser? Not the goods; for he has them not, either in property or possession. He neither sells the goods, in any strict or proper sense, nor incurs any direct obligation to deliver them. He gives, or contracts to give, the sub-purchaser, what alone he has, a *jus ad rem*, which is a *jus crediti* in a personal obligation for delivery of the goods. If the subsale stands on words of bare agreement, then, in form at least, the original purchaser has not yet parted with his own right, his *jus ad rem* or *jus crediti*, which would seem to require words of conveyance or transference. But whether, either at common law or under the statute, mere words of agreement will sufficiently imply transference of such a right, it seems clear, that if the subject of the subsale be the original purchaser's personal *jus crediti* against the original seller, that must in one way or other, expressly or by implication, be transferred to the sub-purchaser, and this transference the law calls *assignation*, whatever form it may assume. It very often assumes the form of a delivery-order, which is only a mandate; but being a mandate for the mandatory's behoof, it is the earliest and simplest form of assignation known to the law under the name of a procuratory *in rem suam*. So, if this statute makes words of bare agreement in a subsale equivalent to a transference of the first purchaser's right to the second purchaser, and intends the contract of subsale so to operate when presented to the seller, it makes it, in practical legal effect, an assignation, whatever it may be in form. But all assignations (with certain well-known exceptions) require intimation to make them effectual; and the criterion of preference, either in a competition of assignations, or in a competition of an assignation with diligence or other rights, is the date of intimation of the assignation. It is, therefore, in perfect consistency with the common law, and from a sound view of the nature of the right created by the subsale, that the statute requires intimation of the subsale to the original seller, as a pre-requisite of the restraint which it imposes on his common law rights, and of the new privilege which it confers on the sub-purchaser.

While, then, the subsale remains unintimated to the seller, it is liable to be defeated by any of those impediments to its completion, which would be fatal to an ordinary assignation in competition.

Thus: A creditor of the original purchaser, using arrestment in the hands of the original seller, will defeat the sub-purchaser's unintimated subsale, with all the benefit of its statutory privilege against the original seller: for that same personal obligation of delivery which the first purchaser in the obligation can assign, and does assign, to the sub-purchaser, is also, from its very nature, attachable by arrestment. In a certain loose and popular sense, this is called arresting the goods in the hands of the seller, just as in the case of a money-obligation, the creditor is said to arrest, in the hands of the arrestee, the money due by him to the common debtor. But in both cases the true subject of the arrestment is, the obligation or accountability of the arrestee; and the existence of such an obligation or accountability is, in every case, the true test of the competency and efficiency of the arrestment. In the case supposed, therefore, it is this personal obligation of the seller to the purchaser, that is the subject at once of the arrester's diligence and the sub-purchaser's assignation; and in the competition between these two rights, the arrester must prevail, because he has created an effectual *nexus* in the hands of the original seller, before the sub-purchaser has intimated his assignation.

It follows, of necessity, that the confirmation of the trustee in the first purchaser's sequestration, having by the Bankrupt Acts the effect at once of an intimated assignation and of an arrestment followed by forthcoming, must, if it intervenes between the subsale and its intimation, entirely exclude and defeat the sub-purchaser's right.

Now, in the present case, the original purchaser, Risk, was sequestrated on the 6th July 1858, and the trustee was shortly thereafter appointed and confirmed; while it is admitted by the respondent Wyper, that no intimation of the subsale, and no demand for delivery, was made by him to the advocators, Harvey and Company, till after these events. The result in law is, that the whole right of Risk to delivery of the goods is transferred to and vested in the trustee, for the benefit of Risk's creditors; and the respondent's uncompleted assignation being thus effectually cut

down, he had and has no title to present or insist in the petition for delivery of the goods, with which these proceedings commenced in the Sheriff Court.

[614] The trustee in Risk's sequestration has no doubt refused to interfere in these proceedings, because the bankrupt's debt to Harvey and Company being much larger than the value of the undelivered goods, the trustee has no interest to assert his right to delivery of the goods, knowing that he would be met with Harvey's plea of retention, which is more than sufficient to extinguish his demand. But the trustee's prudent abstinence from an active assertion of his right does not affect the state of the title to demand delivery, which remains exclusively in the trustee, and of which he has not indicated any purpose of divesting himself, if he could consistently with his duty do so.

In this state of the facts, not only is the respondent Wyper deprived of all title to insist in the petition for delivery of the goods, but if it should become necessary for Harvey and Company to plead their right of retention, it would be pleaded—not against the sub-purchaser, whom alone the statute protects against the effects of the plea—but against a person who can, as against such a right of retention, take no benefit from the statute—viz. the trustee in Risk's sequestration.

These considerations present sufficient, and we think satisfactory grounds for a judgment completely disposing of this case.

But, in order to exhaust the subject of consultation, it is necessary, in conclusion, to advert to the 3d section of the statute, and to the effect of an arrestment, which was used by Harvey and Company under the authority of that section.

If the alteration on the law of sale had been allowed to stand on the provisions of the 1st and 2d sections, without the addition of the third, one very anomalous consequence would have followed. Before the sub-purchaser intimated his sub-purchase, and so entitled himself to demand delivery, a creditor of the first purchaser might have arrested in the hands of the seller, in which event he would have been preferable to the sub-purchaser. But he would not, in virtue of his diligence of arrestment, have been entitled to prevail against the seller's right of retention for a general balance due by the first purchaser; and thus one of those legal puzzles would have arisen, which are expressed by the brocard, *Vinco vincentem, ergo vinco te.*

In this way the seller's right of retention might have been in danger of being defeated, not by the sub-purchaser, whom alone the statute in such a case intended to benefit, but by a successful antagonist of the sub-purchaser. And it was in any view unreasonable, that the ordinary creditors of the first purchaser should have the means of doing diligence against the undelivered goods, while the undivested owner in possession of these goods, also a creditor of the first purchaser, was compelled to hold them for the benefit of any sub-purchaser who might afterwards appear, without the means of attaching them in his own hands for the debt due to himself by the purchaser from him. The 3d clause, therefore, empowered the seller to attach the goods in his hands, by arrestment or poinding, at any time before the intimation of a subsale; "and such arrestment or poinding shall have the same operation and effect, in a competition or otherwise, as an arrestment or poinding by a third party."

In terms of this section, an arrestment was used by Harvey and Company on the dependence of an action raised against Risk on 9th July 1858.

Such diligence, if used by a third party, a creditor of Risk's, in the hands of Harvey and Company, before the intimation of the subsale, would, to the amount of the debt for which the arrestment was used, have excluded and been preferable to the sub-purchaser. When used by Harvey and Company, the original sellers, it must *vi statuti* have the same effect; because it is made competent to the seller to attach the goods sold, while in his own hands, by arrestment or poinding, to the same effect as if the diligence were used by a third party. Therefore, had there been no sequestration of Risk's estate, Harvey and Company would have been entitled to a preference against the respondent Wyper, as well as against any other party; because Wyper had neither intimated his sub-purchase, nor used any diligence which could come into competition with Harvey and Company's arrestment.

But then it is said that Harvey and Company's proceedings, being taken after the sequestration of Risk, are absolutely inept and void. This, however, is a mis-

take. The benefit of these proceedings enures to the trustee and the sequestrated estate, and the arrestment is available to the creditors of Risk, including Harvey [615] and Company; but whether to the effect of giving Harvey and Company any preference over the other creditors of Risk, must (if it be necessary for Harvey and Company to claim that preference) be determined in the sequestration itself. The arrestment, being thus effectual as a diligence, is preferable to the unintimated assignation of the respondent, and affords another ground of judgment against the respondent as petitioner in the Sheriff-court.

Whether the diligences introduced by the 3d section, and called arrestment and poinding, are truly in all respects the same as the diligences ordinarily called by these names, or whether an arrestment or poinding of one's own property, which would be an unmeaning absurdity in the eye of the common law, and is a statutory anomaly introduced for an express and limited statutory purpose, falls within the equalising rules of bankruptcy, we give no opinion. The question does not occur here for judgment. And the present case, we think, may be safely disposed of on the grounds already stated.

LORD BENHOLME.—I concur in the result of the opinions of the Lord Justice-Clerk and Lord Kinloch, although I do not altogether concur in some of the details of either.

The preference of Harvey and Company over Wyper in this competition I am inclined to rest upon the 3d section of the Mercantile Amendment Act, and upon the fact that Harvey and Company arrested in their own hands before receiving any intimation of the sub-purchase from Wyper.

Had Harvey and Company not arrested, I have great doubts whether they could have founded upon the sequestration of Risk as a ground of preference to themselves in competition with Wyper; more especially as the trustee on Risk's sequestrated estate has declined to make any claim for the subjects of the sale.

On the other hand, I am of opinion that, under the facts that have occurred, Wyper cannot found upon the sequestration of Risk, to the effect of cutting down Harvey and Company's arrestment, and so working out a preference to himself in competition with them.

LORD NEAVES.—I am of opinion that the original petitioner, John Wyper, is not entitled to delivery of the whisky in dispute.

I agree in the opinion of the Lord Justice-Clerk, and the other Judges who concur with him, as to what would have been the rights and liabilities of the parties at common law, and before the statute. Upon that footing the preference of Harvey and Company over Wyper would have been clear.

By the Mercantile Law Amendment Act, the law is partially changed. But I conceive that it remains unchanged in these two particulars: first, that the property of goods sold but not delivered, remains still with the seller; second, that the seller of goods in that situation is entitled to retain them for any debt due to him, as in a question with the whole world, excepting only a sub-purchaser placing himself in a certain privileged position, pointed out by the Act.

If a sub-purchaser of such goods intimates the subsale to the original seller before any step has been taken by such seller for his own behoof, then there is no doubt that the seller is bound to make delivery of the goods on payment of their price, and is not entitled to retain them for any separate debt. But, on the other hand, I conceive that if the sub-purchaser delays to intimate the subsale till after the original seller has used attachment of the goods in his own hands for a separate debt, then the sub-purchaser is not preferable to the original seller.

It appears to me that the combined effect of the 2d and 3d sections of the Act is, that an attachment of the goods in his own hands by the original seller, such as here took place, before intimation of a subsale, excludes the privilege of the sub-purchaser. That attachment is an anomalous proceeding introduced by the statute. It is not necessary as against any party but a sub-purchaser; the use of it, as devised by the Act, is to exclude his claim, and whenever it is used before his claim has been intimated, I think that the claim of the sub-purchaser is, by the plain intention of the statute, excluded accordingly.

It appears to me that, in this case, the sequestration of Risk, the original purchaser, has no effect on the question. That sequestration either attached the right to claim the goods, or it did not. If, on the one hand, it did not attach the right to claim the goods,

which is Wyper's plea here, then it can have no effect in cutting down Harvey and Company's claim to retain them. That claim, or the arrest- **[616]** -ment in support of it, could only be cut down on the footing that the goods were *in bonis* of Risk, and were carried by his sequestration. If this was not the case, then the sequestration could not annul Harvey and Company's claim or arrestment, because the sequestration is not intended to cut down claims except by carrying them to the trustee in the sequestration. If, on the other hand, the sequestration of Risk carried the right to the goods to Risk's trustee, then Wyper's claim is excluded by the sequestration, and his present application must equally fail.

Even in that view, it might be held that the sequestration itself, which is of the nature of an arrestment, would, as in the case of M'Lachlan *v.* Bennet, 3 W. S., 449, be held equivalent to diligence at Harvey and Company's instance, and would exclude Wyper.

In short, I recur to the proposition that, in the case in question, the statutory privilege of the sub-purchaser is dependent on his intimating his purchase before the original seller has attached the goods in his own hands for his separate debt; and that as Wyper did not here intimate the sub-purchase till after the goods had been attached by Harvey and Company, the claim of Harvey and Company, which would have been good at common law, is still good under the statute.

LORD KINLOCH.—I concur with the Lord Justice-Clerk, and the Judges who agree with him, in the result of their opinion, namely, that the petition of Wyper for a decree against the advocators to deliver to him the whisky in question, ought to be refused. But I rest my conclusion entirely on the effect of the statutory arrestment used by the advocators, as giving them a preference to the petitioner.

By the leading enactment of the Mercantile Law Amendment Act, the ownership of goods, remaining undelivered in the custody of the seller, is so far transferred to the purchaser, without the necessity of delivery, that the goods in this predicament are protected against all attachment by the creditors of the seller, and laid open—unaffected by any competing claim by these creditors—to legal attachment by the creditors of the purchaser.

But the case of a second purchaser from the first, or, as he has been termed, a sub-vendee, whilst the goods still remain with the original seller, is placed by the statute in a different position. There is neither an *ipso facto* transference of ownership to any extent, nor any *ipso facto* exclusion of the creditors of the author. His right is made to hinge on intimation to the original seller; and for the plain reason that, until such intimation, there is no privity between the original seller and the sub-vendee. The right of the sub-vendee, prior to such intimation, is not a real right in the goods, but a right, as the statute expresses it, "to demand delivery." And it is only "on intimation being made to him of such subsequent sale," that the statute declares that the original seller "shall be bound to make such delivery on payment of the price of such goods, or performance of the obligations or conditions of the contract of sale, and shall not be entitled, in any question with a subsequent purchaser, or others in his right, to retain the said goods for any separate debt or obligation alleged to be due to such seller by the original purchaser."

But so soon as this intimation is made, I conceive the statutory effect to follow, of the original seller losing, in any question with the sub-vendee, all right of retention for any extrinsic debt due to him by the original purchaser. In the present case, it is not disputed that intimation of the second sale was made to the original sellers by the sub-vendee, and delivery of the goods demanded. I consider it immaterial at what date the intimation was made. At the moment of its being made the statutory enactment took effect; and all right of retention for an extrinsic debt, competent to the original sellers, at once fell to the ground, so far as the sub-vendee was concerned.

But the statute expressly declares, in the third section, that "any seller of goods may attach the same, while in his own hands or possession, by arrestment or poinding, at any time prior to the date when the sale of such goods to a subsequent purchaser shall have been intimated to such seller; and such arrestment or poinding shall have the same operation and effect in a competition, or otherwise, as an arrestment or poinding by a third party." The effect of this enactment was to remove the difficulty, under our law, of an individual arresting or poinding goods in his own possession. Removing the difficulty, it gave, I think, to the proceeding the ordinary effect of the diligence.

By the express terms of the statute, the arrest- [617] -ment or poinding is declared to have the same effect as an arrestment or poinding by a third party.

It is proved that, prior to the intimation by the sub-vendee, the advocators, the original sellers, used arrestment in their own hands, as creditors of Risk, the original purchaser, in respect of a debt of L.1113, 11s. 6d. due to them by Risk, and for which they had raised action, and ultimately obtained decree. The amount of this debt is not disputed to be far beyond the value of the arrested goods. In order to determine the effect of this arrestment, I think the simple question to be asked is, What would have been the effect of an arrestment at the instance of a third party, a creditor of Risk, in competition with the sub-vendee, not making intimation till after the date of the arrestment? I am clearly of opinion that such arrestment would be preferable to the right of the sub-vendee. I conceive the right of the sub-vendee to be incapable of being stated higher than an assignation, from his author Risk, of his own right of delivery against the original sellers. He is at best in the position of a purchaser, with an order of delivery from Risk. In competition with a creditor of Risk, using arrestment prior to intimation by the sub-vendee, the latter appears to me to be simply in the position of an assignee, whose assignation has not been intimated. The case is the simple one of an arrestment, duly executed, competing with an unintimated assignation, and preferable to such assignation. That Risk, the common debtor, was under an obligation to make good the sale to the sub-vendee no more interferes with the right of the arresting creditor, than does a first assignation, unintimated, with a second, completed by intimation; or, in the common every-day case, an assignation, unintimated, with an effectual arrestment. The competition is to be ruled by the common law, because the statute gives to the petitioner, as vendee of Risk, no preference in any question with Risk's creditors. As regards any competition between these, the statute is wholly silent. I could not, therefore, hesitate to prefer any third party, creditor of Risk, using arrestment in the hands of the advocators, to the sub-vendee in an unintimated sale. But, under the statute, I must place the advocators, by virtue of their arrestment in their own hands, in precisely the same position.

I am of opinion that the right given to the advocators, by force of this arrestment, is not affected to their prejudice by the sequestration of Risk's estates, which issued the day previous. The sequestration is at best only a competing diligence at the instance of the general body of Risk's creditors, and could only be used as the foundation of a claim at the instance of these creditors, not as support to the claim of the sub-vendee, to whom it is *jus tertii* to plead the sequestration in his favour. Any question on the effect of the sequestration can only lie between the trustee for the creditors, on the one hand, and the advocators on the other; and if no claim be advanced by the trustee (for which a very good reason may be found in the fact of the advocators' lien not being cut down by the statute in a question with any but the sub-vendee), the advocators are entitled to prevail. Their arrestment is only ineffectual, in so far as it is adverse to the sequestration; and, under the provision of the Bankrupt Statute, it would be equally void, whether used posterior to the sequestration, or within sixty days before. But the right of challenge is in either case confined to the trustee in the sequestration. And if no such challenge is or can be brought, the arrestment of the advocators must be held to remain good, to its full statutory effect.

I am, on these grounds, of opinion that the advocators are entitled to prevail in the present question. I do not hold them to do so, by force of their alleged right of retention, maintained either directly or indirectly. I do not rely on the sequestration operating actively in their favour; for I could only reach this result by assuming the right of retention, and then holding that the sequestration, as a general diligence for all the creditors, operated in favour of the advocators, as creditors by preference. If such was the ground of judgment, I think it would necessarily involve an inquiry into the right of retention, both as to its legal validity, and to the pecuniary extent to which it subsisted. I am by no means prepared to admit it to be established in the law of Scotland, that a seller of goods has a general lien over them, not merely for the price of subsequent purchases (which the later authorities appear to sanction), but for all and every kind of debt owing, or which may become due to him by the purchaser, however extrinsic to [618] the relation of buyer and seller. But, according to my view of the case, it is unnecessary to inquire into this question. I hold the right of retention, whatever was its legal validity, to have fallen by force of the statute, in any

question between the present parties. But, by force of the same statute, I consider the arrestment of the advocators of unquestionable efficacy to exclude the claim by the petitioner. It is unnecessary, in this view, to inquire into the nature of the debt covered by the arrestment. It is a debt constituted by decree of Court, and secured by an unimpeached arrestment, used previously to the date of the petitioner's intimation of his implied assignation. And the right given by such arrestment I conceive clearly preferable to the right of the petitioner.

Of this date the case was advised,—

LORD PRESIDENT.—This case arises upon an application presented to the Sheriff of Lanarkshire, to compel delivery of certain casks of whisky, and the circumstances under which it has arisen were fully stated to us, orally and in writing. The question and printed cases were sent for the consideration of all the other Judges, and they have considered them, and given their opinions. I shall now state the view that I take of the question, and shall recapitulate shortly the circumstances under which it has arisen.

On 20th March 1857, Harvey and Company, who are defenders in this case, sold whisky to Risk. On 27th April, Risk paid the price of the whisky. In the meantime, on 21st March, Risk subsold that whisky to Wyper, and, on 15th April, Wyper paid the price to Risk. These facts seem to be all ascertained. The whisky was not delivered, but was allowed to remain in the possession and custody of Harvey and Company, the original sellers. On 6th July 1858, Risk was sequestrated. He was at that time owing to Harvey and Company L.1113, 11s. 6d. On 9th July, Harvey and Company raised an action for that sum, and laid arrestments in their own hands, to attach the whisky still in their hands. At this time, the subsale by Risk to Wyper had not been intimated to Harvey and Company. On 26th August, Wyper presented a petition to the Sheriff to compel Harvey and Company to deliver the whisky to him. Harvey and Company contend that they are entitled to retain the whisky for the debt owing to them by Risk, and for which they have obtained decree. The trustee on Risk's estate declines to interfere; and so the contest lies between the demand of Wyper for delivery, and the refusal of Harvey and Company to deliver. The Sheriff has decided in favour of Wyper, and Harvey and Company have brought that judgment under review by advocation.

It appears to me that this question depends upon the effect to be given to the first, second, and third clauses of the Mercantile Law Amendment Act, 19 and 20 Vict. c. 60. These sections of the Act deal with the case of goods sold but not delivered.

The spirit of the enactment, in the first section, appears to me to be this, as bearing upon this case, that it limits the rights of the creditors of the original seller, as in a question with the purchaser, or others in right of the purchaser. It does not deal with the seller's right of retention.

The second section of the Act—(*quotes.*) Now that section of the Act appears to me to deal with the case where the first purchaser has transferred his right to a subsequent purchaser from him. It gives rights to such subsequent purchaser as against the original purchaser, and also as against the original seller. It modifies, but it does not abrogate the original seller's right of retention. It gives to a subsequent purchaser right to demand delivery "on intimation being made" by him to the original seller, and it cuts off the right to retain as against a subsequent purchaser who has made intimation. But until intimation of the subsale, he may deliver to the original purchaser, or others in his right; for example, his creditors.

Then there is the third section, which I think is important—(*quotes.*) Now this clause assumes the case of a subsale not intimated, and in these circumstances it gives to the original seller a right to attach the goods in his own hands. That is a new species of right, given, as it appears to me, as a limited or modified substitute for his former broad right of retention.

In the present case, the sub-purchaser made no intimation of his right anterior, [619] either to the sequestration of the original purchaser, or to the arrestment used by the original seller in his own hands. It appears to me that the sub-purchaser has failed to do that which the statute required him to do in order to render his right effectual, and that the original seller has done that which the statute required

him to do, in order to preserve his right as a substitute for the right of retention; and, therefore, that the conclusion to which the Sheriff has arrived is not a sound conclusion; that the pursuer is not in a position to demand delivery; that his notice having come after those obstacles of sequestration and arrestment, he is not in a situation to insist, as against the original seller, for delivery; and that his petition ought to be refused.

LORD IVORY concurred.

LORD CURRIEHILL.—The question at issue in this case is, whether or not the advocators, Harvey & Co., are bound to deliver to the respondent, Mr. Wyper, five puncheons of whisky, of which the former were the owners prior to the 20th March 1857, and the possession of which still remained with them when this action was instituted in August 1858, notwithstanding the different proceedings regarding these goods, which had taken place during the intermediate period. These proceedings consisted of,—1st, A sale of the whisky on the former of these dates, viz., the 20th March 1857, by the advocators to John Risk; 2d, A subsale of that whisky by Risk to the respondent, Mr. Wyper, on the following day, the 21st of March 1857; 3d, The contraction of a debt of L.1113, 11s. 6d. by Risk, the original purchaser, to the advocators, the original sellers, between the 8th February and the 1st June 1858; 4th, A sequestration of Risk's estate on 6th July 1858; and, 5th, An arrestment of the goods by the advocators in their own hands on 9th July 1858, in security of the debt incurred to them by Risk. Let us, then, consider the legal effect of these five proceedings, in order to determine whether or not the respondent thereby acquired a right to compel the advocators to deliver this whisky to him.

1. What was the effect of the original sale by the advocators to Risk on 20th March 1857? On the one hand, although that sale imposed on the former a personal obligation to deliver the goods to the latter, yet, as it was not accompanied nor followed by delivery of the goods to the buyer, the ownership, or *jus dominij* thereof remained with the seller, in virtue of the trite rule of the common law of Scotland, that, in such a case, a mere contract of sale, even although the price of the goods be paid, leaves the ownership or *jus dominij* thereof with the sellers, so long as that contract is not followed by delivery of the goods. The judgments in the Sheriff Court, if I rightly understand them, proceed on an assumption that by "the Mercantile Law Amendment Act (Scotland) 1856," this elementary rule of the common law of Scotland has been abolished; and that it has been enacted that the *jus dominij* of a subject which is sold passes from the seller to the buyer by the mere contract itself, without tradition or delivery, in conformity with what is said to be the rule of the law of England. There is no ground whatever for such an assumption. There is no such enactment in that statute. Although it limits, to a certain definite extent, the operation of the real right of ownership left with the seller in such a case, the statute, *quoad ultra*, leaves the rule of the common law of Scotland in its full operation and effect.

On the other hand, Risk acquired, by that contract of sale, and by his paying the price of the goods, a personal right,—which is indiscriminately denominated in our judicial phraseology, a *jus crediti*, or *jus ad rem*, or *jus actionis*,—entitling him to demand delivery of the goods from the sellers. Whether or not, according to the common law of England, a right of this kind, as being a chose in action, is transmissible, I do not know. But, according to the law of Scotland, it certainly is so. It is transmissible judicially by the diligence of arrestment. It is also transferable by voluntary deed; but in order to complete such a voluntary transfer of the *jus crediti*, and to substitute the transferee as the creditor of the original seller, the transfer must be intimated to the latter. Such were the rights of the respective parties to the original sale.

2. On the 21st of March 1857 a subsale of the whisky by Risk to the respondent took place. I assume that that subsale had the full effect of a deed of transfer or assignation of Risk's *jus crediti*; and it certainly had no greater effect. But, even assuming the subsale to be equivalent to an assignation, yet, as it was not [620] intimated to the advocators, and remained latent, the relation of obligant and obligee, which had been constituted between them and Risk, the original buyer, remained unchanged, and no such relation was formed between them and the respon-

dent, the sub-vendee. And thus the latter, so long as the subsale to him was allowed to remain latent, was exposed to the hazard of the personal claim or *jus crediti* of Risk for delivery of the goods, being onerously transferred from him, conventionally or judicially, to some third person. Unfortunately for the respondent, he appears to have allowed himself to remain exposed to this hazard, because he did not intimate the subsale to the advocators, and that proceeding was left latent and unknown to them.

3. While matters were left in this predicament, and between 8th February and 1st June 1858, Risk, the only party known to the advocators as having a claim upon them for delivery of the goods, incurred to them the debt of L.1113, 11s. 6d., already mentioned. And the next question is, how did that proceeding affect the rights of the different parties? In the first place, as to the advocators, as the possession of the goods still remained with them undisturbed, the real right of property or *jus dominij*, which had been left with them, as already mentioned, continued still unchanged. But the personal obligation which they had incurred to Risk became qualified by a right to retain the whisky as a security for that debt. According to the common law of Scotland, a right of retention arises to a seller in such circumstances, as was established by the cases of Melrose & Co., 7th March 1851, and of M'Naughton, 15th July 1852. This right of retention, although in its operation and effects it resembles in some views the operation and effect of a right of lien, is yet *sua natura* quite different. A lien is a security held by a person over effects, the real right of property or *jus dominij* of which belongs to another party. But such a right of retention is a security held by a person over effects, the real right of property or *jus dominij* of which is vested in himself. This right of retention arises, not, as in the case of lien, by a new real right being conferred upon the creditor in that debt (because his original right of property or *jus dominij*, of which he has never been divested, does not require, and, perhaps, does not admit of such an addition), but by his being exempted from performance of his personal obligation to deliver the goods to the buyer, so long as the latter leaves unperformed his counter obligation to pay the debt so incurred by him to the seller. So long as the latter obligation is not performed, performance of the former obligation cannot be enforced. Thus the buyer of goods, by leaving the possession of them with the seller, establishes a credit with the latter, which, in several effects, resembles the credit which is created by that kind of security which is well known in the practice of Scotland as a security by a conveyance *ex facie* absolute, and back bond. The advocators thus became entitled, at common law, to avail themselves of their *jus dominij* of the goods as a security for the debt incurred to them by the buyer, subsequent to the sale. All this would be indisputable if there had been no subsale by Risk to the respondent. And how is the case affected by the fact of there having been such a subsale? This much is clear enough, that but for the Mercantile Law Amendment Act, 1856, the legal right of retention of the advocators would not have been affected to any extent by that subsale, so long, at least, as the subsale remained unintimated and latent. The advocators, during the period while the debt above mentioned was being contracted to them by Risk, would, at common law, have been in safety, notwithstanding that latent proceeding, to have delivered the whisky to him, or to have repurchased it from him and paid him the price, and to have thus extinguished altogether their personal obligation to him; and they were equally in safety by the common law, to give him credit on the security of the goods, as in virtue of their legal right of retention they thereby became exempted from the operation of that personal obligation so long as the debt so incurred remained unpaid.

This being clear, the question comes to be, How did the statute referred to affect this legal right of retention? And in the first place, that statute left that right of retention in full operation and effect as to all the world excepting the sub-vendee himself. The Act contains an express proviso, in section 2d, that it should not prejudice or affect "any right of retention competent to the seller, except as between him and such subsequent purchaser." Secondly, by the same section of the statute, there is conferred upon such subsequent purchaser or sub-vendee, an im- [621] -munity from the original seller's right of retention of the goods as a security for any debts or obligations extraneous to those contained in the contract of sale itself. But, thirdly, this immunity is a conditional one; the condition being, that the subsale shall be intimated to the original seller. The enactment is express that "on intimation being

made to him of such subsequent sale," he shall not be entitled in any question, even with a subsequent purchaser, to retain the goods for such extraneous debts or obligations. Such intimation, when it is made *tempestivé*, may have a retrospective effect, and deprive the original seller, in a question with such sub-vendee, of the benefit of his right of retention as a security for debts or obligations previously incurred to him on the faith of it; and, consequently, such a right of retention is, by this statute, rendered a precarious security; inasmuch as it is exposed to the risk of its being defeated by some latent subsale which may have been made by the immediate purchaser from him to a third party, provided that that subsale shall be intimated to the original seller before he has realised the retained subject, or attached it by the legal diligence prescribed by that statute itself. But still, so long as the original seller receives no intimation of any subsale, his common law right of retention remains unaffected; and when, before any subsale is intimated to him, the subject of the security is *habili modo* applied towards payment of the debt contracted upon the credit of it, the transaction is safe from challenge. And hence, at 1st June 1858, the date of the termination of the account which Risk incurred to the advocators, their right of retention of the whisky was a good security to them against all the world, subject only to the hazard of a subsale by Risk to some third party being afterwards intimated to them. And at that date no intimation of any such proceeding had been made to them by any party.

4. The next question is, How were the rights of parties affected by the sequestration of Risk's estate on 6th July 1858? That sequestration operated as a completed transference, as at that date, of whatever right was then in the person of the bankrupt Risk, to the trustee for behoof of his creditors, as effectually as if Risk's personal claim or *jus crediti* to the goods had then been assigned to the trustee, and the assignation completed by intimation to the advocators, or as if he had then effectually attached that right *habili modo* by completed legal diligence. But what was the nature and extent of the right so transferred? Of course it was not the right of property or *jus dominij* of the goods, because that right still remained as before vested in the advocators. What was so transferred was only the personal claim or *jus crediti*, which Risk had acquired, to demand delivery of the goods from the advocators. And that personal claim was thus transferred, subject to the operation of the right of retention of the advocators, to which it had then been subjected, as I have already stated, and which rendered it inoperative to Risk, or any party in his right, so long as the debt in question remained unpaid. That right passed to the trustee *tantum et tale*, as it previously stood in the person of the bankrupt, according to the principle of the case of Gordon *v.* Cheyne, 5th February 1824. In short, the personal right which passed to the trustee by this judicial transference, was burdened with the debt in question, and the trustee was entitled to enforce it by claiming delivery of the goods only on payment of the full amount of the debt.

But the personal right or *jus crediti* so acquired by the trustee was not further burdened with the unintimated and latent right of the sub-vendee. The sub-vendee and the trustee were in the relative positions of having acquired competing transferences of the *jus crediti* which had belonged to Risk,—the transference to the former consisting of the unintimated and latent subsale, and the transference to the latter consisting of the completed legal diligence of sequestration; and the principle of *tantum et tale*, although it left the trustee exposed to the right of retention pleadable by the obligants themselves, did not also expose him to the incompleted right of a competing transferee. The preference in such a competition is regulated by the principle *prior tempore potior jure*. In other words, in such a case, the transfer, which is first *habili modo* completed, is preferable, although it may not have been first in date. It is on this principle that all such competitions are settled, whether the competitors be voluntary assignees or execution-creditors. And, as on the 6th of July 1858, when the transfer to the trustee in the sequestration was completed, the inchoate transfer to the respondent by the subsale still remained latent and incomplete, the sequestration was preferable to it, and **[622]** had the effect of excluding the respondent from ever afterwards placing himself in the predicament of being the creditor or obligee in the personal obligation of the advocator as to the delivery of the whisky.

But the trustee in the sequestration, to whom that *jus crediti* had been so transferred, had the option to deal with this right in one or other of two ways. He

was entitled—on tendering payment of the full amount of the debt incurred by Risk to the advocators, and so relieving the *jus crediti* from the right of retention—to demand delivery of the goods, and realise them for behoof of the general creditors; or he was entitled to relinquish altogether his personal claim to them, leaving the *jus dominij*, or right of property thereof, which had all along remained vested in the advocators, entirely freed and exonered from that claim; and in that case, the claim of the advocators to rank on the sequestrated estate as creditors for the debt of L.1113, 11s. 6d., would of course be diminished to the extent of the value of these goods. The trustee wisely adopted the latter course, as the amount of the debt exceeded the value of the goods; and he has accordingly, by a minute lodged in process, informed the Court that he had been advised not to claim delivery of the goods, and had acted upon that advice. But still, of course, as already stated, the sequestrated estate has got the benefit of the transfer to it of the bankrupt's claim to the goods, by the claim of the advocators to rank on the estate being thus diminished to the extent of the value of the goods.

In these circumstances, I am of opinion that even if the defence of the advocators against the respondent's demand for delivery of the whisky had rested only on their legal right of retention, that defence would be well-founded, in respect that they never were divested of the right of ownership,—or *jus dominij* of the goods,—that the personal right which was acquired by Risk, in virtue of the sale to him, to demand delivery of the goods, was afterwards placed in abeyance until he should perform the counter obligation of paying the debt he incurred to them; that it was thereafter extinguished by the trustee on his sequestrated estate, to whom that personal claim was transferred, having abandoned it to the advocators, and thereby operated the relief of the sequestrated estate, to the extent of the value of the goods, of a ranking by the advocators for the debt owing to them; and that in consequence of the respondent having kept the subsale to him unintimated and latent until after all these proceedings had taken place, he never had been placed in the position either of being the obligee of the advocators, or of acquiring the statutory immunity from the effect and operation of their legal right of retention.

5. Even supposing that the proceedings in the sequestration had not had the effect of thus extinguishing the personal obligation of the advocators to deliver the whisky, there would still remain for consideration the effect of the arrestment which they used in their own hands on 9th July 1858. On that supposition, the advocators, on the one hand, although they remained in ignorance of the latent subsale to the respondent, would have been exposed to the hazard of having their legal right of retention rendered abortive by that latent subsale being brought to light and intimated to them. The Legislature, by the statute referred to, exposed them to such a hazard. And had the Legislature stopped there, sellers, who might be in such a predicament, would have been in a worse position than the other creditors of purchasers, because, while the latter could at any time attach by arrestment the goods left in the hands of the sellers, the sellers themselves could not, at common law, use arrestments in their own hands. But the Legislature, while it exposes to that hazard sellers in the predicament in which the advocators were placed, puts them on an equal footing with other creditors by an express enactment, that they may use arrestment in their own hands; and that such an arrestment, if used before any subsale is intimated to them, shall have the same operation and effect in a competition, or otherways, as an arrestment by a third party would have. The advocators availed themselves of this statutory remedy on the 9th of July; and, as at that date, no subsale had been intimated to them, the diligence was effectual.

And what was its effect? Suppose that there had been no sequestration of Risk's estate,—that, on 9th July 1858, some third party, a creditor of his, had used arrestment in the hands of the advocators,—that, at that date, the subsale to the respondent was still unintimated, but that, at a future date, the respondent intimated the subsale to the advocators,—and that a competition for the goods then took place between the arresting creditor and the respondent, I am of opinion that, in such a [623] competition, the arresting creditor would have been preferred according to the trite rule *prior tempore potior jure*. There can be no doubt that, in such a case, arrestment is habile diligence for attaching a debtor's personal claim to goods purchased by him, and left in the hands of the seller. As little doubt is there that such arrestment

is preferable to any voluntary transference which may have previously been granted by the common debtor, but which has remained only latent and unintimated to the arrestee. As I have already stated, the doctrine of *tantum et tale* does not apply to such a competition between rival transferees. Such an arrestment, therefore, had it been used by any other creditor of Risk, would (on the supposition that the personal claims had not been extinguished under the sequestration) have been preferable to the respondent's subsale. And the arrestment which was used by the advocators, as it is declared by the statute to have the same operation and effect as if it had been used by any other creditor, is preferable to the respondent's claim in virtue of the subsale, which still remained latent and unintimated at the date of that diligence.

The result is, that, in my opinion, the advocators are not bound to deliver the goods in dispute to the respondent, in respect that, by the operation and effect of the sequestration of Risk's estate, and the abandonment therein of the goods by the trustee to the advocators in satisfaction *pro tanto* of the claim of the latter on the sequestrated estate, the respondent's claim, in virtue of this latent subsale to him, is excluded; and that, even if this had not been the case, the advocators would have acquired a preferable right to the goods, by their having used the statutory diligence prescribed by the Mercantile Law Amendment Act before the subsale was intimated to them.

Lord Deas.—The facts of this case are shortly these:—In spring 1857 Harvey and Company, distillers, sold to Risk six puncheons of whisky, marked respectively with the numbers 325 to 330, both inclusive, lying in their bonded warehouse at Yoker. Risk paid the price, but did not take delivery. About the same time Risk resold the whisky to Wyper, who, in like manner, paid the price, but did not take delivery, except of the puncheon No. 325, which he removed on 5th May 1858. On 6th July 1858 Risk's estates were sequestrated under the Bankrupt Statute. On 9th July Harvey and Company raised a summons (which was executed on the 10th) against Risk, concluding for payment of L.1113, 11s. 6d., due to them by him upon transactions as their commission agent. Upon the dependence of this action Harvey and Company used arrestment, in their own hands, upon the date of the summons, 9th July 1858. Wyper shortly afterwards applied for delivery of the whisky, which was refused. Risk's trustee did not interfere, whereupon Wyper applied, by petition, to the Sheriff, directed against Harvey and Company and Risk's trustee, to have Harvey and Company ordained to make delivery to Wyper. Defences were lodged for Harvey and Company, founding upon their arrestment as entitling them to refuse delivery. Risk's trustee entered appearance, but lodged no defences upon the merits. The Sheriff-substitute found Wyper entitled to delivery, and decerned accordingly; and to this judgment the Sheriff adhered. The case was then brought up by advocation; and the whole Judges having been consulted, it will now, of course, fall to be decided by the opinion of the majority. It is right, however, that each should form and express his own opinion, irrespective of the result.

In giving my opinion I assume the law of Scotland, as to retention against a sub-purchaser, to be in accordance with the judgment of this Court in Melrose *v.* Hastie, 7th March 1851, 13 D., 880, except in so far as modified by the Mercantile Law Amendment Act. My own opinion has always been adverse to the soundness of that judgment, for the reasons which I indicated in Mathieson *v.* Alison, 27th December 1854, 17 D., 281–2, to which it is sufficient here to refer. I regret, as the House of Lords did (1 M'Queen, 698), that the appeal in Melrose *v.* Hastie was too late, and therefore incompetent, because either an affirmance or a reversal would have satisfactorily settled the question. But, for the purposes of this case, I assume, as I have said, the judgment to have been sound. I further assume that the seller's right of retention is not altered or affected by the Mercantile Law Amendment Act, except as in a question with a sub-purchaser, or any one in his right, and where the price due to the original seller has been paid.

The events, it has been seen, present themselves in this order:—1st, The sale by **[624]** Harvey and Company to Risk (*retenta possessione*), with payment of the price. 2d, The sale by Risk to Wyper, with payment of the price—the possession remaining as before. 3d, The sequestration of Risk. 4th, the arrestment, by Harvey and Company, in their own hands. 5th, Wyper and Company's application for delivery, which was refused. These proceedings were followed by the constitution of their debt by Harvey and Company, by decree in absence, on 9th August 1858.

The questions involved relate—1st, to the effect of the sequestration; and 2d, to the effect of the arrestment.

The joint opinion of six of the consulted Judges proceeds upon the footing, that sequestration having intervened between the subsale and intimation thereof to the original sellers, this entirely excludes and defeats the sub-purchaser's right. The considerations thence arising, they say, present sufficient and "satisfactory grounds for a judgment, completely disposing of this case."

This result is reached, exclusively, upon the common law and the Bankrupt Statutes, which are held to be thus far unaffected by the Mercantile Law Amendment Act. The 2d section of that Act provides, that it shall not be competent for the creditors of the seller, who hold the goods undelivered, to attach the goods, by sequestration or otherwise, so as to prevent the purchaser, or others in his right (including, I presume, a sub-purchaser), from enforcing delivery. This enactment would obviously have been applicable and conclusive in favour of Wyper, if Risk, the first purchaser, had got delivery. But, as the Act is silent as to the effect of sequestration of a seller who has not got delivery, the result of the view taken is, that sequestration of a seller who has a mere *jus ad rem* will enable his creditors (where there is no claim of retention) to get the goods, to the prejudice of a sub-purchaser; while sequestration of a seller who has a *jus in re* will have no such effect. This result is anomalous. But I admit it to be inevitable, if the view taken of the effect of sequestration of the first purchaser, under the common law and Bankrupt Statutes, be correct. That, however, is an important general question, and, in considering it, I cannot help thinking that the position in which Wyper stands towards Risk and his estate has been somewhat overlooked.

It is assumed that Risk was a creditor of Harvey and Company for delivery of the goods. But it is overlooked that, in the same sense, Wyper was a creditor of Risk. Hence, the sequestration operated for behoof of Wyper, just as it did for behoof of all the other creditors of Risk. The effect of the sequestration was to fix the rights of all the creditors as they stood at its date; and nothing done after it could make the rights of any of them, *inter se*, either better or worse. Now, to see clearly the effect of the sequestration, as between the general body of creditors and Wyper, let us lay out of view, in the first instance, not only Harvey and Company's arrestment, but also their debt. It is only upon this footing, or upon the supposition that the value of the goods exceeded the debt, that the trustee would have an interest to maintain the plea, that the sequestration excludes Wyper; and, consequently, it is only in this view that the soundness of that plea can be tested.

Now, were it not for the joint opinion before us, I should have thought it clear that Risk's *jus incorporale* to delivery of the goods was carried to the trustee in the sequestration, *tantum et tale*, as it stood in the person of Risk. An onerous assignee or purchaser is not subject to latent equities, as was decided by the House of Lords in the case of Redfern, 1 Dow, 50. But a trustee in a sequestration, for the general body of creditors, is so, as was decided in the cases of M'Combie and of Gordon *v.* Cheyne, 2 S. & D., new ed., 566. I am quite aware of the limitation placed upon this doctrine in questions of feudal rights, which are regulated by the public records, as exemplified in the judgment of the House of Lords in Stuart's Trustees *v.* Walker's Trustees, 10th April 1835, 1 Maclean, 203. Notwithstanding of this limitation the House of Lords doubted, in the case of Edmond, 3 Macqueen's App., p. 126–7, and p. 132, bot., whether the general rule of *tantum et tale* did not apply even to what was there called a *jus crediti*, connected with lands, although they held it unnecessary to decide that point. But I am not aware that it has ever been doubted that the general rule applies to a *jus incorporale* in a moveable subject, which is the case we have now to deal with. As Lord Balgray observed in Gordon's case, "in regard to *jura incorporalia*, the general rule has always been considered as applicable" (2 S. & D., new ed., 569), and the exception introduced by Redfern's case, in favour of an onerous assignee, has never been extended to a [625] trustee taking the *universitas* of the bankrupt's estate. We gave marked effect to this doctrine in the late case of Littlejohn *v.* Black, 13th December 1855, 18 D., 207. I refer to the opinion of your Lordship in the chair, at pp. 215 and 216; the opinion of Lord Ivory, at p. 220; and to my own opinion, at pp. 226–7 of the report. Your Lordship there observed—"The general object of the statute was to preserve, as far as possible, all rights and interests in the position in which they stood the moment before bankruptcy, and to give to them the same effect

to which they were then entitled." "I cannot regard him (the trustee) as in any proper sense the holder of a security." "His title is universal, and he takes the estate subject to all its qualities and conditions, as at the moment of bankruptcy." In like manner Lord Ivory observed—"Looking to the whole working of the statute, I see nothing in it which disturbs the doctrine, as regards a trustee taking the estate of the bankrupt, when he takes the *universitas* of it, *tantum et tale* as it stood in the bankrupt. It is altogether framed for vesting and distribution of the estate. The present case is wholly dependent on the effect of the general attachment under the sequestration by the trustee for the personal creditors. The cases of Dingwall, M'Combie, and Cheyne, &c., are conclusive, that such trustee, whether private or statutory, takes only as the bankrupt held, and that, in a question with the general creditors, all latent securities are as available against the trustee as against the bankrupt himself" (p. 220).

Now, observe what was Wyper's position at the date of the bankruptcy. He was a creditor of Risk. But he was a creditor for corporeal delivery of specific articles, namely, the five puncheons of whisky, Nos. 326-7-8-9 and 330, just as Risk was a creditor of Harvey and Company for corporeal delivery of the same specific articles. The property, I assume, had not passed in either case; but the personal contract of sale was equally complete in both cases. The price had been paid in both cases; and the importance of this latter fact consists, not in its adding anything to the already complete contract of sale, but in its rendering absolute the right to delivery, which, until payment of the price, was only conditional. A contract of sale of moveables, where there are no special stipulations, involves two conditions, and two only—payment of the price by the buyer, and delivery by the seller. Payment of the price is a condition precedent of the right to delivery becoming absolute. But the fulfilment of that condition is entire fulfilment of the purchaser's part of the contract; and, after such fulfilment by Wyper, Risk had no right to take delivery, except as a mere hand and instrument for behoof of Wyper. To have done otherwise would have been a fraud. But the trustee came precisely into the shoes of Risk. He had no more right than Risk had to take delivery, except for the benefit of Wyper. Where the article sold is specific, I take it there is no doubt that the doctrine of Pothier (*Contr. de vente*, No. 68) is the doctrine of the law of Scotland—that, if within his power, the seller must deliver the article, which has been paid for, and is not entitled to satisfy his obligation by offering damages. If, therefore, there had been no debt due to Harvey and Company, and the trustee, on the principle of the cases of Lindsay *v.* Paterson, 10th July 1840, 2 D., 1373, and Gordon *v.* Millar, 12th January 1842, 4 D., 352, had obtained delivery of the whisky, I think he must have sustained Wyper's claim, in the sequestration, to have the whisky handed over to him; and that it could not have been sold for the benefit of the general body of creditors.

I am unable to see how intimation, or non-intimation, to the original seller, could affect the relative position of the sub-purchaser and the trustee. It is said the sub-sale is an assignation; but this, in my opinion, is a misuse of legal terms. There is a sense in which every sale, whether original or subsequent, may be called an assignation. So may a contract of permutation, and various other contracts. The one party may be said to assign his interest in the subject to the other. But we are not, therefore, to confound such contracts and their requisites with assignation and its requisites. Mr. Erskine, after explaining what are called legal or judicial assignations, says (5, 5, 1),—"But, by assignation, in proper speech, is understood a written deed of conveyance by the proprietor to another, of any subject not properly feudal." To an assignation, he continues, intimation "is an essential requisite, not only for interpelling the debtor from making payment to his first creditor, but for completing the conveyance" (*ib.* 5, 5, 3). There is no such solemnity, however, necessary to the completion of the personal contract of sale. All our autho- **[626]** -rities lay it down in the words of the same learned author (3, 3, 2), that "this contract is perfected by consent alone." Or, to use the language of Mr. Bell, "the contract of sale is complete when the parties are agreed, the one to pay a certain price, and the other to sell, for that price, a certain subject." There is then *consensus in idem placitum, et conventio*" (Prin., sect. 89). Mr. Brown, referring to Stair (1, 14, 1), says, still more explicitly, "that the contract may be completed by the bare consent of parties, without delivery, and without the intervention of writing, or other solemnity" (Brown on Sale, p. 2). The obvious remark to be made upon this trite law is, that intimation to Harvey and Company,

while it could not transfer the property on the one hand, could add nothing to the personal contract of sale upon the other. That contract was already complete; importing a right to delivery on payment of the price. This right to delivery became absolute by the price being paid; and, between the position which Wyper thus came to occupy, and the position of proprietor, which he could not attain except by actual delivery, there was no intermediate or better position which he could possibly reach. If the goods had been in the hands of a third party, intimation to that party might have operated as constructive delivery, and vested Risk and Wyper, successively, with the *jus in re*. But the goods being in the hands of Harvey and Company, intimation to them could have no such effect. It could not have given Wyper the *jus in re*, and it could not make his *jus ad rem* either better or worse than it was before. If, therefore, the sequestration cuts Wyper out of his right to delivery, it must equally have done so although the sale to him had been previously intimated or known to Harvey and Company.

If a state of the law so unfavourable to the freedom of commerce exists, it is remarkable that we have not heard of it till now. The original seller's preference, as undivested owner, for his general balance, in a question with a sub-purchaser who had paid the price, gave rise, in the case of Melrose, to much discussion and difference of opinion. But it was not suggested that the trustee in the sequestration of a first purchaser, who never had the property of the goods, and to whom the sub-purchaser owed nothing, could effectually have claimed a similar preference over the sub-purchaser.

It is not necessary to a contract of sale that the seller should have a *jus in re;* or that the goods should be in the possession of the seller or his agent. The goods may be on their way from a foreign country, by land or by sea, and they may be effectually sold and resold when it is impossible to tell in whose possession they are. The transaction with Wyper was equally a contract of sale as the transaction with Risk. If the goods had perished, without fault of the custodier, they would have perished neither to Risk nor to Harvey and Company, but to Wyper. Mr. Erskine's explanation of this exception to the general rule, that everything perishes to the proprietor, is important. He says (3, 3, 7), "The reason of it is, that the property, which continues in the seller till after delivery, is but nominal; he is truly no better than the keeper of the subject for behoof of the purchaser; and so he is debtor for its delivery, and no debtor for the delivery of a special subject can, in equity, be answerable for the casual misfortunes to which it may be exposed."

This peculiarity in the position of a debtor for delivery of a special subject brings out very clearly the difference between the position of a purchaser, as creditor for such delivery, and the position of a creditor in a money obligation, or an obligation to deliver goods which are not specific—as so much flax of a certain kind, or so much wine of a certain vintage. The creditor, in the money or indefinite obligation, can only rank for his debt. But the creditor for delivery of a specific article, if he has fulfilled his counter obligations, is entitled to specific implement. His right to delivery is absolute, except (and I have already said I assume the exception) against the right of retention of the undivested owner. Taking the case, as I am now taking it (to test the right of the trustee), upon the footing that Harvey and Company had been paid in full, Harvey and Company, in the words of Mr. Erskine, were "truly no better than the keepers of the subject for behoof of the purchaser," Risk; and Risk and his trustee, by taking possession, would be "truly no better than the keepers of the subject for behoof of the purchaser," Wyper.

If this be so, it clearly follows that the circumstance of there being a debt due [627] by Risk to Harvey and Company, cannot better the position of the general body of creditors, as in a question with the sub-purchaser. The trustee is to be regarded as the stakeholder, through whom all rights and preferences are to be asserted. Harvey and Company, as creditors of Risk for their debt of L.1113, 11s. 6d., are, to the extent of the value of the goods, preferable to the general body of creditors. But, apart from their arrestment (of which immediately), Wyper is preferable to Harvey and Company. The position of Harvey and Company's debt, therefore, only brings out more prominently the preferable right of Wyper over the general body of creditors; and, in no point of view, can these creditors be in a better position, as against Wyper, than if no debt had been due to Harvey and Company.

In like manner, it appears to me that the general body of creditors can claim no benefit from Harvey and Company's arrestment. It is said that the arrestment inures to the trustee and the sequestrated estate, and is available to the creditors of Risk, including Harvey and Company. But, in this point of view, and in precisely the same sense, it is equally available to Wyper as to the other creditors of Risk, leaving the question where it was, as between the other creditors and Wyper, as a creditor for specific delivery. The arrestment, in short, could add nothing to the effect, as between the general body of creditors and Wyper, of the general arrestment, previously implied in the sequestration.

But besides the important view, as to the supposed effect, against Wyper, of Risk's sequestration, upon which a majority of the consulted Judges mainly rely, another view is taken, which appears to me not only inconsistent with this leading view, but inconsistent with the very nature and effect of sequestration, as declared by the Bankrupt Statute, viz., that Harvey and Company's arrestment, as creditors of Risk, for their general balance, although subsequent to the sequestration, confers upon Harvey and Company a preference over Wyper, as a creditor of Risk for delivery of the specific articles sold.

This view necessarily implies that any other creditor of Risk, using arrestment subsequent to the sequestration, would have had the same preference over Wyper which Harvey and Company now claim. The Mercantile Law Amendment Act expressly enacts that the arrestment or poinding (both of which it makes competent for the first time) to be used by the seller, in his own hands, "shall have the same operation and effect, in a competition or otherwise, as an arrestment or poinding by a third party."

It is no part of the seller's right of retention, as undivested owner of the goods, which is to be preserved or restored to him by the arrestment. No arrestment or poinding by a third party,—meaning, as we are all agreed, any other creditor of Risk,—could ever have attached the seller's right of retention or any portion of it; for this right belonged, not to Risk, whose claim against Harvey and Company was to be arrested, but to Harvey and Company themselves. The effect of the seller's arrestment is not left to inference. We have only to inquire what would have been its effect had it been used by any other creditor of Risk, after the sequestration, in order to know what is its effect when so used by Harvey and Company.

Now, I have not been able to see how an arrestment used by any other creditor of Risk, after Risk's sequestration, could have operated in favour of that creditor a preference, which he would not have had otherwise, over Wyper, as a creditor of Risk, for delivery of the specific goods in dispute. The Bankrupt Statute enacts (sect. 102) that "The act and warrant of confirmation in favour of the trustee shall, *ipso jure*, transfer to and vest in him, or any succeeding trustee, for behoof of the creditors, absolutely and irredeemably, as at the date of the sequestration, with all right, title, and interest, the whole property of the debtor, to the effect following:—1st, The moveable estate and effects of the bankrupt, wherever situated, so far as attachable for debt, to the same effect as if actual delivery or possession had been obtained, or intimation made at that date, subject always to such preferable securities as existed at the date of the sequestration, and are not null or reducible." 2d and 3d, The bankrupt's heritable and real estate, wherever situated, subject to the provisions therein mentioned. The 42d section of the statute enacts, that, "In all questions under this Act or preceding Acts regarding sequestration of the estates of debtors, the sequestration shall be held to commence and take effect on and from the date of the first deliverance on any petition for **[628]** sequestration, which shall be held to be the date of the sequestration, although the sequestration be not actually awarded until a later date." The combined effect of these two sections is to transfer to and vest in the trustee, as at the date of the first deliverance (*inter alia*), the whole moveable estate of the bankrupt, and all right, title, and interest which he had thereto. Accordingly, in reference to the corresponding enactments in the previous statute, 2 & 3 Vict. c. 41, sects. 78, 79, and 24, Mr. Bell, in his commentary upon that statute (p. 144), says—"This fixes the date for regulating the vesting of the moveable estate under section 78, the vesting of the heritable estate under sect. 79;" and, he adds, "also the competition of diligence under sects. 82 and 83," which last sections correspond to sects. 107 and 108 of the existing statute, providing that the sequestration shall, as at the date

thereof, be equivalent to a decree of adjudication of the heritable estate, and an arrestment in execution and decree of forthcoming, and to an executed or completed poinding as to the moveable estate.

Now, after the moveable estate of the bankrupt, which is defined by section 4 to include "all rights, powers, and interests therein capable of legal alienation, or of being affected by diligence, or attached for debt," has been transferred to and vested in the trustee, it seems impossible to hold that any part of that estate, or of these rights, powers, and interests, can be effectually arrested by the individual creditors of the bankrupt as still belonging to and vested in the bankrupt.

This would be contrary to the very nature of sequestration. Accordingly, Mr. Bell, in commenting on the statute 54 Geo. III. c. 137, says, "At common law no act of the debtor can affect the property while under sequestration, and no diligence can be available against it, the neutral possession being held for those who have then interest in the subject, and according to that interest. But," he adds, "the statute has fortified this effect of sequestration by declaring" that it shall operate as an inhibition and adjudication, and "as a complete attachment and transfer of the moveable or personal estate, for behoof of all the creditors, as at the date of the first deliverance" (the clauses to that effect being, however, as your Lordships know, much less explicit than those in the existing statute). Mr. Bell goes on to say—"The first effect of the sequestration is to suspend the diligence of individual creditors against the estate. 1. The moveables are adjudged as from the date of the first deliverance; and no arrestment can proceed to the effect of raising a preference; neither is a poinding competent to that effect."—2 Bell's Com. p. 327, 5th ed.

It is not necessary here to consider the equalising clauses, sects. 12 and 108, as to arrestments and poindings used prior to the sequestration, because neither of these sections apply to the arrestment in question. I understand the object of section 12, although not very accurately expressed, to be the same with that of section 2 of the former statute, 54 Geo. III. c. 137, viz. to cut down preferences under arrestments and poindings, used within sixty days before and four months after notour bankruptcy, when such bankruptcy has preceded the awarding of sequestration. The object of sect. 108, again, is to cut down preferences under arrestments and poindings used within sixty days before the sequestration itself, corresponding to sect. 40 of the statute 54 Geo. III. c. 137, with this important addition, which Mr. Bell desiderated in that statute, viz. that "the sequestration shall, as at the date thereof, be equivalent to an arrestment in execution, and decree of forthcoming, and to an executed or completed poinding," the object of this addition (which had been already introduced into the intermediate statute, 2 & 3 Vict. c. 41, sect. 83) being, not to add anything—which it could not do—to the complete divestiture of the bankrupt, and investiture of the trustee in the whole estate, as at the date of the sequestration, but to give to the trustee the same benefit of a *pari passu* ranking as an arresting creditor, for the general behoof, which had been conferred by sect. 2 of the old statute, and is conferred by sect. 12 of the existing statute, upon individual creditors arresting or poinding within sixty days prior to and four months after notour bankruptcy,—an effect which had been denied to sequestration under the old statute, in M'Geachy *v.* Millis, 2d March 1808, and M'Ewan *v.* Young, 27th May 1817, F.C.

It is not, therefore, in respect of these clauses, but in respect of what Mr. Bell calls the common-law effect of the sequestration, embodied into express enactment by section 102 of the existing statute, whereby everything which belonged to the [629] bankrupt is transferred, absolutely and irredeemably, to the trustee for the general behoof, that it appears to me impossible to hold that any arrestment by a third party, a creditor of Risk, after the sequestration, could operate a preference in favour of that third party, either against the general body of creditors, or against any one of their number; and, if it could not so operate in favour of such third party, then it is clear it cannot so operate in favour of Harvey and Company, because the very statute, which authorises their arrestment, gives it precisely the same operation and effect, in a competition, or otherwise, as an arrestment by such third party.

The way in which this comes to tell in favour of Wyper, and against Harvey and Company, is just the way in which sequestration always tells in favour of some creditors and against others, by fixing their rights, permanently as they happen to stand at the date of the sequestration. After sequestration no diligence can be done

to the effect of changing or inverting the relative rights of parties. On the contrary, the existing statute (sect. 111) expressly declares that all preferences or securities, obtained between the date of the sequestration and the date of the bankrupt's discharge, shall be "null and void." If, therefore, at the *punctum temporis*, when sequestration fell to be awarded, Wyper was entitled to claim delivery, I think he is entitled to claim delivery still.

I am not moved by any difficulty in point of form as to whether Wyper's claim should have been vindicated in the sequestration. Had the debt due to Harvey and Company been less than the value of the goods, no doubt the trustee would have asserted his right to be the judge, in the first instance, of the competing claims between Harvey and Company and Wyper, and between both or either of them and the general body of creditors. It is true that the Mercantile Law Amendment Act (sect. 2) entitles the sub-purchaser to direct delivery, without specifying any other condition than that the first purchaser's obligations to the original seller, under the contract of sale, shall have been implemented; but it does not follow that, on the first purchaser being sequestrated, the trustee on his estate, as a neutral party, charged with the interests not only of the bankrupt, but of his creditors, individually and collectively, is not entitled to step in, as stakeholder, and to inquire and decide (subject to review in the usual manner) whether the sub-purchaser's obligations, of which the Act says nothing, have been implemented towards the first purchaser, as well as the first purchaser's obligation towards the original seller, and what are, consequently, the relative rights of parties in what may be called the subject or fund *in medio*. But if it was the trustee's right so to interfere, it was also his duty. His declinature to interfere is precisely what, I think, renders the application to the Sheriff clearly competent. But, in dealing with the question in the shape in which it thus comes before us, we are not to deal with it on different principles than if it had come to us by appeal from the trustee's judgment in the sequestration. Accordingly, it is not proposed to dismiss the petition as incompetent. What is dealt with by the consulted Judges, and by your Lordships, is not the form of the remedy resorted to by Wyper, but the nature and substance of his right.

If the above views be sound, it is unnecessary to go farther. But, although there had been no sequestration at all, I am not prepared to hold that an arrestment used by a third party, a creditor of Risk, would have been preferable to Wyper's right of delivery. The position of such third party is, throughout, the question to be considered; for if he would not have been preferred, so neither can Harvey and Company.

This point presents itself for consideration in two aspects. In the first place, how would it stand at common law? and, in the second place, how is it affected by the Mercantile Law Amendment Act? Has that Act placed third parties, creditors of the first purchaser, in a more favourable position with reference to a sub-purchaser who has paid the price, than they were before?

Now, 1st, As to the common law:—If there be any authority for holding that an arresting creditor of the first purchaser attaches the right to delivery preferably to the sub-purchaser who has paid the price, I wish it had been quoted to us. The single attempt of this kind occurs in the able and ingenious case for Harvey and Company, by the quotation of a sentence, which has nothing to do with the matter, from the opinion of Lord President Hope in Auld *v.* Hall and Company, **[630]** 12th June 1811, F.C., where his Lordship says—"Moveables cannot be effectually transferred or pledged, without delivery, if in the possession of the party transferring or pledging; or, if in the possession of a third party, without intimation to the custodier. In all cases, the same possession must be given to the purchaser which was in the seller." That was a case of goods in the seller's bonded warehouse, under the statute 43 Geo. III. c. 132, where there had been neither actual nor constructive delivery, and the sellers were consequently held entitled to retain for the unpaid price. Such a case has no application here. Neither have the above observations of Lord President Hope, which related exclusively to the transference of the *jus in re* by delivery where the seller is custodier; and, where he has the property but not the custody, by intimation to the third party custodier. But it has not been, and will not be said, that in this sense Harvey and Company were third parties here,—that intimation to them would have carried to Wyper the *jus in re* which had never been in Risk. Such a view would be subversive of the whole theory on which Harvey and Company's argument is based,—namely,

that by the common law they could have retained for their general balance, as undivested owners, and that their rights, as such, remain in so far as not expressly taken from them by the Mercantile Law Amendment Act.

I cannot see, therefore, how intimation to Harvey and Co. of the subsale could, at common law, have affected an arrestment used in their hands by a creditor of Risk. Even in the case of two sub-purchasers, each paying the price, if the second got delivery *bona fide*, doubtless he would be safe. But I know no authority for holding that mere notice or intimation to the original seller, or his personal knowledge of the second sale, would have the same effect in favour of the second purchaser, with actual delivery.

Besides, it must be recollected that arrestment, even when followed by decreet of forthcoming, only carries the right *tantum et tale* as it stood in the person of the arrester's debtor. In this respect, it differs from an intimated assignation, as familiarly explained by Mr. Erskine (3, 6, 16) in following out his observation that "the arrester affects by his diligence the subject arrested, *tantum et tale* as it stood in his debtor, with all its burdens." Instances of the application of this doctrine occur in the cases of Maitland Gibson, 2d Dec. 1826 (5 S. & D. n. ed., 60); Brodie *v.* Wilson, 27th June 1837 (15 S. & D. 1195); Adie *v.* M'Martin, 3d May 1837 (15 S. & D. 1045 and F.C.); Simson's Trustees *v.* Cunninghame, 28th Feb. 1837 (15 S. & D. 687).

To test the right at common law of the third party arrester, we must suppose the case of nothing being due, by the first purchaser, to the original seller who retains the custody. The proposition must be that, in that case, a creditor of the first purchaser who arrests in the hands of the original seller, will be preferable for delivery to a sub-purchaser of the specific goods, who, prior to the arrestment, has implemented his contract by paying the price. I know of no authority for that proposition.

Neither am I disposed to think that a doctrine so little consistent with equity and the freedom of commerce has been introduced into our law by the Mercantile Law Amendment Act. There are just two things in that Act which can be supposed to countenance such a supposition. In the first place, the concluding words of the first section, which are these:—"And the right of the purchaser to demand delivery of such goods shall, from and after the date of such sale, be attachable by or transferable to the creditors of the purchaser." And in the second place, what is said in the second and third sections about intimation.

As to the concluding words of the first section,—it has not been said that they recognise or sanction more than the attachable and transferable nature of the right of the first purchaser. They introduce no new mode of attachment or transference, and they give to existing modes no other effect than the common law gives them. Assuming arrestment to have been previously a competent mode of attachment, it is so still. But it receives from this clause no preferable effect which it would not previously have had.

As to the words in the second section, "and the seller, on intimation being made to him of such subsequent sale, shall be bound to make such delivery on payment of the price of such goods," &c.,—I look upon this phraseology as, substantially, the same thing with saying that delivery shall be made to the sub-
[631] -purchaser when demanded, if the conditions of the first sale have been implemented, by payment of the price, &c. I cannot spell out of these incidental words, the introduction of intimation as a solemnity which is either to transfer the property of undelivered goods to the sub-purchaser or to change in other respects the character of the rights of parties in these goods. The sub-purchaser could not, of course, get delivery till he applied for it. But, upon applying for it, he is entitled to get it, if the conditions of the sale, incumbent on him, have been, or shall be then implemented.

So it is, I think, under the third section. The seller of the goods may use arrestment in his own hands, so long as he is not put in *mala fide* to do so by being made aware of the subsale by a demand for delivery or otherwise. An arrestment in his own hands after intimation of the subsale is not authorised at all. But if he uses arrestment before such intimation, it is to have the same operation and effect with an arrestment used by any other creditor of the first purchaser.

It is a misapprehension to suppose that in this view the seller's right to arrest in his own hands is altogether nugatory. I own I do not understand—and none of our brethren have said that they understand—how any of Risk's creditors could *poind* his *jus incorporale* to delivery of the goods; or how they could *poind* the goods themselves,

which, *ex hypothesi*, never were the property of their debtor. But, leaving this for future development, I quite comprehend both the competency of an arrestment of that *jus incorporale*, and likewise how it may be held to give a preference to the creditor who uses it before the sub-purchaser has paid the price; because, until then, the sub-purchaser's right to delivery had not become absolute. After payment of the price, I hold that, at common law, no arrestment by a creditor of the first purchaser could cut down the sub-purchaser's right to delivery. Under the Mercantile Law Amendment Act, I admit this question is greatly more difficult. But I should be slow to believe that, by that Act, there is, for the first time, given to all the creditors of a first purchaser, the means of establishing a preference over a sub-purchaser who has paid the price. This would be a move in the wrong direction—rendering the law of Scotland less equitable, and, I rather suppose, less similar to the law of England than it was before.

I have gone thus fully into the different views of this case, because they involve matters of great interest and importance in this commercial country. But, if I am right in holding that, after sequestration, there could be no effectual arrestment, the more perplexing question, under the Mercantile Law Amendment Act, does not arise. In any view, however, and, after giving all due weight to the reasoning of your Lordships and the consulted Judges, I am unable to arrive at any different result than that which was arrived at by the Sheriff-substitute and Sheriff,—viz., that the prayer of Wyper's petition fell to be granted.

The Court pronounced the following interlocutor:—"The Lords having resumed consideration of this case, in pursuance and respect of the opinions of the majority of the whole Judges, consulting and consulted, advocate the cause: Recal the interlocutors of the Sheriff and Sheriff-substitute submitted to review: Find that it is established as matter of fact—1st, that in March 1857, the bankrupt, John Risk, bought from the defenders, John and William Harvey and Company, certain puncheons of whisky, including the six puncheons referred to in the petition, and that he thereafter paid to them the purchase price of the said whisky; 2d, that the said six puncheons remained in the hands of the said defenders, and were entered in their books as held by them for Risk; 3d, that on 21st March 1857, Risk sold the said six puncheons to the pursuer, and on 15th April 1857 the pursuer paid the price to Risk; 4th, that in May 1858 the pursuer got delivery from the defenders of one of the said six puncheons, but the other five puncheons remained in the hands of the said defenders, and were entered in their books as held by them for Risk; 5th, that on 6th July 1858 the estates of John Risk were sequestrated, and he was rendered bankrupt; 6th, that, at the date of said sequestration, Risk was debtor to the defenders in a sum of L.1113, 11s. 6d., being a balance of monies that had been collected **[632]** by him on their account, and on 9th July 1858 the defenders raised an action against Risk for payment of said balance, and, on the dependence of that action, arrested, of the same date, in their own hands, 'all goods, gear, debt, sums of money, or any other effects whatsoever lying in their hands, custody, and keeping, pertaining or in any manner of way belonging to the said John Risk:' Find that the pursuer has failed to establish that the sale of the said five puncheons of whisky by Risk to him was intimated to the said defenders, the original sellers, prior to the date of the sequestration or of the said arrestment: Find that Alexander Wylie, the trustee on Risk's sequestrated estate, who was called as a defender in the present application, has made no claim to the said five puncheons of whisky, and has judicially stated, by a minute in process, that he declines to make appearance in the litigation, in respect that the defenders are creditors of the bankrupt for a sum greatly more than the value of the whisky, and that, therefore, the sequestrated estate could derive no benefit from his taking any steps in regard to the whisky in question: Find, in point of law, that the sale by Risk to the pursuer not having been intimated previous to the date of the said sequestration, or of the said arrestment, the pursuer is not entitled to insist for delivery of the whisky in question: Therefore dismiss the petition, and decern: Find the pursuer liable to the defenders in expenses of process, both in the Inferior Court and in this Court," &c.

[Cf. Sale of Goods Act, 1893, §§ 39 and 40; *National Bank* v. *Union Bank*, 13 R. 410; *Distiller's Co.* v. *Russell's Trustees*, 16 R. 482, 499, 503.]

No. 97. **XXIII. Dunlop 632.** 28 Feb. 1861. 1st Div.—Lord Jerviswoode.

ARCHIBALD BORTHWICK (GLASSFORD'S Trustee), Petitioner.—*Sol.-Gen. Maitland—Moir.*

JAMES GLASSFORD GORDON GLASSFORD, Respondent.—*G. G. Bell—D. Mackenzie.*

Judicial Factor—Entail—Possession—Competition.—Circumstances in which the Court refused to appoint a judicial factor to uplift the rents of an entailed estate at the instance of the trustee in the sequestration of the deceased proprietor. The trustee had never been in possession of the entailed estate, but nine months after the bankrupt's death, and before the heir-apparent had completed a title, brought a declarator that the entail was invalid, and that the estate had vested in him by virtue of the sequestration.

The estates of the late Henry Glassford of Dougalston were sequestrated in 1847, under the Act 2 & 3 Victoria, cap. 47, and the petitioner, Archibald Borthwick, was appointed trustee. The estate of Dougalston was held under a deed of entail, dated 6th August 1783, which the petitioner challenged as defective, in an action of declarator directed against the heirs of entail, and *inter alios* the respondent, Mr. Glassford's eldest son. On 15th November 1853, the Court assoilzied the respondent from the conclusions of that action.[1]

The lands of Dowan and Boghall were also held by Mr. Glassford, under a deed of entail executed in 1806 in conformity with the Dougalston entail, but they were not included in the action referred to.

After Mr. Glassford's sequestration it was arranged that the petitioner, as trustee, should give up all right or interest in the heritable estates to the creditors, who held heritable securities over Mr. Glassford's life-interest, **[633]** and, on their application, Mr. Raleigh was appointed judicial factor on the estates.

Mr. Glassford died on 2d February 1860. Thereafter the petitioner, in terms of "The Titles to Land (Scotland) Act 1858," expede a notarial instrument in the lands of Dowan and Boghall, and, on 6th November 1860, he brought a declarator, that the entail of these lands was defective under the Act 1685, c. 22, and that they were held by the late Mr. Glassford in fee-simple, and were transferred to the petitioner by force of the sequestration. The respondent and the late Mr. Glassford's younger children were called as defenders to that action, and lodged defences in it.

The petitioner, alleging that he was not aware that James Glassford had made up a title to the lands in question,—but that he claimed them, and refused to allow the petitioner to manage them,—asked the Court to sequestrate the rents of the lands, and to nominate a judicial factor thereon pending the competition.

Answers were lodged for Mr. Glassford, in which he stated that the lands of Dowan and Boghall came in place of the lands of Balvie and Colvar, which were comprehended in the original entail of Dougalston;—that, in 1802, these lands of Balvie and Colvar had been sold;—that, in the action of declarator directed against the Dougalston entail, no mention was made of this transaction, and the petitioner and his advisers, who had no access to the titles, believed the whole lands to be comprehended in the one entail, which had been unsuccessfully challenged, and had entered into a transaction with the petitioner, who was thereby barred from insisting in the new challenge he had brought. The respondent farther stated that the late Mr. Henry Glassford was, on 8th April 1858, discharged under the sequestration. Since his appointment the petitioner had never entered into possession of, or interfered with, the management of the lands in question, nor had he, during the life of the bankrupt, ever challenged the validity of the entail; yet he had interpelled the tenants from paying rent to the respondent, though he was heir of entail, and was prevented completing a title, because the title-deeds were withheld by the petitioner's agents, on the plea of hypothecation.

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[1] See *ante*, vol. xvi. p. 37.

On 7th February 1861 the Lord Ordinary "refuses the petition, and decerns: Finds the respondent entitled to expenses," &c.[1]

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[1] "NOTE.—The question here raised under the petition and answers was fully argued before the Lord Ordinary, and many reported cases were quoted as supporting the views of the respective parties.

"With reference to the import of these decisions, it appears to the Lord Ordinary to be important to inquire, as bearing materially upon the judgment which he ought here to pronounce, with whom the possession of the subjects, the sequestration of the rents of which is sought, has hitherto been? Much of the argument was directed to this point, and the conclusion to which the Lord Ordinary has come is, that the possession must in law be held to have been with the respondent.

"His father, the bankrupt, held the lands now in question under a deed of entail, supposed to be strict and valid. He was infeft in these lands. Previous to his sequestration in 1847 he had granted conveyances, in favour of certain creditors, of his life interest therein, and the creditors drew the rents thereof through a factor appointed by the Court. The petitioner, as factor for the general body of creditors, did not interfere with these rents. He made up no title to the fee of the property until after Mr. Glassford's death in the year 1860. Nor did he assert a claim to the fee of the lands, as carried to him by force of the sequestration, until May of the said year, when he expede a notarial instrument in the form set forth in the petition.

"It appears, therefore, to the Lord Ordinary, that the late Mr. Glassford must be held to have been truly in possession of the fee of the lands, in virtue of the tailzied title under which he held them, and that the possession of the life interest therein by his creditors was in no respect inconsistent with the tailzied investiture. It is not disputed that the respondent is the heir-apparent of the deceased under that investiture, and the person who, if the entail be valid, is entitled to take the lands in his character as such.

"But the petitioner now comes forward, alleging the existence of a flaw in the deed of entail under which the lands are held, and that these are, in consequence, truly carried to him, as trustee in the sequestration. In so proceeding, the petitioner assumes the character of pursuer, on whom the *onus* lies to show grounds on which so far to invert the past possession as to have the rents sequestrated until this matter be determined.

"To meet the argument for the petitioner, the respondent referred, *inter alia*, to the cases of Horne *v.* Horne, June 24, 1698, M.D., 5235, and of Mackay and Fullarton *v.* Sir Hew Dalrymple, March 9, 1796, M.D., 5239, in the latter of which, as the rubric bears, it was found that 'notwithstanding the dependence of an action of reduction and declarator of irritancy brought against the proprietor and his heir apparent, the latter, upon the death of the former, is entitled to continue possession till decree be obtained.'

"It was not denied, on the part of the petitioner, that these cases, and especially the latter, went strongly to support the argument for the respondent, but it was alleged for him in reply, that they were sufficiently met by the case of Hyndford, December 5, 1769, M.D., 14,347. But, in the first place, that case bears date long anterior to that of the case of Fullarton *v.* Dalrymple; and, in the second place, it appears to the Lord Ordinary to differ materially in its circumstances. There the ancestor had granted a trust-conveyance, on which infeftment had followed. The heir challenged the trust-deed, and on the application of the trustees, the rents were sequestrated. The ground of judgment was, that in a competition for the rents, the disponee of the ancestor was preferable to the heir. But no entail existed, and the *onus* was thus clearly with the heir, the respondent in the application, who was challenging his ancestor's deed. Here the title is *prima facie* with the respondent, and the petitioner is accordingly seeking, in the form of declarator, to set that title aside.

"The case of Mackay *v.* Rollo, February 13, 1824; Clouston *v.* Anderson, January 15, 1825; M'Dougal *v.* Maclarin, July 11, 1839; Bogle *v.* Cochrane, July 16, 1847; Munro *v.* Graham, June 28, 1849; and Gilmour *v.* Mure and Others, July 18, 1850, were also quoted for the respondent as supporting his argument.

"On the other hand, the petitioner, besides relying on the case of Hyndford, already mentioned, and the various cases enumerated as bearing on this point in Mr. Thom's Treatise on Judicial Factors, pp. 2, 3, made special reference to the case of

[634] The petitioner reclaimed, and pleaded;—That all that was necessary to warrant sequestration was to shew that the apparent heir had not got pos- **[635]** -session. Now, the respondent had neither *de facto*, nor *de lege*, connected himself with this estate. All that he said was merely that his father was in possession of the estate, and that he was entitled to take it up; and, therefore, that his possession was only the continued possession of the late Mr. Glassford. The question is, was Mr. Glassford at the time of his death in possession of these lands as entailed proprietor? If he was fee-simple proprietor, that right passed to his trustee; and, therefore, the trustee, and not Mr. Glassford, was in possession of the estate. Therefore, if the trustee should succeed in the pending action of declarator, that would be the result, and it was not to be assumed that the trustee would fail in the action. Therefore the parties were at issue, whether the possession of the late Mr. Glassford was that of fee-simple proprietor or not.

The respondent was not called on.

LORD PRESIDENT.—I think the grounds taken by the Lord Ordinary are quite sufficient. The first point is, what is the result of the declarator? It is not to be assumed that the right is fee-simple.

The Court pronounced the following interlocutor:—"Refuse the desire of the said reclaiming note, and adhere to the interlocutor reclaimed against: Find the reclaimer liable to the respondent in additional expenses," &c.

[Cf. *Padwick* v. *Stewart*, 9 M. 796.]

No. 98. **XXIII. Dunlop 635.** 28 Feb. 1861. 1st Div.—Lord Neaves.

Sir GRAHAM GRAHAM MONTGOMERY, Bart., and DAVID MARSHALL, Complainers.—*Dundas—Monro.*

ALEXANDER WATSON and Others, Respondents.—*J. C. Smith.*

Property—Fishing—Loch—Road—Interdict.—In an application for interdict by a party producing a title to a loch and fishings therein,—*Held* (and *aff.* judgment of Lord Neaves), that the mere right of access to a loch does not give the right of fishing in it, and proof of usage by the public for the prescriptive period refused, the allegation that conterminous proprietors enjoyed that right of fishing being held irrelevant in the absence of any specific allegation of their titles, or of a derivative right either express or tacit from them.

Fraser *v.* Thorburn, December 15, 1855, and to the course which the Court there took. That judgment affords, no doubt, countenance to his argument, in so far as sequestration was there awarded on the ground of an existing competition for the estate. But the Lord Ordinary does not see that either party did or could allege possession. The heir-at-law appears to have intimated his purpose to challenge the deed of his predecessor, but even that step had not been actually taken. The case of Pringle Elliot *v.* Scott and Others, May 27, 1843, which was also referred to in the course of the debate, rather than founded on by either party, appears to the Lord Ordinary to be special in its circumstances. The conveyance to trustees by the previous proprietor of the lands had, on the one hand, been followed by infeftment, taken in peculiar circumstances; while the entail, which was founded on as the title of the heir, on the other hand, was manifestly not a strict entail in the sense of law. The heir in that case sought for sequestration, and for no higher remedy; and this he obtained.

"On the whole, the Lord Ordinary thinks there is not sufficient ground here to sequestrate the estate, the subject of this application. If the respondent had completed his title, this would, as the Lord Ordinary thinks, have been clear; and although this has not been done, the Lord Ordinary does not consider the omission fatal, especially seeing that the respondent states a reasonable cause for failing so to do."

Sir Graham Graham Montgomery of Stanhope, Baronet, heritable proprietor of the barony of Kinross and Lochleven, comprehending therein the castle, lake, and fishings of Lochleven, and David Marshall, residing in Kinross, tacksman of the fishings of Lochleven, presented a note of suspension and interdict against Alexander Watson, collier at Lochgelly, and others, "trespassing on the lands of the said Sir Graham Graham Montgomery, lying around the margin of the lake of Lochleven, and from entering on and passing over the *solum* of the said lake, the property of the said complainer, and from fishing in the said lake of Lochleven for perch, trout, and other fish, either from the banks of the said lake, or by entering or wading into the said lake itself, and fishing therein for perch, trout, and other fish, by rod, line, and hook, or any other implement, or in any other manner whatsoever, and to find the respondents liable in expenses."

Sir Graham Montgomery instructed his title by production of an instrument of sasine in his favour, dated 18th July 1844, and a crown charter of confirmation thereon, dated 5th July 1845, and also a crown charter in favour of his predecessor George Graham of Kinross, dated 6th August, and sealed 6th September 1777. "Besides this general right to the lake and the fishings, these titles comprehend, *per expressum*, various special or sub- **[636]** -ordinate rights in relation to the lake, which appear to have existed at a remote period, and are now merged in the said complainer's sole and absolute right in the lake and fishings. In particular, these titles comprehend all and whole the boat on the lake of Lochleven, formerly belonging to the commendator and convent of the monastery of Dunfermline, commonly called the Abbot's Boat; as also 'the town and lands of Portmoak, Kilmagad or Kilmagadwood, the boat and fishings in the lake of Lochleven, the limekilns in Bishophill, gullats in the lake of Lochleven, commonly called the cruives;' as also 'all and whole the boat or fishing boat on the lake of Lochleven, formerly belonging to the commendator and convent of the monastery of Dunfermline, commonly called the Abbot's Boat, with the whole profits, privileges, and pertinents of the same whatever;' as also 'all and whole the island of St. Servan, lying within Lochleven, with free ish and entry to the same by a boat or boats, and also with full right of fishing on said loch, and of landing about the same as shall be needful.'"

The complainer also founded on the Act 1633, cap. 29, entitled "In favour of the Earle of Mortoun and the Lord Dalkeith his sonne; anent the Loch of Levin, and preservation of the fishings thereof;" which Act proceeded on the preamble that the Loch "pertains heritably in propertie" to the Earl whom the complainer claimed to represent, in regard to the whole rights in the lake and fishings which belonged to the Earl. In 1827, provision was made by the Act 7 & 8 Geo. IV., cap. 105, for partially draining the Loch, proceeding upon the preamble that the lake belonged to the predecessor of the complainer. By the operations under that Act, there were recovered about 1200 acres from the lake. "Previously to the said lowering of the waters, rod fishing, though practised from boats for amusement, was less resorted to than fishing by net, and the ordinary feeding grounds of the fish could not be approached by wading; but the water about the edges of the lake is now so shallow as readily to admit of persons wading to the neighbourhood of the feeding ground, and other places where the fish are to be found, and there taking them by rod and line."

The complainer claimed the absolute property in the *solum* of the lake. The fishings were stated by him to be let at a rent of L.210 per annum. The uninterrupted right of fishing in the lake, he further stated, had been enjoyed by him and his predecessors for time immemorial. The respondents, on the other hand, averred that by themselves and the public they had, from time immemorial, enjoyed the privilege of walking on the banks of the loch, and of fishing by rod and line for trout and perch;—that the lands of other proprietors, and a commonty belonging to the town of Kinross, ran down to the loch, and were bounded by its shores; and all the conterminous proprietors had a right of fishing for trout with rod and line.

The respondents stated;—(Stat. 1) "The respondents, by themselves and the public, have for centuries, and, at all events, for the last forty years and upwards, or for time immemorial, possessed, used, and enjoyed the right and privilege of walking along the banks and shore of Lochleven, and of fishing by rod and line for trout and perch therein. In doing so, or in exercising those rights and privileges, they have never until now met with any challenge or interruption." (Stat. 2) "In particular, they

have possessed, used, and enjoyed the rights and privileges mentioned for the last seven years, without any challenge or interruption from any one." (Stat. 3) "The complainer, Sir Graham Graham Montgomery, is proprietor of only part of the land surrounding the loch. The lands of other proprietors run down to it, and there is a commonty belonging to the inhabitants of Kinross, which also is bounded by the said loch, which is a species of inland sea. The public have always had access to the shore of it by rights of way, and have been in use to walk along said shore from end to end, and to walk on any part thereof, and to bathe in the said loch, and have never been inter- [637] -fered with. All the conterminous proprietors have the right of fishing for trout with rod and line, and they have had that right exercised by them and for them for time immemorial. The respondents have a right to fish from the banks and shore of the loch—and, in particular, they have such right where it does not belong to the suspender, so long as the proprietors of the banks and shore do not seek to prevent them. The respondents claim no right of fishing from boats, or by net and coble."

The respondents produced no title. They pleaded a prescriptive right of traversing the banks of the loch, and of fishing for trout and perch therein. "3. The right of fishing for all fresh-water fish, excepting salmon, being a pertinent of the right of property in land, and the complainer not being proprietor of all the land surrounding Lochleven, nor of all the rights of fishing therein, he is not entitled to interfere with the respondents fishing from lands that do not belong to him, but to others, in whom the right of fishing is vested, and their exercising the rights of other proprietors."

On 5th June 1860 the Lord Ordinary pronounced the following interlocutor:—"Sustains the reasons of suspension: Suspends the proceedings complained of; and declares the interdict already granted perpetual—all to the effect aftermentioned; and of new interdicts, prohibits, and discharges the respondents from entering on or passing over the *solum* of the lake of Lochleven in question, and from fishing in the said lake of Lochleven for perch, trout, or other fish, either from the banks of the said lake, or by entering or wading into the said lake itself, and fishing therein for perch, trout, and other fish, by rod, line, and hook, or any other implement, or in any other manner whatsoever, and decerns: And, in respect the defender does not now insist as regards the respondents who have made appearance for an interdict against trespassing on his lands lying around the margin of the said lake, recals to that extent the interdict originally granted: Finds the suspender entitled to expenses," &c.[1]

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[1] "NOTE.—The suspender here has produced a sufficient title to the lake of Lochleven in question. That title is an express one, and it includes, *per expressum*, the fishings of Lochleven, though, in the case of trout and other ordinary fish, the fishings would pass with the lake as a pertinent of the property.

"The respondents have not produced, on their part, a title to any subject connected with the lake, or to any subject whatever.

"In these circumstances, the suspender has a clear right to maintain exclusive possession of the lake and its fishings, unless the respondents can shew a right to participate in that possession on some special ground, apart from a clause of common property, in their persons, to which they can make no pretension.

"The respondents claim a right to fish in the lake as members of the public, in respect of an alleged enjoyment of that privilege by the public for forty years, or for time immemorial. But the Lord Ordinary is of opinion that no such right can be thus acquired by the public in an inland lake, which is necessarily private property, whether held under a general or under an express infeftment.

"The respondents next say that the suspender is proprietor of only part of the land surrounding the loch, and they refer to certain lands of other proprietors, and, in particular, to the lands of Vane and Findaty, as running down to the loch, and to a commonty belonging to the inhabitants of Kinross, which is also bounded by the loch. They allege that the other conterminous proprietors have the right of fishing in the loch, and maintain that they themselves have a right to fish from the banks and shore of the loch, at least at those places where it does not belong to the suspender, so long as the other proprietors do not seek to prevent them. The Lord Ordinary is

[638] The respondents reclaimed, and pleaded;—That although the Second Division, in the case of Fergusson *v.* Shirreff, 18th July 1844, *ante*, vol. vi. p. 1333, had found that the right of trout-fishing cannot be acquired by usage, that was a solitary decision, and was contrary to all principle.[1] Farther, assuming that the public had no right to fish, the respondents could not be prevented fishing from the lands of other proprietors adjoining Lochleven. The complainer's lands did not surround the loch. It was therefore *jus tertii* for him to interfere, so long as the respondents were merely exercising the rights of other proprietors.[2] No patrimonial injury was here alleged. There was only a crown grant, on the one hand, as against prescriptive possession alleged on the other hand. Proof of usage ought to be allowed, or, at all events, the titles of the conterminous proprietors cleared up so as to let in the plea of *jus tertii*.

The complainers were not called on.

LORD PRESIDENT.—This is an application at the instance of Sir Graham Montgomery against certain parties, to interdict them from fishing in Lochleven. The prayer for interdict went farther, and was directed against trespassing on the lands of Sir Graham

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of opinion that the grounds here stated are also irrelevant to support the respondents' claim.

"In a case of this kind, where the pursuer has an express infeftment, the respondents, if they were to found on the titles of other parties, ought, it is thought, to have set forth those titles in precise terms. This they have not done, no particulars of any kind being given as to the nature of the titles on which they rely.

"Apart, however, from this objection, the Lord Ordinary is of opinion that there is no substantial relevancy in the respondents' statement. The respondents do not state, and certainly do not state explicitly, that any other party than the suspender has a right of property in the loch itself. But, farther, assuming that the other conterminous proprietors, as having property which reaches to the loch, could themselves fish in it from their own lands, the Lord Ordinary is of opinion that the respondents are not entitled to found upon that right, without alleging that they have leave or license to exercise the right from those to whom it may so belong. The respondents do not allege that they have any such leave or license, but contend that the suspender is not entitled to inquire into that matter, or at least that they are entitled to fish from the shore, if the proprietors on whose ground they stand do not seek to prevent them. The Lord Ordinary considers that these views are unsound, and that the suspender, more particularly as a party expressly infeft in the loch, has a good title to see that no one else fishes in it who has not a right to do so.

"The Lord Ordinary is aware that a point of this nature was under the consideration of the Court in the case of Somerville *v.* Smith, 22d December 1859, *ante*, vol. xxii. p. 279, but was not there decided. The question referred to, but which was not there properly raised, related to a fishing in a river; and it was made matter of debate whether a party having lands on one side of the stream has a title to challenge another who is fishing for trout, without leave, on the opposite bank, from the lands of a different proprietor. It is not necessary here to express an opinion as to that question, which may partly turn on the peculiar nature of the rights of riparian proprietors in the *alveus* of a river. In the present case, where the dispute relates to a loch, in which, too, there is an express infeftment, it is clear that the suspender has either the sole right of property, or has at least a joint *pro indiviso* right in the whole lake, and in the whole of its *solum*; and he seems thus to have an undoubted title to exclude any one from assuming a possession of these subjects who cannot shew a good right and title to do so."

[1] Craig (Jus Feudale), 2, 8, 14; Stair, 2, 3, 69, and 2, 1, 5; Colquhoun *v.* Carmichael, 20th Nov. 1787, Dict., 9645; Hailes, 1033; 2 Blackstone, 34 and 396 (Kerr's Ed.); Cujacius, 2, 283; Grotius, 2, 3, 10, 2; Bell's Pr., sect. 747; Phear's Treatise on Water, p. 65; Dyce *v.* Hay, *ante*, vol. xi. p. 1266, and H. of L. 1 M'Q., 311.

[2] Houston *v.* Mackenzie, 18th August 1831, H. of L., 5 W. & S. 428; Hamilton *v.* M'Callum, 12th Feb. 1724, Dict., 7824.

Montgomery, lying around the margin of the lake. But we have nothing to do now with the question of trespassing. The question relates to the right of fishing in the loch, as the loch now exists. It appears very clear from the titles, that Sir Graham Montgomery is the proprietor of the lake, and proprietor of the solum of the lake. It is not a sea or a loch, of which there are several pro- [639] -prietors. It is his property. He is proprietor of the solum. He is also proprietor of the fishings. But the main thing is, that he is proprietor of the whole lake and solum. On the other hand, the respondents have no title at all. There is no question between him and other parties who have right to the shore, and who are also claiming right to the fishings *ex adverso* of their lands. This is merely a question with parties who are desirous of going on the solum of what is his property, just as much as any pond on his grounds is his property, and that is enough to exclude these parties in this case. In the case of Shirreff *v.* Fergusson, all the authorities which have been cited to us were before the Court, and the matter very fully discussed; and opinions were given, after deliberate consideration by very eminent Judges, and the most decided of all the opinions was that of Lord Moncreiff, and the result was to negative the pretensions even to get into proof to establish the usage of fishing. I think that this is a still clearer case. The principle of the decision in the case of Shirreff *v.* Fergusson has been recognised since that case on the other side of the wall in the High Court of Justiciary, and I also think in this Division. Upon the whole, I see no ground for altering the interlocutor of the Lord Ordinary.

Lords Ivory and Curriehill concurred.

Lord Deas.—I also concur. The respondents say—1. That Sir Graham Montgomery has not got all the lands around the loch. 2. That they were not on his lands, but on the lands of Vane and Findaty. 3. That there has been forty years' usage of fishing in the loch by the public, giving a prescriptive title to fish in the loch. Now it must be remembered that this is a question not of declarator, but of interdict; and Sir Graham Montgomery having right to the solum of the loch, that gives him a sufficient title to obtain interdict against all intruders. The respondents allege no title except as members of the public, having (as they say) lawful access to the loch. But the case of Shirreff *v.* Fergusson disposes of the relevancy of that allegation. No doubt it is farther said, that "all the conterminous proprietors have the right of fishing for trout with rod and line," and that the respondents have the same right, "so long as the proprietors of the banks and shore do not seek to prevent them." But there is here neither a specific allegation of a right of fishing in the particular proprietor from whose lands the respondents fished, nor of a derivative right, either express or tacit, from that proprietor to the respondents. In short, there is nothing tangible in the respondents' case, except an impugning of the doctrine of Shirreff *v.* Fergusson, which cannot be listened to, especially in this summary process of interdict.

The Court adhered, with expenses.

[Cf. *Grant* v. *Henry*, 21 R. 360.]

No. 99. **XXIII. Dunlop 639.** 22 Feb. 1861. 2nd Div.

Alexander John A. Tulloh, Pursuer.—*Gifford—Blair.*

Mrs. Mary Durney or Tulloh, Defender.—*Logan—M'Ewen.*

Husband and Wife—Divorce—Jurisdiction—Domicile—Paramour—Relevancy.—Circumstances in which *held* (1), That a husband, pursuer of an action of divorce on the ground of adultery, was domiciled in Scotland. *Held* also (2), that the Court had jurisdiction in the said action, although the defender was resident, and the adultery was said to have been committed in Ireland; and (3) (*aff.* judgment of Lord Ardmillan), that, where a husband averred the dates at which his wife had borne children, and condescended on his own and his wife's places of residence, to show that they must have been in different countries at the period of the conception of the children, the action was not irrelevant, though there was no statement as to who the defender's paramour was, and no specification of the dates of the adultery.

Proof—16 *Vict. c.* 20—*Admissibility of witness.*—In a question of domicile with reference to the jurisdiction of the Court in an action of divorce, a proof by commission was allowed. *Held*, that the husband (pursuer) was inadmissible as a witness upon that question.

This was an action of divorce. The pursuer alleged that he was the son of a Scotsman; that he had been married to the defender in Australia in 1844, according to the Roman Catholic ritual; that they had returned to [640] this country in 1846, and, in consequence of doubts as to the validity of such marriages in Australia, they had been again married in the parish church of St. George, London, according to the forms of the English Church; that thereafter they came to reside at Troon, in Scotland, where they became permanently domiciled; that in 1848 a voluntary contract of separation was entered into between them, since which time they had never cohabited or met; that in May or June 1849 the defender had gone to reside in Ireland, and during the years 1849 to 1859 inclusive had never been out of Ireland; that during the said years the pursuer had never been in Ireland, nor had any meeting or communication with the defender. He specified the different places where he had resided during the whole period, and also entered into detail as to the places in Ireland where the defender had from time to time resided.

His specification as to the adultery on which the action was based was contained chiefly in the following averments:—(Cond. 8) "That since the defender's separation from him, she has been guilty of adultery with some person or persons unknown, in Ireland, and the result of this adultery has been that the defender has given birth to three children in Ireland, of which the pursuer is not, and cannot possibly have been the father, but who are the offspring of the defender's adulterous connection with some person or persons to the pursuer unknown." (Cond. 9) "The pursuer has caused every possible inquiry to be made in Ireland, in order to discover the person or persons with whom the defender has carried on adulterous intercourse, and to discover the father or fathers of the children to whom the defender has given birth. These inquiries, however, have been unsuccessful, and the pursuer is unable to state the names of the person or persons with whom the adultery was committed. The children to whom the defender has given birth were born as follows:—The first child, whom the defender calls Louisa, or Louisa Mary, Tulloh, was born in the year 1851. There are two registers of baptism of the child. According to the register of the parish of Tramore, the child Louisa Mary was born in Tramore on or about the 1st September 1851. The pursuer believes, however, that the birth actually took place in the beginning of the year 1851, and that the defender gave a false date when the child was baptised, with the view of preventing or misleading inquiry, or for some other reason. The second child, whom the defender calls Eliza Jane Tulloh, was born in Tramore on or about the 1st July 1852. The pursuer was not the father of any of these children, and all access or intercourse between him and the defender, during the time of conception, was impossible, the defender having been in Ireland during the whole of the years 1850, 1851, and 1852, and the pursuer, during these years, never having been in Ireland, but having been in London, Kirkcaldy, and Rosefield, in Scotland, and in Australia." (Cond. 10) "The third child to whom the defender has given birth was born on or about 2d December 1858, in the house of Mrs. Flynn, Lower Clanbrassil Street, Dublin. This child is also the result of adulterous intercourse between the defender and some person unknown. The pursuer, although he has made every inquiry, has been unable to discover the father of the child; but the pursuer is not the father, and it is impossible that he could be, because during the whole period of conception, and the whole of the year 1858, the pursuer has never been out of Scotland, while during the whole of that year the defender has never been out of Ireland. The child is a boy, and the defender has named him William Tulloh, although she has no right to use the pursuer's name either for this or for any other of her illegitimate children."

The defender pleaded, *inter alia*;—(1.) This Court is not the proper forum for dissolving the marriage in question, the more especially as the adultery alleged against the defender is said to have taken place in Ireland. (2.) The pursuer having stated no relevant or sufficient grounds, either in [641] fact or in law, to support the conclusions of the summons, the defender is entitled to absolvitor.

On 17th January 1860 the Lord Ordinary pronounced the following interlocutor:

—"Having heard counsel for the parties on the preliminary defences, and made avizandum, Repels the first plea in law for the defender, and appoints the cause to be enrolled for farther procedure."[1]

On 7th March 1860, a record having been closed, the Lord Ordinary pronounced an interlocutor in the following terms:—"Having heard parties' procurators, Repels the plea in law stated for the defender against the relevancy of the libel: Allows to the pursuer a proof of his averments in the summons as amended, and to the defender a conjunct probation thereanent: Grants diligence," &c.[2]

The defender reclaimed; and, on the case coming before the Inner-House, their Lordships, after hearing parties, pronounced the following interlocutor:—"Having considered the reclaiming note for the defender against Lord Ardmillan's interlocutor of 7th March last, and heard counsel, before farther answer, and with a view to determine the question whether the Court has jurisdiction to entertain the action, Allow the pursuer a proof of his averments in the 4th and 6th articles of his condescendence that he is a domiciled Scotchman, and has been so since 1846, and to the defender a conjunct probation: Grant diligence," &c.

In the course of the proof the pursuer tendered himself as a witness. It was objected to his admissibility, that it was incompetent to adduce either party as a witness in a consistorial cause; more particularly, it was provided by sect. 4 of 16 Vict. c. 21, that it should not be competent to examine the parties in "any action, suit, or proceeding instituted in Scotland in consequence of adultery, or for dissolving any marriage," &c. This was an action of divorce, and although the point remitted to proof was preliminary to an investigation into the merits, still the section of the Act referred to specified the class of cases in which the examination of parties should be incompetent, and not the nature of the point remitted to proof.

[642] Answered for the pursuer;—The Court having remitted this inquiry to a Commissioner, and not to the Sheriff-commissaries, which must necessarily be done in all consistorial proofs, showed that they did not consider this inquiry to be one of a consistorial character, and therefore not to be regulated or limited by those rules which apply to a consistorial proof. Reference was made to the case of Shaw, 13th July 1850 (*ante*, vol. xii. p. 1239), where the principle was clearly brought out that the special rules which apply to evidence taken in an action of divorce are not to be extended to a question of domicile incidental to, but not connected with, the proper merits of the cause. In connection with the case of Shaw, reference was also made to the Act 6 & 7 Will. IV. c. 41, sect. 2.

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[1] "NOTE.—If there had not been a contract of separation, there would be no doubt that the action is competent in this Court. But it is settled by the decision in the case of Warrender, that such a contract does not prevent the application of the rule, that the wife during the marriage has no separate domicile, but follows the domicile of the husband."

[2] "NOTE.—This case is, in point of averment, distinguishable from the case of Pegg, 17th May 1859. The statements of the pursuer on the record are, on the one hand, much more ample, and, on the other hand, much more specific. The case, as here laid, is not so narrow, and it is not so vague as in the case of Pegg. It rests on broader grounds, and is supported by more distinct and definite allegations.

"The pursuer alleges that, after a contract of separation in 1848, he and the defender lived absolutely and invariably separate. He has set forth in detail, and with great precision, where he lived during the whole period between 1848 and the date of the action, and where the defender lived during the same period. If his statements are true, which must be assumed in this question of relevancy, it is not possible that he could have been the father of the several children born by the defender in Ireland.

"There will be difficulty of proof, and if the evidence adduced by the pursuer shall not support these averments, so that the possibility of intercourse shall turn out not to be excluded, then the presumption of paternity, on which the defender founds, will receive its legal effect. But, *in hoc statu*, dealing with the relevancy only, and considering the defender's plea as a plea urged in bar to investigation of the facts alleged, the Lord Ordinary cannot sustain the plea, which rests solely on a presumption of paternity which is not absolutely inflexible and invariable, but which may yield, and must yield, to conclusive evidence of facts alleged by the pursuer."

The Commissioner reported the objection to the Court.

LORD JUSTICE-CLERK.—This may be a point of some importance, but it is not open to any doubt. In this action of divorce a question of jurisdiction has been raised, and the pursuer has tendered himself as a witness, as to his own domicile. The objection was taken by the defender, that, being a party to the suit, he cannot be admitted as a witness at common law, and that he can be admitted only if he has been rendered admissible by the Act 16 Vict. c. 20. The 3d section of that Act provides, that "it shall be competent to adduce and examine as a witness in any action or proceeding in Scotland, any party to such action or proceeding, or the husband or wife of any party, whether he or she shall be individually named in the record or proceeding or not." Now these are comprehensive terms. But the exception contained in the 4th section provides, "that nothing herein contained shall apply to any action, suit, or proceeding instituted in Scotland, in consequence of adultery, or for dissolving any marriage, or for breach of promise of marriage, or in any action of declarator of marriage, nullity of marriage, putting to silence, legitimacy or bastardy, or in any action of adherence or separation." It appears to me that the exception is conceived in language precisely corresponding to that of the permissive clause, and I think the same construction must be put upon both. So much for the construction of the Act.

But it is said by the pursuer, that the same reason which led the Court to appoint a Commissioner to take the proof as to the question of domicile, instead of remitting to a Sheriff-commissary, as required by statute in consistorial proofs, must also operate so as to separate this proof from the proper consistorial action, and so save it from the exception in the Act.

I think the two statutes are open to different constructions. The Act 6 & 7 Will. IV. c. 41, requiring proofs in consistorial causes to be taken before certain parties, refers to proofs of that which is the ground of action. The Legislature proceeded on the ground that the subject-matter of these actions was of a peculiar kind, and that it was desirable that proofs of facts, which are the foundation of consistorial actions, should be taken by parties accustomed to take them. But there is nothing to lead us to such a construction in the Act of 16 Vict.

LORD COWAN and LORD BENHOLME concurred.

LORD WOOD absent.

The following interlocutor was pronounced:—"Find that, in terms of the 4th section of the statute, 16 Vict. c. 20, the pursuer is not admissible as a witness to any effect in this action of divorce at his instance: Of new allow the defender a conjunct probation, and renew the commission," &c.

Thereafter parties were heard upon the proof in regard to the question of domicile. The import of the evidence is detailed in the following opinion by

LORD COWAN.—This is an action of divorce instituted by the pursuer, designing himself as "presently residing at Dollar," against the defender, his wife, designed as "presently residing in Dublin," on the ground of adultery, alleged to have been committed by the defender in Ireland.

The first plea stated in defence was an objection to this Court being the proper forum for trying the action. This plea was repelled by the Lord Ordinary on 17th January 1860, by an interlocutor, against which no reclaiming note was presented, **[643]** the Lord Ordinary stating in his note, that had there been no contract of separation, there could have been no doubt of the competency of the action in this Court; but that the case of Warrender had settled that such specialty did not prevent the application of the rule, that the wife, during the marriage, has no separate domicile, but follows the domicile of the husband. Thereafter the Lord Ordinary repelled the plea stated by the defender against the relevancy of the libel, and allowed the pursuer a proof of his averments. The interlocutor is brought under review by the reclaiming note now to be advised.

From the statements in the record relative to the pursuer's own residence and history prior to the institution of this action, it appeared to the Court to be indispensable that there should be inquiry into the facts bearing on his alleged domicile in Scotland, so as to leave no doubt on the question of jurisdiction of this Court before

the action was allowed to proceed. Accordingly, on 5th July 1860, the pursuer was allowed a proof of his averment, that he is a domiciled Scotsman, and has been so since 1846. The proof has accordingly been led, and we are now to dispose of the question of jurisdiction. The facts established are these :—

The pursuer was born in 1815–16 in England, where his father was at the time resident. The property of Burgie, situated in Elginshire, belonged to the pursuer's grandfather, who died in the year 1830, when the pursuer's father succeeded, but who did not come to Scotland, the property being much burdened with debt. He died either in England or in France in 1844, where he had been from the time of his succeeding to the estate in 1830. The property was conveyed by the father to trustees, and the trust still subsists, an allowance being made to the pursuer out of the rents. The pursuer continued in England from the time of his birth until he went to Australia in 1840, where he married the defender, who is a native of Ireland. They came home from Australia in 1846 with one child, when the pursuer then, for the first time, came down to Scotland. He and his wife lived in Irvine, and afterwards in Troon, in furnished lodgings till the end of 1847, or beginning of 1848. Disputes having then arisen between them, he left his wife and child at Troon, and went to London. A contract of separation in the Scotch form was prepared by his Edinburgh agents, and subscribed by the defender at Edinburgh, and by the pursuer in London, in the month of April 1848. The pursuer thereafter returned to Australia, and the defender went to Ireland with her child. They did not again meet. The pursuer came back to London in June 1849, where he remained till July 1850, when he came down to Scotland, and remained at different places in this country till July 1852. He then returned, for the third time, to Australia, where he remained for five years, coming to this country finally in 1857.

Had the question occurred in 1857, before the pursuer settled in Scotland, it would have been difficult to say that he had acquired a domicile in this country. Neither by birth, nor by residence, had he any connection with Scotland prior to his leaving England for Australia in 1840; and out of the seventeen years prior to his return in 1857, he had spent twelve of them in Australia, and two in England, having been only three or four years, at different times, in Scotland. No doubt, when he first came to Scotland in 1846, he had an interest in the estate of Burgie, and the contract of separation in 1848 was a Scotch deed; but even, with the aid of these facts, it would have been difficult for me to hold that, prior to 1857, he had formed that abiding connection with Scotland, by residence in the country, to make it his proper and permanent domicile. However, he did come to this country in 1857, and the whole evidence applicable to the intervening period, to which it is unnecessary specially to advert, demonstrates that he had returned *animo remanendi*, and it was when he was living at Dollar in Scotland with his child, with a view to its education, that this action was instituted by him in November 1859.

I am of opinion, in this state of the facts, that the pursuer was domiciled in Scotland when the summons of divorce was libelled; and I concur in the view of the Lord Ordinary stated in the note to his interlocutor, to which I have referred, that the judgment in the case of Warrender is applicable, to the effect that the domicile of the defender, his wife, must be held to be that of her husband, the pursuer. I am of opinion, therefore, that we ought to sustain the jurisdiction of the Court, and hear parties under the reclaiming note on the question of relevancy.

[644] Lord Wood, not having been present at the argument, gave no opinion.

Lord Benholme concurred with Lord Cowan.

Lord Justice-Clerk.—I would only add, that there is one other circumstance that appears to me material in this question of jurisdiction, and that is the fact, that when, in 1848, the contract of separation was entered into, the parties were resident as married persons in Scotland, and entered into a Scotch contract of separation, under which they have been living separate ever since. If that contract were put an end to, the home to which this lady would return would be in Scotland; and this appears to me to strengthen our conclusion, that the husband's permanent residence here confers jurisdiction over the wife.

The Court pronounced the following interlocutor :—"Find that, in and after the year 1857, the pursuer became permanently resident and domiciled in Scotland, and

that the pursuer and defender were resident as married persons in Scotland at the date of the contract of separation between them in 1848, under the conditions of which the spouses have ever since remained separate: Therefore, sustain the jurisdiction of the Court, and appoint parties to be further heard on the reclaiming note against Lord Ardmillan's interlocutor of 7th March 1860."

On the question of relevancy, it was argued for the defender;—The most important averment made by the pursuer was contained in Article 8. There was no statement who was the paramour, although it had been settled that the pursuer of an action of divorce for adultery was bound to condescend upon, or at least to give some particular description of the party with whom the alleged adultery had been committed.[1] The period of the conception of the defender's children corresponded with the dates of the pursuer's visits to Britain. On such averments, it was not to be permitted to the pursuer to prove impossibility of access, so as to redargue the presumption founded on the rule *pater est quem nuptiæ demonstrant.* The same accuracy in statement was required in an action for divorce as in a criminal libel, and, for reasons of public policy, could not be dispensed with. What the pursuer was bound to prove was, not only that he could not have access to the defender, but that he actually had not access to her.[2]

The Court allowed the pursuer to put in a minute of amendment of the record, deleting the words, "as already mentioned," in the 7th Article of his condescendence, and adding the words "and now avers" after the words "The pursuer has recently discovered," with which the 8th Article of his condescendence commenced.

Lord Justice-Clerk.—We have now to give judgment on the reclaiming note against Lord Ardmillan's interlocutor of 7th March 1860, but it is necessary to keep in view, that since its date we have pronounced an interlocutor, by which we made certain findings in point of fact on the proof, and in respect thereof sustained our jurisdiction to entertain this action. The question now before us is, whether the averments of the pursuer are relevant?

I should be sorry to say anything to disturb the rule, that the averments of the pursuer of a divorce on the ground of adultery must be as precise and pointed as they can be made, or to throw doubt upon the proposition that the allegations of the *species facti* must be criticised with the same severity as if in a criminal libel. I go the full length of holding that proposition. But even holding that, I think the averments here are relevant. The case is peculiar, and we are bound to regard the **[645]** circumstances. The pursuer, after his marriage to the defender in Australia, led a wandering life for some time. He had a small heritable estate in Scotland, and seemed to have had some intention of pushing his fortune abroad, and in that state of doubt and uncertainty he continued until 1857, when he came to reside in Scotland *animo remanendi.* Previous to that there had been a quarrel, and the husband and wife had entered into a contract of separation. At that period they were temporarily resident in Scotland, although not permanently settled there.

The averments upon which the present action is founded, refer to the period subsequent to the separation, and before the institution of the action,—that is to say, between the years 1849 and 1859. The leading and most important averment is, that the defender was never out of Ireland, and that the pursuer never was in Ireland, during these years. That standing alone might be considered too general to be quite satisfactory. But, in addition to that, we have as precise averments as could be expected, as to the different places where the pursuer was during these years, and details, as the pursuer says, as precise as he has means of giving, as to the different places within Ireland where the defender resided during these years. There is a complete and satisfactory series of averments that, from 1849 to 1859, the pursuer and defender not only never met, but could not possibly have met in this sense—that

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[1] Nicolson *v.* Nicolson, 21st Feb. 1770, Mor. p. 12,639; Earl of Monteith *v.* Lady Monteith, 19th July 1684, Mor. p. 16,686; Steel *v.* Steel, 10th July 1835, 13 Sh. & D., p. 1096; Smith *v.* Smith, 13th Feb. 1838, 16 Sh. & D., p. 499.

[2] Pegg *v.* Pegg, 17th May 1859, *ante*, vol. xxi., p. 820; Nicolson *v.* Nicolson, 21st Feb. 1770, Mor. p. 12,639.

they never were in the same country. There was therefore, in point of fact, an impossibility of access, if these averments be true. The pursuer says he has now discovered, and he now avers, that during this period the defender was guilty of adultery in Ireland, with some person or persons unknown, and that she, in consequence of the adultery, gave birth to three children, of which the pursuer was not, and could not be the father. That, again, is rather a general averment, and requires more specification. Accordingly, in article 9 of the condescendence, we have details of the time when the children were born, and from this the pursuer infers, and we can infer, the periods at which the copulation took place, of which these births were the result. These all must have been between 1849 and 1859.

In that state of the record, I am unable to say that the pursuer's averments are irrelevant. I think the case differs from the case of Pegg, and the earlier cases. There the averments on the record did not come up to the averments here. There was this material defect in the averments in the case of Pegg, that while it was stated that the pursuer went to the Highlands before the time when the adultery was alleged to have commenced, he gave no information as to his stay in the Highlands, and for anything the record stated, might have been staying in the same town, or in the same house, with his wife at the time of the children's conception. But if the averments here be true, it follows of necessity that the pursuer cannot be the father of these three children, and from that it follows of necessity that the defender must have committed adultery, and therefore, holding these averments to be absolutely inconsistent with anything else than the adultery of the wife, I cannot refuse to sustain the relevancy.

LORD COWAN.—This is a very peculiar case. There are no special averments made of any specific acts of adultery, the commission of it being averred only as an inference to be deduced from the other facts, which it is proposed to send to proof. The facts averred resolve into this, that, during the absence of her husband the pursuer, the defender has born three children, of which he could not possibly be the father, from the conception and birth of these children, at the times set forth, having occurred in Ireland, while the pursuer had never been in that country, but had been resident at those times elsewhere, as specifically alleged in the record. Assuming the pursuer to make out satisfactorily his allegations on these subjects, I think their relevancy is very clear, although I am not aware of any case in which such a *species facti* has previously come before the Court. In the result at which I arrive, I entirely concur with your Lordship.

It is said that, to sustain these averments as relevant, and allow them to be proved, would be to interfere with the principle on which is founded the maxim *pater est quem nuptiæ demonstrant*. But that rule is not without exception. There is in England a rule that the maxim is not to be interfered with unless the husband be shewn not to have been within the four seas; but with us, as it is laid down by Lord Stair, it is sufficient if the husband's absence is made so clear that he could **[646]** not have been with his wife at the conception of the child. His words are,—"With us it will be sufficient that his absence be special and circumstantiate, so that there remaineth no doubt that he could not have been present" (Stair iii., t. 3, sect. 42). This affords a good general principle by which to test the relevancy of the pursuer's averments. It is enough for me that it is averred that the parties were so placed, the one in Ireland, and the other out of Ireland, that the pursuer could not have been the father of the children; and as the children must have had a father, it follows that the mother must have committed adultery in their conception.

LORD BENHOLME.—I am quite of the same opinion as to the point which we are now to decide. The relevancy of this libel depends upon what I may say is, to a great extent, a negative averment. In a case of this kind, it is certainly the duty of the Court to see that these negative averments should be so clear that there can be no escape from the result that adultery must have been committed. I think Lord Cowan, in his remark that there is no precise averment of adultery, has overlooked the minute of amendment by which that defect has been remedied. Had it not been for the amendment, I could not have sustained the libel. It will, I think, be almost impossible to prove this libel. I say "impossible," using that word in an improper sense, but I use the word to show how difficult it will be to prove these negative averments with sufficient exactness. It seems to me that the pursuer must prove the

locus of every moment of the defender's existence for ten years, or, at least, of every half-hour. As to the pursuer's own whereabouts during that period of time, it will be necessary that he should prove, not only where he lived, but also how he journeyed or voyaged, when he went from one place to another.

But we need not deal at present with the nature of the proof. We have only to consider the relevancy; and, although this is the first case of this kind, I cannot hold that this is not a relevant summons.

LORD JUSTICE-CLERK.—I think it right to say that I confine my judgment entirely to the question of relevancy, and I am not disposed to form any opinion as to the kind and amount of proof which may be necessary; but I hardly think I could concur with the strong view on that matter which has been expressed by Lord Benholme.

The Court pronounced this interlocutor:—"Having resumed consideration of the reclaiming note against Lord Ardmillan's interlocutor of 7th March 1860, with the record as of new amended, refuse the reclaiming note, and adhere to the interlocutor reclaimed against."

[Sequel, *Coles* v. *Homer*, 22 R. 716.]

No. 100. **XXIII. Dunlop 646.** 1 Mar. 1861. 2nd Div.—Lord Jerviswoode.

ROBERT JOHNSTON, Pursuer.—*Young—A. Moncrieff.*

JOHN ROBERTSON (Inspector of Poor for Latheron), Defender.—*Gordon—D. M. Smith.*

Obligation—Penalty—Reparation—Compensation—Act 1592, *c.* 141—*Jury Trial—Issues—Expenses.*—A contract for the erection of a poor-house contained a clause binding the contractor to have it completely finished, and the keys delivered up on or before a specified day, "under a penalty of L.5 sterling for every week during which the whole of said works shall remain unfinished" after the said day. In an action by the contractor for an alleged balance of the contract price, also for payment of extra work, and also for damages for non-implement of a former contract, decree in absence was taken; but thereafter a note of suspension of this decree was passed and conjoined with the process, and a record was made up, in which the defender pleaded, *inter alia*, that under the above clause the pursuer, through failure to finish and deliver over the works at the stipulated time, had incurred damages to a large amount at the rate therein specified; and he proposed to take a counter issue, on the footing that the damages were fixed by the contract, and were not subject to modification; and also an issue on the footing that the damages might be assessed by the jury;—*Held* (1.) that, on a sound construction **[647]** of the whole contract, the sum stipulated in the event of non-completion was of the nature of pactional damages, and was not a penalty subject to modification; (2.) that the defence was not properly a plea of compensation, but a defence arising in an action upon a mutual contract out of the principle that one party is not entitled to enforce performance of the stipulations of such a contract in his favour, without shewing that he has given or tendered performance of his part of the contract; and therefore (3.) that the statute 1592, c. 141, did not apply.

Terms of issues adjusted to try the question.

Circumstances in which the Court did not, on settling issues, dispose of the question of expenses.

Johnston contracted with the Parochial Board of Latheron to erect a poor-house, according to plans and specification, for the sum of L.1742, 7s. 3d. The contract was executed on 1st and 2d June 1855. Besides providing that the work should be completed in a sufficient, substantial, and workmanlike manner, agreeably to the plans and specification, to the satisfaction of a party appointed by the parochial board, the contract provided, *inter alia*, as follows:—"And, further, the said Robert Johnston binds and obliges himself and his foresaids immediately to proceed to the execution of

the works before mentioned, and to have the same completely erected, built, executed, and finished, and the keys delivered up on or before the 31st day of March 1856 years, under a penalty of L.5 sterling for every week during which the whole of said works shall remain unfinished after the said 31st day of March 1856 years; and the said Robert Johnston binds and obliges himself and his foresaids to maintain and uphold the whole of the works hereby contracted to be done by him, in so far as regards deficiency of execution, or carelessness, or neglect in completing the same, for the space of one year from and after the date at which the said poor-house may be taken off his hands: And it is here expressly provided and agreed upon, that it shall be in the power of the said Parochial Board of Latheron to make such alterations during the progress of the works as may appear to be necessary or beneficial, without in any respect altering or affecting the terms and obligations of this contract, declaring that whatever additional work may be done beyond what is shown on the said plans and stated in the said specification, or whatever deduction there may be in consequence of such alterations, the same shall be ascertained and fixed, and the value thereof calculated according to the schedule of prices upon which the estimate has been formed, which schedule of prices is subscribed by the parties as relative hereto, and that by the said William Lambie Moffat, or other architect or architects to be appointed as aforesaid: For which causes, and on the other part, the said Robert Dunbar, as chairman of the said Parochial Board of Latheron, binds and obliges the said parochial board to make payment to the said Robert Johnston, or his heirs, executors, or assignees, of the sum of L.1742, 7s. 3d., being the sum for which the said Robert Johnston has agreed, and hereby agrees, completely to finish the whole works of the foresaid poor-house, conform to said plans and specification, and that at the periods, and by the proportions or instalments following, viz.,"—the instalments were L.500, L.200, L.400, L.300, the last instalment, being the balance of the contract price, and amounting to L.342, 7s. 3d., subject to any "addition or deduction arising from any extra work done or diminution made from the work embraced by the said plans and specification, when the whole of the works of every description contracted for by these presents are completed and taken off the hands of the contractor, by certificate by the said William Lambie Moffat, or other architect or architects to be appointed as aforesaid."

The contract also contained a clause to the effect, that any question as to the meaning of the contract, or of the specification, or regarding the execution of the works, or in relation to the measurement, prices, or pay- **[648]** -ment, the parties submitted and referred all such questions to William L. Moffat, the architect, whom failing, to any other architect appointed to superintend the works, "and the award or awards to be pronounced by any of the said arbiters shall not be challengeable by either party upon any ground or pretence whatever; and the said Robert Dunbar binds and obliges the said parochial board, and the said Robert Johnston binds and obliges himself and his foresaids to implement, fulfil, and perform their respective parts of the premises to each other, under the penalty of L.500 sterling each, to be paid in name of damages, without any abatement or deduction whatever, by the party failing to the party performing or willing to perform their part, and that over and above performance; and the parties consent to the registration hereof," &c.

Johnston now sued the parochial board in the present action,—1st, For the sum of L.342, 7s. 3d., as the balance or last instalment of the stipulated contract price of erecting the said poor-house; 2d, For the sum of L.304, 5s. 10½d., as the amount of certain accounts for extra work; and 3d, For the sum of L.150, as damages sustained by him through the failure of the board to carry out a contract alleged to have been previously entered into between him and them for the erection of said poor-house in August 1853. The summons also concluded, that the board should be ordained to put the contract into the hands of Moffat, in order that he might determine whether an account for L.260, 16s. 2½d. for work in relation to the poor-house was due; and failing their doing so, then for payment of that sum.

On 24th November 1858 the pursuer obtained decree in absence, in terms of the first three conclusions, with expenses; *quoad ultra* the cause was continued. This decree was extracted. Thereafter the board presented a note of suspension, which was passed on 9th April 1859. On 28th May the pursuer obtained decree in absence, in terms of the first part of the last conclusion; but, on 7th June, the Lord Ordinary, of consent, recalled this interlocutor, allowed defences to be received, and conjoined the

process of suspension with the foresaid action. Thereafter a record was made up in the conjoined processes.

The pursuer alleged that, previous to the contract above recited, the board had entered into another contract with him, from which they had broken off; that, in entering into the second contract, he had reserved all claim for damages, and that the board was indebted to him in the sum of L.150, on account of damage sustained by him through their failure to proceed with the said first contract. He also alleged that the work contracted for had been completed by the month of May 1857, and had been then reported as completed according to the contract by Mr. Mackenzie, the clerk of works appointed by the board. Mr. Moffat, the architect of the board, was stated to have reported the same fact to the board in or about the said month of May, and to have sent a formal certificate on 28th September 1857, that the works were completed according to contract. It was also set forth by the pursuer, that extra work had been performed by direction of the board, for which the sums concluded for under that head were due.

The defenders admitted that the last instalment of L.342, 7s. 3d. had not been paid. They alleged that the pursuer had failed to have the works finished as stipulated by the 31st March 1856: that the works had not yet been finished in terms of the contract and specification, but were incomplete, defective, and insufficient in various specified particulars. "In consequence of the failure of the pursuer to complete the said premises in terms of the said contract and specification, the same have not been, and in their present state cannot be, occupied for the purposes for which they were intended, and the parochial board have thereby suffered great loss, injury and damage. The said loss, injury and damage, including the expense of putting the works into a proper state, in terms of the contract and specifi- **[649]** -cation, will much exceed the balance concluded for by the pursuer against the board. The pursuer is liable to the board for the said loss, injury and damage, and the same forms a valid counter claim against the present demand made by him against the board. Moffat, the architect named in the contract, fraudulently, and in order unduly to favour the pursuer, permitted the deviations complained of made by the pursuer from the contract and specification; and the reports and certificates granted by him during the progress of the works, are false and fraudulent, in so far as they are inconsistent with the facts above set forth; and were granted without proper inspection or examination." This the pursuer knew. "Moffat, by his conduct above stated, disqualified himself from acting as arbiter under the contract condescended on, and he had ceased for a considerable time before the present action was raised to be employed by the board as their architect. The pursuer is now liable to the board in L.5 sterling per week of stipulated penalty aforesaid, from and since the said 31st day of March 1856, amounting, as at 31st January 1860, to upwards of L.1000, and still current and accruing; and he is also liable for loss, injury, and damage to an amount exceeding the sums concluded for in the summons."

Pleaded for the defenders, *inter alia*;—4. The pursuer having failed to implement the contract libelled on, he is not entitled to the sums concluded for as due under the same. 5. The reports or certificates condescended on being false and fraudulent, and having been fraudulently obtained and used by the pursuer, knowing them to be so, cannot be founded on by him against the board. 6. The said William Lambie Moffat having ceased to be architect to the board, is not now entitled to act in that capacity, and by his conduct has disqualified himself from acting as arbiter. 8. The said sum of L.1000 of penalties already incurred, and the future accruing penalties until the completion of the works by the pursuer, and the said loss, injury, and damage occasioned to the board, being larger in amount than the sums concluded for by the pursuer, the board are entitled to be assoilzied from the conclusions of the present action, with expenses.

Pleaded for the pursuer, *inter alia*;—4. There are no relevant averments by the defenders of any claims at their instance against the pursuer, by which the sums concluded for in the present action can to any extent be lessened or compensated. 5. The works having been completed to the satisfaction of the defender's architect, and the referee under the contract, the pleas in defence, founded on allegations to a different effect, are incompetent, and are excluded by the terms of the contract. 6. *Separatim*, —The defender's pleas cannot be competently urged against the pursuer's extracted decree, sought to be suspended.

On 13th December 1860 the Lord Ordinary reported the cause in terms of the following interlocutor:—"Having heard counsel for the parties, on their respective issues, and on the motion made by the defender to sist process, and thereafter made avizandum and considered the process, Refuses said motion; and, in respect parties cannot agree on the adjustment of the issues, Appoints the record and issues as proposed by each party, being Nos. 40 and 41 of process, to be printed and boxed to the Court: Reports the same to the Second Division thereof, and grants warrant to enrol."[1]

[650] The issues proposed by the pursuer (giving effect to various modifications and alterations suggested during the discussion) were as follows:—

"1. Whether the pursuer executed the work undertaken by him under the contract, No. 30 of process, for the erection of a poor-house? and whether the defender is indebted and resting owing to the pursuer in the sum of L.342, 7s. 3d., or any part thereof, as the balance of the price stipulated under said contract, with interest on said sum at the rate of five per cent per annum, from 15th May 1857 till payment thereof?

"2. Whether the pursuer, on the employment of the Parochial Board of the parish of Latheron, executed certain additional work not included in the stipulated contract price of L.1742, 7s. 3d.? and whether, in respect of the execution of said work, the defender is indebted and resting owing to the pursuer in the sum of L.565, 2s. 1d., or any part thereof, with interest thereon from 31st December 1856 till payment thereof?"

The defenders proposed the following counter issue:—"1. Whether the pursuer failed to completely erect, build, execute, and finish the works undertaken by him under the said contract, and to deliver up the keys thereof to the said parochial board, in terms of said contract, on or before the 31st day of March 1856, and during the period betwixt the said 31st day of March 1856 and the 31st day of January 1860, or any part of that period? And whether, in respect of said failure, the pursuer is indebted and resting owing to the defender, for behoof of the said parochial board, the sum of L.995 sterling, or any part thereof, as the amount of penalties, at the rate of

[1] "NOTE.—It may be right to state, with a view to explain the particular form of the present interlocutor, that on the occasion of the second meeting for the adjustment of issues, and, if the Lord Ordinary's memory serves him correctly, also on the occasion of the first meeting, a motion was made on the part of the defender, that the process should be sisted until a counter action, which the defender was about to raise, or had raised, was brought into Court, and that the Lord Ordinary intimated that he was prepared to refuse that motion. He was not, however, then called upon to pronounce an interlocutor to that effect, and counsel were heard on the terms of the issues, as to which they were not agreed, and it was understood that, with a view to a report, in terms of the statute, the issues for the parties, respectively, should be stated in the terms for which they intended to insist.

"The Lord Ordinary then requested the counsel for the defender to state whether they still adhered to their motion, to sist process, and having been answered in the affirmative, he has pronounced the present interlocutor.

"As regards the merits of the motion, to sist process, it appears to the Lord Ordinary that, as the counter action is stated to have been only recently executed, and not yet called in Court, it would be unwarrantable to prevent the pursuer from proceeding with the preparation of the present action for trial, seeing that it has depended in Court since November 1858; no reason for the delay on the part of the defender having been stated which the Lord Ordinary can consider as sufficient.

"As respects the terms of the issues, the Lord Ordinary understood the defender to maintain that the pursuer must insert in his first issue, a question to the effect, whether the works had been duly executed by him? and also put in issue, whether the balance claimed is due to the pursuer? The pursuer objected, on the other hand, to the defender's counter issue, on the ground that it is not warranted by the record; and, further, that the clause in the contract, whereby he is bound in a penalty of L.5 for every week during which the works should remain unfinished after the 31st day of March 1856, does not, in law, impose an obligation to pay more than the actual damage sustained,—the penalty being, as such, restrictable. The defender maintained that the penalty was absolute, and not of such a character as to be restrictable."

five pounds sterling for every week during which the said work remained unfinished from the said 31st day of March 1856 till the said 31st day of January 1860?"

The following additional issue was also subsequently proposed by the defender:—"1. Whether the pursuer failed to completely erect, build, execute, and finish the work undertaken by him under the said contract, and to deliver up the keys thereof to the said parochial board in terms of the said contract, on or before the 31st day of March 1856, and during the period betwixt the said 31st day of March 1856 and the 31st day of January 1860, or any part of that period, to the loss, injury, and damage of the said parochial board? Damages L.995."

[651] The pursuer objected to the counter issue proposed by the defenders, and argued;—This was not a case for an issue of compensation, which the issue proposed by the defenders was. The extracted decree in absence of 24th November 1858, and the terms of the architect's certificates, of which a reduction had only been brought in November 1860, excluded any such plea, *ope exceptionis*. The Act 1592, c. 141, relative to compensation, expressly excepted debts for which decree had been given, and which were brought forward in a suspension, from the benefit of its provisions. It enacted, "that any debt, *de liquido ad liquidum*, instantly verified by writ or oath of the party, before the giving of decree, be admitted by all judges of this realm by way of exception, but not after the giving thereof, on the suspension or reduction thereof." Accordingly it had been settled that compensation could only be pleaded before decree.[1] The case of A *v.* B, relied on by the defenders, was a single decision, in a nameless case, and was of no authority. Besides, it was stated by Bell to be the same case as that reported by Monboddo (5 Br. Sup. 747). Erskine was against the defenders in the passage cited by them. The cases referred to by the pursuer were entitled to special weight, being shortly after the passing of the Act. It was impossible to construe the clause of the contract, referred to by the defenders, otherwise than as a clause imposing a penalty, subject to modification, and requiring the party founding on it to prove damage. It bore expressly, that the sum of L.5 per week was a "penalty;" and even if this were not *per se* conclusive, it had always been deemed conclusive that the same sum was stipulated, whether the default was great or small.[2] The amount of the claim (L.1000) illustrated the penal nature of the stipulation.

Argued for the defender;—The pursuer was not entitled to sue upon the contract, without submitting to be met by all defences arising out of the contract. The clause referred to was an obligation to pay stipulated damages in the event of the default specified, not a penalty. The Act of 1592 had no application to such a defence as that proposed to be put in issue. Such a defence had been decided not to fall under the Act.[3] As to Cunningham *v.* Wilson, reference was made to 2 Bell's Com. (5th ed.) p. 139. They were entitled to both the issues proposed.

Lord Benholme.—We have here two conjoined actions,—an ordinary action at the instance of Robert Johnston, and an action of suspension at the instance of John Robertson,—arising out of a contract for the erection of a poor-house, between Robert Johnston and the Parochial Board of Latheron, now represented by John Robertson. The necessity for the suspension arose from the circumstance that a decree had been taken to a certain extent in terms of the conclusions of the original action. That decree was extracted, and, in order to bring the whole case before the Court, a suspension of the decree was necessary, and when brought, it was conjoined with the not yet exhausted ordinary action. The discussion has arisen on the issues proposed for the trial of the conjoined actions.

There is no dispute as to the issue to be granted to the pursuer, who has to make out, by proof, his right to decree in terms of the conclusions of the summons. But on

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[1] Wright *v.* Shiell, 1676, M. 2640; Logan *v.* Coutts, 1678, M. 2641; Ersk. iii. 4, 19; Bell's Pr. 575; Cunningham *v.* Wilson, Jan. 17, 1809, F.C.; Baillie *v.* Dawson, 1733, Elch. Compn. No. 1.

[2] Addison on Contracts, pp. 1156, 1158, 1161; Low *v.* Peers, 14th May 1768, 4 Burrows, 2225.

[3] A *v.* B, 1747, M. 2648; Corbet *v.* Hamilton, 1707, M. 2642; Horner, 9 Mees. & W. 681; Betts, 1859, 28 L. J. (N.S.) Exch. 271; Fletcher *v.* Dyce, 2 Durnf. & East. p. 32.

the counter issues proposed by the defender, questions have been raised of considerable nicety and interest, on pleas of various kinds suggested by the pursuer, with the view of avoiding the counter issues.

[652] Although two counter issues have been proposed by the defender, I think the only counter issue we can grant is one much in the terms of the first issue proposed by the defender, with some slight variation, and that we cannot grant an issue like the second. The first issue is founded on a stipulation in the contract between the parties, with reference to the period at which the works were to be finished and the keys delivered, viz., that a certain sum should be paid by the contractor for every week during which the works remained unfinished after that period. That stipulation is very precise, and the penalty stipulated is different from that agreed on in the event of failure to fulfil the contract generally. And the view I take of the clause is, that it is a stipulation of liquidate damage; and, therefore, I think we may grant the first counter issue, provided there is nothing in the pleas by which the pursuer endeavours to show that the defender should not get a counter issue in this case at all.

Various objections have been stated to the counter issue. It is said, in the first place, that, because there has been here a decree in absence extracted, and because the defence is, or involves, a plea of compensation, it is inadmissible under the Act 1592, c. 141, with reference to pleas of compensation. It has also been stated, as an objection to the counter issue, that the defence resolves into a claim of damages, which requires to be constituted by a separate action, and cannot be entertained by way of exception.

As to the first of these objections, I do not think the Act of 1592 applies to this case at all, because this is not a defence by which it is sought to meet one liquid by another liquid claim, which is the case contemplated by the Act. For here the pursuer has to make out his case by probation, and cannot assume the position of having a liquid claim, except under the decree in absence; and now that that decree has been brought under suspension, he assumes the character of pursuer of the issue, and, in order to succeed under his issue, he must prove that he has done the work in question. In this case, therefore, there is no liquid claim on the part of the pursuer. Both parties have to prove their claims, the claim of neither is liquid; and, therefore, the provisions of the Act 1592 do not apply either to the one claim or the other.

The plea of the defender is based mainly on the rule of the law of Scotland, that one party to a mutual contract, in which there are mutual stipulations, cannot insist on having his claim under the contract satisfied, unless he is prepared to satisfy the corresponding and contemporaneous claims of the other party to the contract. I think the rule of law, that an illiquid claim cannot be set off against a liquid claim, does not apply to such a case; and that, at all events, if the one claim be liquid, and the other partly illiquid, yet contemporaneous, the rule should suffer some qualification or relaxation if the claims arose under one contract. The counter claims must be contemporaneous, for, if not, the rule would apply.

Here it appears to me that the pursuer cannot prove his case without letting in the defence. The question raised by the pursuer is, has the work been performed within the stipulated time? That requires probation, and the circumstance that the defender's claim, on the ground of delay in completing the work, arises out of the same contract, appears to me to be a satisfactory answer to the objection that the damages claimed under the defender's issue have not been constituted by a substantive action.

It is a very [salutary] rule in general, that a claim of damages should be so constituted, —that is, a rule of universal application, when the subject-matter out of which a claim of damages, advanced by a defender, is not the subject-matter on which the pursuer founds.

Here this counter issue is proposed to establish a defence, and being a defence, it cannot go beyond the conclusions of the summons. More cannot be got under it by the defender than the amount claimed by the pursuer.

I cannot refer in this case to a better example than the case of Taylor *v.* Forbes (2d Dec. 1830, 9 S. & D., 113), in which an action was brought for freight for the carriage of a cargo of flour; and the answer was, that the flour had been injured through improper stowage, and a claim of damages was pleaded in defence. The plea was sustained, though one of the pleas insisted in by the pursuer was, that the claim of damage should be constituted by a separate action. But the answer of the defender, that the claim of damage was a direct defence to the action against **[653]** him, was held

satisfactory, because if it were well founded, the pursuer had not performed his part of the contract.

On these grounds, I think we may safely grant such a counter issue as that proposed by the defender. But to avoid what might appear an ambiguous expression in the issue, I would propose that, instead of using the word "penalties" in the issue, it should be whether, in respect of the failure specified in the first part of the issue, the pursuer was indebted and resting owing the sum of L.995 sterling, or any part thereof, as the amount stipulated to be paid by the pursuer to the defender, at the rate of L.5 sterling for every week during which the work remained unfinished from the date agreed on.

There is an express stipulation in the contract to that effect, and the claim founded on, it appears to me, is as liquid as the claim made by the pursuer. In granting an issue of that kind to the defender, it does not appear to me that we are interfering with any established rule of practice.

LORD COWAN.—This case comes before us on adjustment of issues; and the issues proposed by the defender raise two questions,—*First*, the nature of the claim proposed to be proved under it, *ope exceptionis;* and, *second*, the competency of pleading a claim of that kind, as a compensatory claim, in the state of the process.

1. As regards the nature of the claim advanced by the defender, we have to determine whether the clause in the contract on which the claim is rested is to be regarded as a proper penalty clause, and so liable to be modified to the amount of damage actually suffered, or whether, on the contrary, it is to be regarded as a clause of liquidated damages not subject to modification. And it will be useful, in considering this point, to contrast this clause with another which occurs at the close of the contract. The clause on which the issue is proposed to be founded is this:—"The said Robert Johnston binds and obliges himself and his foresaids immediately to proceed to the execution of the works before mentioned, and to have the same completely erected, built, executed, and finished, and the keys delivered up on or before the 31st March 1856, under a penalty of L.5 for every week during which the whole of said works shall remain unfinished after the 31st March 1856." And the other clause at the end of the contract is this,—"The said Robert Dunbar binds and obliges the said Parochial Board of Latheron, and the said Robert Johnston binds and obliges himself and his foresaids to implement, fulfil, and perform their respective parts of the premises to each other, under the penalty of L.500 sterling each, to be paid in name of damages, without any abatement or deduction whatever, by the party failing to the party performing or willing to perform their part, and that over and above performance." No question is raised upon this latter stipulation; it is the usual clause of style in such deeds, and is a proper penalty clause, and to be dealt with and construed as such. The issue is proposed to be taken under the former stipulation, specifically inserted to enforce completion of the work within the specified term.

The defender avers that the works have not yet been completed, or finished, in terms of the contract,—that they are incomplete, defective, and insufficient, in almost every respect, and the penalty of L.5 per week is demanded for the whole period from the time when it was stipulated the works should be finished until they are delivered over in terms of the contract. The defender maintains that his demand is in terms of the express obligation to make such payment; that it is *pars contractus*, that every week's delay gave him right to the sum he demands without modification,—that, in short, the clause is one of pactional damage, by which the parties have agreed to estimate the damage for the period from the date of breach of the obligation till the fulfilment of it.

I concur with Lord Benholme in taking this view of the clause. I think it cannot be regarded in any other light than as a stipulation for pactional damages, and which the Court has, therefore, no power to modify or interfere with; and, I think, the circumstance that there is a general clause of damage at the end of the contract aids me greatly in construing this preceding clause in the way I have mentioned. It is clear that damages caused by any breach of the contract, if not specially provided for, would fall under that general clause, and be open to modification by the Court. But for the special breach now in question there is a special remedy provided. The stipulation as to it must, I think, have been inserted *ex proposito*, in order to fix the amount of the damages to be paid, and to exclude **[654]** any modification by the Court,

on inquiry into the actual injury and loss suffered. It is the same as pactional rents in leases. And there is nothing illegal or contrary to principle in a stipulation of this kind, made for the purpose of insuring that the execution of the work shall not be unduly delayed, any more than in the additional payment of rent for each acre not cultivated in terms of the lease.

The distinction between this kind of stipulation and a proper penalty clause could not be better pointed out than it is in Bell's Principles, sect. 34, where a number of authorities are adduced, the accuracy of which I have tested. I think this is one of that class of cases, as to which Mr. Bell says, that there can be no inquiry by the Court into the actual amount of the damage. So early as 1637 I observe a case (Skeen, M. 8401), in which a stipulation in favour of a landlord, that if the tenant did not enter to the farm at the date stipulated, he should pay a year's rent, was enforced; and although it was argued that the landlord had not in fact suffered any damage, yet the Court thought that the penalty ought to be enforced, without reference to the actual damage. From that date to this the distinction between a general clause of penalty and a special stipulation, fixing the amount of damage, has been clearly recognised. And no difficulty arises from the use of the word "penalty." The same expression will be found in some of the decided cases. I am satisfied that the mere use of the word cannot affect the nature of the thing provided against, and the substance of the stipulation. However, while I am prepared to grant this issue, it is possible that many questions may arise during the course of trial for determination by the Judge, as to which I am not to be understood as indicating any opinion.

2. There remains the second question, which is of great practical importance. I concur generally with Lord Benholme as to the competency of pleading this counter claim *ope exceptionis*, and am clear that an action of reduction is not necessary to enable the defender in this way to meet the demand of the pursuer. I also concur in thinking that the statute of 1592, which I hold not to apply to this case, does not raise any difficulty.

There is a passage in Stair (b. i. t. 18, sect. 6), which seems to indicate that that which was allowed by the statute had not been admissible under the previous practice of the Court. After mentioning the statute, he says, "So that if the charge or pursuit be instantly verified by writ, the defender will not get a term to prove compensation; but if a term be assigned to the pursuer, the same would be assigned to the defender, to instruct any debt wherewith he would compense by writ or oath, yea, by witnesses, if the probation can be closed as soon as the pursuer's probation; for the statute bears 'compensation to be in liquid debts instantly verified before the decree;' for the statute, though it mention not probation by witnesses, it doth not exclude the same." But this passage may be held to apply to the case of liquid debts unconnected with each other, which is not the kind of case with which we have now to deal. I cannot doubt that opposing claims, arising out of one mutual contract, may be dealt with in this way. The case of Dickson *v.* Porteous, 12th Nov. 1852, is a peculiar case, and does not interfere with the general principle that claims out of mutual contracts may be pleaded against one another. That defence is not properly the defence of compensation, but is rather a defence to the effect that the pursuer is not entitled to what he demands under the contract, until he fulfil his own obligations under it.

It is unnecessary for me to deal with the question as to the decree in absence. I think the law, as stated by Lord Stair (i. 18, 6, and iv. 40, 37) in the passages referred to in the course of the argument, is consistent with the recent decisions and existing practice of the Court. On the whole, I concur in thinking that this issue should be allowed.

LORD JUSTICE-CLERK.—I agree with your Lordships in thinking that questions have been raised in this case which are of considerable importance, and, therefore, I shall state shortly the grounds on which I concur, though not entirely, in the views expressed by Lord Benholme.

This is an action on a mutual contract, and the action is laid on two clauses in that contract, as may be seen from an examination of the issues proposed by the pursuer.

The first issue demands payment of the balance of the contract price of the work undertaken to be executed by the pursuer—that is the subject of the leading clause of the contract.

[655] The second issue is founded on another clause of the contract which provides

for extra work, and gives power to the parochial board, represented by the defender, to make alterations as to the work agreed to be executed, "without in any respect altering or affecting the terms and obligations of this contract," and it provides that the sum to be paid for such extra work should be calculated according to the schedule of prices on which the estimate had been formed.

The defender meets the action by several defences. The first is, that the work was not performed at all in terms of the contract, and that, therefore, there can be no action for the price, either of the original or of additional work. Secondly, that supposing the work to have been performed in terms of the contract, there are defects in it which require to be put to rights; and, thirdly, supposing the work to be now executed in terms of the contract, and that the pursuer is entitled to claim the contract price for the original work and for extra work, still, in consequence of the pursuer's delay in executing the work, a counter claim arises to the defender, under another clause of the contract, on which he specially founds, and his defence under which he desires to try by his counter issues.

The clause on which the defender so founds is this:—"And, further, the said Robert Johnston binds and obliges himself and his foresaids immediately to proceed to the execution of the works before mentioned, and to have the same completely erected, built, executed, and finished, and the keys delivered up, on or before the 31st day of March 1856 years, under a penalty of L.5 sterling for every week during which the whole of said works shall remain unfinished after the said 31st day of March 1856 years."

Before we can determine whether any issue should be granted to try the defence under this clause, and what its terms should be, it is necessary to determine the true meaning and construction of the clause.

The mere use of the word "penalty" is not conclusive as to the true character of the stipulation. A consequence may be a penalty, although it is not called so; and, on the other hand, it may not be a penalty, though it receives that name. And, therefore, I do not attach much importance to the circumstance, that this L.5 per week is called a penalty.

It is always material, in questions of this kind, to consider whether the thing to be provided against by the so-called penalty is essential in the view of the contracting parties, or one or other of them. In this case, it is clear that the time when it was agreed the works were to be completed, was a matter of the highest importance, because the parochial board, so long as their poor-house was unfinished, required to provide accommodation for their paupers elsewhere; and, therefore, they stipulated that the work should be concluded by a fixed day, and that by that time the work should be in such a state of completeness that they could then enter on the premises.

The next inquiry is, whether the stipulation is a reasonable and appropriate mode of enforcing that obligation to complete the work by the date specified, and whether it is so conceived, that the penalty stipulated may be proportionate to the loss suffered by the party seeking to enforce the obligation?

Now, payment of a sum for every week after the stipulated time during which the work was not completed, was a very suitable and appropriate remedy for the loss the parochial board might suffer by the delay. It would enable them to provide accommodation for their paupers elsewhere; and, secondly, it was plainly proportionate to the loss they suffered by non-fulfilment of the contract obligation.

I am, therefore, of opinion, that what was stipulated by this clause was not a penalty; but that the clause is an obligation to pay a sum for every week during which the completion of the works was delayed beyond the time agreed on, and that that was a reasonable and appropriate stipulation; and that, therefore, it may be enforced *in terminis*, and without modification.

It is not surprising to find that the defender has no defence, on the ground of unreasonable delay. His defence is, that there was delay against the express stipulation of the contract; and there is no defence to the effect that he has a good claim of damage, on the ground that the time occupied by the contractor was unreasonable in itself; and therefore only one issue is required for the defence.

The next question is, whether the defence on this clause of the contract can be **[656]** made *ope exceptionis*, or whether it requires a separate action?—and in connec-

tion with that, whether the defence amounts to a plea of compensation within the meaning of the statute of 1592?

As to this second question, I think the statute does not apply; it applies only to compensation *de liquido in liquidum*, instantly verified by writ or oath of party. The claim by the defender here is not a liquid debt, and it takes no benefit from the statute; and therefore we may discharge from farther consideration the question as to whether the decree in absence is any impediment to this defence, because the objection to the defence is founded solely on the clause of that Act which provides that the defence of compensation shall not be allowed in a suspension or reduction of a decree.

The defence arises out of an obligation in a mutual contract, which is to be enforced at the same time as the stipulations in favour of the pursuer. Even that consideration might not be conclusive against the objection that a separate action should be raised to enforce this claim under the contract. But then we must take into consideration this other principle, that in a mutual contract, where one party seeks performance of the stipulations in his favour, he must show that he has given or tendered performance of his part of the contract. Every action on a mutual contract, implies that the pursuer either has performed, or is willing to perform, his part of the contract; and it is, therefore, always open to the defender to say, that under the contract a right arises also to him to demand performance of the contract before the pursuer can insist in his action.

I think this action is well calculated to try all questions as to the rights of parties under this contract; and it appears to me that the claim of the defender is as nearly liquid as that of the pursuer. The contract price is a fixed sum; but the right to recover it depends on the pursuer proving that the contract has been executed, and his claim on account of extra work cannot be liquidated till it be shown what extra work he has performed. So that probation there must be. Now what probation is necessary to support the defence? No more than proof that there has been delay for a certain period. When that is proved, the provision of the contract, that the damage is to be estimated at L.5 per week, liquidates it at once.

If the defence had been founded on an allegation of unreasonable delay, the case would at all events have been a very different one from this, and must have been dealt with on different principles.

I do not think that cases between a landlord and tenant, or between insurers and underwriters, have any application. When a claim is made for rent, and on the other side there is a claim of damages for breach of the contract of lease, there is this obvious distinction from the present case, that the two obligations are not contemporaneous. The rent is payable at a fixed term, but the damages are not due till liquidated. Then in cases between insurers and underwriters, the counter claims for premiums and for damages never can be contemporaneous.

I therefore think these cases are inapplicable, and that this is a case in the law of mutual contracts, and not a case in the law of compensation at all.

Lord Wood absent.

The Court allowed the pursuer's issues as amended; disallowed the defender's second proposed issue; and approved of the counter issue for the defender.

The defender moved for expenses.

Replied;—Not a case for expenses. The defender has been unsuccessful in one of the issues proposed by him.

Lord Justice-Clerk.—I do not think this is a case for expenses on either side. The success has been various, and it was a fair case for bringing the issues here for adjustment. The expenses ought to be reserved.

The following interlocutor was pronounced:—"Having heard counsel, Approve of the pursuer's issues as now adjusted; approve of the defender's first issue; disallow the second issue proposed by the defender; reserve all question of expenses; and remit the case to the Lord Ordinary."

[Cf. *Craig* v. *M'Beath*, 1 M. 1022; *Macbride* v. *Hamilton & Son*, 2 R. 779, 781, 782; *Pegler* v. *Northern Agricultural Implement Co.* 4 R. 438.]

No. 104. **XXIII. Dunlop 683.** 6 Mar. 1861. 1st Div.—Lord Neaves.

The UNION BANK of SCOTLAND, Nominal Raisers.

MATTHEW CONNELL and Others, Claimants.—*Pyper*—*A. R. Clark.*

The Rev. FERGUS FERGUSON and Others, Claimants.—*Fraser.*

Church—Dissenting establishment—Schism—Congregational funds.—The members of a "congregational church" subscribed to a fund for building a new meeting-house, and the same was lodged in bank in name of the pastor. Thereafter dissension arose, and the minority of the congregation were expelled. The minority then alleging that the constitution had been practically violated by the manner in which this was done, claimed repayment of their subscriptions. *Held* (*aff.* judgment of Lord Neaves), that the claim for repayment of individual subscriptions could not be sustained, as against the claim of the majority to apply the whole fund for the purpose for which it was subscribed.

Process—Multiplepoinding.—*Held* (*per* Lord Neaves)—1. That in a multiple- **[684]** -poinding no parties are bound or entitled to appear as competing without an order for claims. 2. That where a condescendence does not contain a claim, the party cannot be preferred to the fund *in medio*. 3. Where judgment had been pronounced in a Sheriff-court, there having been no interlocutor sustaining the multiplepoinding, or finding the raisers liable in once and single payment, or allowing claims, the Court ordered a new record. *Observed*, that in pleadings it is irregular to refer to a pamphlet, and hold it as insert.

Sequel of case reported of date Feb. 19, 1857, *ante*, vol. xix. p. 482.

In 1844 a number of persons in Glasgow formed themselves into a congregation of Independents or Congregationalists, and certain memoranda were circulated among the members, as embodying their constitution. The 5th article was as follows:—"That the Church shall observe the greatest watchfulness to secure its purity, by faithfully applying the laws of Christ to such of their number as may act inconsistently with their profession.—1 Cor. ch. v.; 2 Thes. iii. 14; Heb. xii. 15; Matt. xviii. 15, 16, 17.—[*Note.*—The usefulness of many churches, in winning souls to Jesus, has been frequently paralysed by want of fidelity in this respect. The evil chiefly referred to, and which the brethren would earnestly and affectionately guard each other against, is the unscriptural and baneful practice of making the inconsistent conduct of any brother or sister the subject of conversation with others, before communicating privately, and in the spirit of love and prayer, with the brother or sister so offending, in the manner and for the purpose mentioned by our Saviour. Any member who sees or hears of any inconsistency, either in word or deed, on the part of another, is bound, for the good of that brother or sister's soul, and of the Church, not only to apply the laws of Christ, but to do so in Christ's own way; otherwise he becomes the violator of the law himself, and thereby injures his own usefulness and that of the Church of which he forms a part.—See Matt. xviii. 15, 16, 17.]"

The "church" having resolved to build a new place of meeting, subscriptions to the amount of L.852, 19s. 5d. were in 1852 lodged with the Union Bank of Scotland, in name of "the Rev. Fergus Ferguson," pastor, by Thomas Halket and James Clark, for "East Regent Street Congregational Church."

The claimants were, on the one hand, Ferguson and his adherents, being a majority of the congregation, and on the other hand a protesting minority, who repudiated Mr. Ferguson as their pastor, but claimed to represent the "church." It appeared that in 1851 dissension arose in the church as to the propriety of sending delegates to a certain convention. The pastor and his adherents, being a majority of the congregation, were opposed to this; but a minority were in favour of it, and in point of fact, "eleven brethren, calling themselves delegates from the congregation under Mr. Ferguson, sat in conference" with the other members of the convention. The result was, that the majority of the office-bearers, and certain others called in for deliberation, resolved that it should be submitted to the church whether Wright and Paul, two of the ringleaders who had acted in defiance of the majority, should be excluded from the membership; and a meeting was held on 5th January 1852, at which, by a large majority, it was

resolved to exclude them, and this without the minister having in the first instance endeavoured to deal with them privately.

Messrs. Paul and Wright's expulsion was followed by a protest, signed by four deacons and a number (said to amount to 120) of other members of the congregation, protesting "against the unconstitutional and unscriptural excision of our brethren, Ronald Wright and Daniel Paul, from the fellowship," &c. "begging most affectionately to appeal to them to hear and consider the facts of the case for themselves, apart from all influences, both public and private, which have been and are being brought to bear upon them."

[685] After various attempts by the protesters, now represented by Matthew Connell and others, to get Messrs. Paul and Wright restored, such of the protesters as continued to adhere to them were likewise declared, on 26th February 1852, to be no longer members of the congregation. On 15th May 1852 these parties took a notarial protest, in name of Martin Mackay as their procurator, setting forth the above facts, the collection and deposit of the money, and protesting "against said attempt, or exclusion, or cutting off, and all that led thereto, and maintain, hold, and protest, that the same was null and void, and of no force and effect; and that my constituents form and constitute the church aforesaid, holding, maintaining, and abiding by the principles thereof: That my constituents, and those adhering to them, are the only parties entitled to said money, or at least are entitled to their fair share and proportion thereof; and that the said money belongs to my constituents, as aforesaid," &c.

On 2d October 1852, Connell and others raised this multiplepoinding in the Sheriff-court of Lanarkshire, in name of Mr. Ferguson and Messrs. Clark and Halket, the fund *in medio* being the money raised for building the new church. In the Sheriff-court Mr. Ferguson was preferred to the fund; but on advocation the Lord Ordinary dismissed the action as incompetent. His interlocutor, however, was recalled in the Inner-House, and the cause was remitted to the Lord Ordinary, to proceed "as shall appear just."

The Lord Ordinary pronounced the following interlocutor:—"11*th March* 1858.—The Lord Ordinary having heard parties' procurators, and considered the record, minutes for the parties, and whole process, Finds that the proceedings in the inferior court in this case have not been conducted with a due regard to the necessary forms and rules of procedure; and in particular, that no interlocutor has ever been pronounced finding the raisers liable in once and single payment, or otherwise sustaining the action, and that no interlocutor has been pronounced ordering or allowing claims to be given in: Finds that no proper record has thus been made up in the process, as in a competition, and that no judgment therein, as among any competing parties, could or can competently be pronounced until the said irregularities and omissions have been rectified and supplied: Therefore recals *in hoc statu* the whole interlocutors submitted to review; and in respect that no objection is now stated to the process, finds the nominal raisers liable in once and single payment of the fund *in medio*, and appoints them, within ten days, to lodge a condescendence of the fund: Further, appoints the haill claimants on the said fund, by the second box-day in the ensuing vacation, to give in condescendences and claims, with a view to a competition; and for the better information of all concerned as to the present state of the process, appoints the nominal raisers to insert *quam primum* a copy of this interlocutor in the "Glasgow Herald" and "North British Advertiser" newspapers,—reserving all questions of expenses."[1]

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[1] "NOTE.—The pleadings and proceedings in this case are in a most unsatisfactory state; and as it has now been held that the action was not incompetent, some steps are necessary to be taken to put the process on a correct footing.

"The action is in form one of multiplepoinding, and is in truth nothing else, having no conclusions except those applicable to such a process. The nominal raisers are the Union Bank, as holding the deposited fund, and the Rev. Mr. Ferguson and others, who are virtually trustees as to that fund. Various parties are called as defenders, including, on the one hand, Mr. Ferguson and his adherents; and, on the other hand, Mr. Law, Mr. Connell, and others, who are the real raisers, together with a number of

[686] Condescendence and claims in ordinary form were then lodged.
In these circumstances, Ferguson and his adherents claimed to be pre- [687] -ferred

other supposed creditors or claimants on the fund, 'and all others concerned, or liable, or pretending right or claim to the fund.'

"An irregularity was committed by the nominal raisers at the outset of the proceedings. They lodged a paper, No. 8 of process, entitled Objections and Claim, in which they objected to the competency of the multiplepoinding, on the ground that all parties were not called, and then entered into the merits of the case and the competing rights of parties. But it is clear, that in a multiplepoinding where the process is objected to, this objection is the first matter to be disposed of, and until that be done no order for claims can be pronounced, nor can any claim be lodged without an order. Further, although the paper of the nominal raisers referred to is called a 'claim,' it contained no proper claim setting forth what they craved to be done in their favour, such as is required in every process of multiplepoinding.

"The nominal raisers afterwards withdrew the objection that all parties were not called, and by an interlocutor of this date (18th May 1853), the objection was repelled, and parties were appointed to attend for the purpose of adjusting the record. No interlocutor was pronounced sustaining the multiplepoinding, or finding the raisers liable in once and single payment, or allowing claims to be lodged, and no such deliverances have ever yet been pronounced. Neither, apparently, has any interlocutor been pronounced as to the fund *in medio*.

"The pleadings of the parties were thereafter revised and adjusted. The condescendence for Law and others, the real raisers, contains a claim craving to be preferred on the fund. The condescendence for Ferguson and others contains no such claim; and, in fact, the record between the parties has been made up and adjusted, not as in a multiplepoinding with competing claims, but as in a petitory action, with a demand by the real raisers opposed by the nominal raisers. Under such a form of proceeding, the claim by the real raisers, if it had been duly given in after a proper order, might be sustained or repelled, but in strict propriety the other party could never be preferred to the fund *in medio*, for they do not ask any such preference. It is easy to understand how this confusion has arisen; but the Lord Ordinary does not think that processes of this peculiar kind ought to be conducted in such complete defiance of all rule and reason.

"Further, the condescendence for Law and others contains an article in the following extraordinary terms:—'The grounds of the present claimants' and their adherents' proceedings are fully explained and set forth in the pamphlets attached to and forming portion of No. 5 of process, here held as insert.'

"It is to be regretted that any pleading should have been made part of a judicial record, containing as inserted in it a pamphlet of any kind, and more especially a plurality of pamphlets like those in question, which consist of upwards of 80 pages, written chiefly in an argumentative, or rather in a declamatory style. But it will be seen that the evil in this respect did not stop here.

"The Sheriff-substitute having allowed a proof, and an appeal having been taken to the Sheriff-principal, the following interlocutor was pronounced:—'In respect Mr. Clark, on the part of the party Ferguson and others, for the end of expediting this case and bringing out its real merits, hereby judicially admits the facts stated by Mr. Lamb on behalf of Law and others on record, and the pamphlets therein referred to and founded on, though under a positive denial of the motives imputed, and of all legal inferences therein deduced, which are hereby reserved entire to both parties: Finds it unnecessary to allow a proof.'

"Thereafter the interlocutors were pronounced preferring the claimants, Mr. Ferguson and others, to the fund *in medio*, although, as already said, they had not technically claimed any such preference; and against these interlocutors the present advocation was brought.

"The Lord Ordinary thought that the process was, in all the circumstances, incompetent, and that if so, it was *pars judicis* to dismiss it. But their Lordships of the Inner-House having recalled his interlocutor, the process must be sustained; and the question now is, in what manner the record and procedure can most easily and least

to the whole fund *in medio*, to the effect of applying the same to the building of a chapel; or otherwise, they claimed the whole fund, minus the amount of subscriptions by the other claimants. They pleaded;—That the money having been subscribed by the donors thereof, for the purpose of erecting a church for the use of the East Regent Street congregation, they were not entitled to recal their donation, so long as the congregation exists, and the purpose for which the subscriptions were made can be competently carried into effect; but in any view the competing claimants were not entitled to claim any sum beyond their own subscriptions. The competing claimants being no longer members of the congregation, have no title or right to make any claim on the fund; and, *separatim*, are barred by their proceedings from claiming or interfering therewith. The claimants being the parties who carry out, and are intending to carry out the object for which the money was subscribed, they ought to be preferred thereto: *Separatim*, the majority of the subscribers being in favour of the claimants, and represented by them, the present claim ought to be sustained as preferable.

Matthew Connell and others, "as the parties who have adhered to the purposes for which the fund *in medio* was contributed, claim to be preferred to the same, to the effect of applying the amount in building the chapel, for which it was intended. And alternatively, they claim to be preferred for the amount of their subscriptions respectively, with interest since the same were paid; and further, to such proportion of the fund *in medio* not effectually claimed by other subscribers as effeirs to the amount of their own subscriptions as compared with the amounts subscribed by competing claimants." They pleaded;—That assuming that the fund *in medio* is irrevoc-

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expensively be put to rights, for the Lord Ordinary thinks it cannot be maintained that it should remain as it is.

"Conceiving that some of these irregularities above noticed might admit of easy correction, the Lord Ordinary made a communication to the parties of his views and suggestions, and it will be seen from the minutes lodged by them what they respectively propose. As, however, they are not agreed on the course to be followed, the Lord Ordinary has been under the necessity of dealing with the case on his own authority, and has endeavoured, by the prefixed interlocutor, to remedy the irregularities committed.

"The most important omission that has occurred is that of the order for claims, which appears to the Lord Ordinary to be fatal to all that has been done with a view to a competition. No parties are bound or entitled to appear as competing without an order for claims, and it is plain that any decree of preference, particularly if it were here given in favour of one particular set of the claimants, would be ineffectual or unsafe as an exoneration of the nominal raisers, if no such general interlocutor allowing claims should ever have been pronounced. The Lord Ordinary has thought it his duty to put this matter right for the sake of regularity of procedure, and as involving an essential pre-requisite to any judgment in the competition; and considering the lapse of time that has occurred, and the multiplicity of interests involved, he has appointed public intimation of his deliverance to be given in the newspapers.

"It is unnecessary to say anything more at present as to the irregular reference in the existing record to pamphlets which are to be held inserted in the pleadings. The proposal of Connell and others to alter the record by giving the substance of those pamphlets, could only be entertained of consent or by opening up the record on both sides *in toto*. But as the Lord Ordinary considers the present record as premature and incompetent, or ineffectual, for any purpose in the competition, this matter would seem to be superseded.

"If this action had been brought in a different shape, these difficulties would have been avoided. But since it has been brought and virtually sustained as a multiplepoinding, to which a very great number of parties are called as possible claimants or competitors, it is not easy to see how the requisites of that form of process can be so entirely disregarded as has here been done. Any judgment on the merits as the case stands would truly be a judgment behind the backs of the various parties called to compete, but who have never been regularly allowed the proper opportunity of appearing in the way in which alone appearance can be made by the competitors in such a process."

ably set apart for the erection of a chapel for the congregation of [688] Regent Street, Glasgow, they were, in the circumstances, the parties entitled to receive and apply the same for that purpose, and the respondents, in respect of having violated the principles and constitution of said church, have no right or interest therein. Assuming that the original object of the subscription cannot now be carried into effect—1. The respondents have not established any right to the fund *in medio*, except to the extent of their own subscriptions. Nothing having been done towards execution of the implied mandate or trust under which the subscriptions to the fund *in medio* were raised, the claimants are entitled to demand repetition of the sums subscribed by them. The respondents are further barred from applying the subscriptions of the claimants, by having, in violation of the constitution and terms of communion by which they were bound, and contrary to law and justice, cut off the claimants from the congregation under Mr. Ferguson's superintendence.

On 8th June 1860 the Lord Ordinary pronounced the following interlocutor:—"Repels the claim and alternative claim made by the claimants, Connell and Wright and others: Prefers the claimants, the Rev. Fergus Ferguson and Thomas Halket, to the whole fund *in medio*, to the effect of their applying the same to the building of a chapel or place of worship for the Independent or Congregational Church or congregation of East Regent Street, sometimes called East Regent Place, Glasgow, under the pastoral care of the said Fergus Ferguson, and decerns: Finds the claimants, the said Fergus Ferguson and Thomas Halket, entitled to expenses of process from the said other claimants, Matthew Connell and Ronald Wright and others," &c.[1]

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[1] "NOTE.—The fund *in medio* in this case, which amounts to upwards of £850, besides interest, is composed of sums subscribed by various parties prior to the year 1852, for the purpose of building a place of worship for the East Regent Street Congregational Church in Glasgow, of which the claimant, the Rev. Fergus Ferguson, was then the pastor.

"This church or congregation was formed, as regards church government, upon the Independent or Congregational system. It seems to have had no very definite constitution in point of doctrine, though its leading principles may be held as embodied in a paper of memoranda, which is to be found printed in No. 9 of process.

"The number of subscribers to the fund seems to have been not less than 435, and the number of the congregation seems to have been still greater.

"Up to the year 1852, the congregation remained united, but, shortly before the beginning of that year, disputes arose, which ended in a separation of the church into two parties.

"The Lord Ordinary would be sorry if it were necessary to determine the original merits of these disputes, as he thinks it would not be easy to do so, and no principles seem to be stated in the record that could assist much in their extrication.

"The first important result of the dissensions was, that, at a meeting of the congregation, held on 5th January 1852, a motion was made by Mr. Ferguson, and carried by a majority of the meeting, that Ronald Wright and Daniel Paul, members and deacons of the congregation, should be excluded from the fellowship of the church. This proceeding was distasteful to others of the congregation, and a protest against it was made by four deacons, and by a number of other members. The disputes continued, but the exclusion of Wright and Paul was not rescinded; and it is alleged by the protesting claimants, and appears to be the fact, that thereupon the protesters, holding that in this state of matters there could be no religious fellowship between the two parties, met by themselves for public worship in a separate building, being a schoolroom in the neighbourhood. It does not appear that they appointed a separate pastor.

"After a little time Mr. Ferguson and his adherents intimated their intention to declare these absentees to be no longer members of the church, if they did not, within a certain period, return to its communion; and a number of parties, who did not so return, but still absented themselves, were thereupon expunged from the roll of the congregation, or declared to be no longer members of the church.

"In May 1852 the protesting parties served upon their opponents a protest, through a notary-public, designing themselves 'Members of the Congregational or Independent Church, under the pastoral care of the Rev. Fergus Ferguson, of East Regent Street, Blackfriars Street, Glasgow, and setting forth, *inter alia*, that the protesting parties

[689] Connell and others reclaimed, and pleaded;—That the object of the subscription had been frustrated, and therefore the subscriptions must be **[690]** returned to

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were a short time since attempted to be cut off or excluded, and that irregularly, unfairly, and without the slightest substantial ground or pretext;' that this exclusion or cutting off 'was null and void, and of no force and effect, and that my (the notary's) constituents form and constitute the church aforesaid, holding, maintaining, and abiding by the principles thereof.' The protest further bore, as to the subscriptions now forming the fund *in medio*, 'that my constituents, and those adhering to them, are the only parties entitled to said money, or at least are entitled to their fair share and proportion thereof.'

"Subsequently the fund *in medio* was deposited with the Union Bank, upon a receipt bearing that the money was received from the Rev. Fergus Ferguson, per Messrs. James Clark and Thomas Halket for East Regent Street Congregational Church, and shortly thereafter the present process was raised by parties who had joined in the protest for the purpose of establishing their right to the whole, or a share of the fund. James Clark, one of the depositors, is dead.

"It is unnecessary to advert to the procedure that has taken place in the process, which was in many respects irregular. After making up a new record in this Court, the Lord Ordinary has found, as the Sheriff had previously done, that the protesting party have not a good claim to the fund, and that the same belongs to the surviving depositors, Messrs. Ferguson and Halket, for the purpose for which it was originally subscribed.

"It seems to be clear, that money subscribed in this way forms a donation, to be applied by the parties to whom it is entrusted in fulfilling the purposes for which it was collected. The money here was subscribed to build a place of worship for a certain congregation, and, if possible, that purpose is to be carried into execution, unless some clear and sufficient reason to the contrary can be established.

"There is no doubt that, at the time of raising this action, and, as far as appears, at the present time also, there existed, and still exists, a church or congregation, being the East Regent Street Church, which is now, as it was then, under the pastoral care of the Rev. Fergus Ferguson. Individual changes have necessarily taken place in its constituent members, but, apart from the special considerations to be afterwards noticed, there seems no ground for disputing its identity with the church or congregation for which this subscription was originally made, in so far as identity is requisite or possible in such matters.

"Certain original members of the congregation have *de facto* been excluded or separated from it since the subscription took place. But it seems impossible to maintain that that circumstance in itself is fatal to the application of the subscription to its purposes. It is a usual privilege of a church or community, that it should have power, on certain conditions and contingencies, to expel or exclude individual members from communion with the body. If that is rightly done, the parties so excluded will lose their status as members of the community, but this will not be fatal to the existence or identity of the main body itself. If such extrusion takes place illegally, it may be a nullity, and parties may be reponed against it, but neither will this destroy the existence of the community itself.

"In the present case, the original contention of the protesting party was, not that the church or congregation in question was dissolved, but that it still subsisted, and that they were the true and only members composing it and entitled to the whole subscribed fund. This is still the import of the leading claim and plea of the protesters in the present process, though they have also minor and alternative pleas.

"Wherever there is disruption or separation of this nature, it may always be a question whether the one party or the other represents the original congregation. If there is no other difference between them, this question may possibly turn upon the amount of members, and the majority may be considered to represent the whole, although the Lord Ordinary would be slow to decide that any majority could arbitrarily deprive their brethren of vested patrimonial rights. But a majority or even a minority may be shown to possess the rights of the original body, if it appear that the others have deviated from the principles or purposes on which all were originally associated, while their opponents have remained faithful to these objects.

the subscribers. The question was, had Ferguson a title to obtain possession of the fund? Those who left the church were a majority [691] of the congregation adhering

"It is not here alleged, in any way that can be considered clear or precise, that the protesting claimants ever did form the majority of this congregation. Their numbers at the utmost never seem to have amounted, upon their own statement, to more than 120, while the number of subscribers was upwards of 400, and the congregation itself seems to have been upwards of 500. If the protesters meant to found on numbers, they ought to have brought out their superiority in that respect in a plain and unequivocal statement of figures.

"The progress of these transactions, however, affords conclusive evidence that the protesters were all along, and acknowledged themselves to be, a minority. Originally, when Paul and Wright were expelled, it is admitted that this was done by a majority of the meeting; and the protests taken consisted in appeals made to the body at large to hear and restore their brethren. When these demands were unsuccessful, the protesters did not attempt to take possession of the place of worship used by the congregation, and from which it derived its name, but they withdrew themselves from fellowship with their brethren, and assembled in a separate building without a pastor. That act of separation left the others for the time in possession *de facto* of the status and rights of the congregation; and when the protesters were afterwards themselves excluded for this absence and discontinuance of communion, they cannot deny that this was done, apparently at least, by the predominant body.

"It is another question whether this majority, or as matters now stand, this surviving and subsisting congregation who have thus excluded the others, have lost their status and their rights by deserting their original principles. This, indeed, seems the main point on which the protesters rely in support of their claim, but the Lord Ordinary is unable to find any relevant statement that can support such a conclusion. It is not attempted to be shown that the existing congregation had ceased to hold independent or congregational principles of church government. It is not said that they have apostatised from any doctrine or article of faith which they originally held; nor, indeed, would it be easy to make out any aberration in this respect, as their only theological principle seems to be "that the Bible shall be the only standard book of doctrine, discipline, government, and rule recognised by the Church." And the parties disclaim any wish to regard their articles in the character of a creed.

"The main, or perhaps the only point of alleged deviation on which the protesters insist, seems to be found in the 5th article of the "Memoranda," which inculcates the duty of dealing with brethren who may act inconsistently with their religious profession in the way said to be enjoined by the Saviour himself, and which are referred to as explained in a particular portion of Matthew's Gospel. Under the precepts there given, it is said to have been the duty of Mr. Ferguson and the congregation to deal privately with Messrs. Paul and Wright for any supposed delinquency on their part before making it the subject of public discussion. But the Lord Ordinary cannot see that the claims of the protesters can be maintained on this ground. Supposing that Mr. Ferguson and the congregation were wrong in this respect, it is not easy to see that their omission, in a particular case, to apply those rules correctly amounts to such an abandonment of their original principles as to forfeit their status as a church. Mr. Ferguson and his adherents have never repudiated those rules as matters of principle, however they may have erred as to their practical application. But further, it is difficult to hold that the precepts referred to are truly applicable to the case in hand, as Messrs. Paul and Wright were censured and expelled, not for any secret delinquency or any inconsistency in their private conduct, but for an alleged disregard of public or official duty towards the church itself, by resisting or rebelling against its orders. On such a case the verses of Scripture referred to seem to have no proper bearing, or at any rate the question whether they apply or not is too subtle and doubtful to support the view that, by the vote which then took place, the majority who passed it virtually excommunicated themselves, and forfeited their whole rights and privileges, so as to hand over all their property to the minority of the congregation.

"What followed after that vote seems scarcely to be a legitimate subject of inquiry. The parties who disapproved of the expulsion of Paul and Wright took up their own position from that time forward, as separatists from the main body; and it can scarcely

to the constitution, and a majority in number and value of the subscribers. If the church had been built, and the only question was to whom it should belong, questions of difficulty might arise. But that was not the question. Nothing had been done which could not be recalled. The money had not been applied; and before it is applied, the object for which it was subscribed is frustrated. The question, therefore, was not, who are the adherents of the church, or who it was that truly violated the constitution, but to whom shall the fund go which had been subscribed for a certain object which had not yet been carried out, and, by reason of this dissension, cannot now be carried out? Suppose that, instead of having actually paid the money, the subscribers had only come under an obligation to pay, could that obligation have been now enforced? There was here no **[692]** distinction between payment and an obligation to pay. There had been no fusion of the general subscriptions. Each individual subscriber retained his interest in his individual subscription. This was not the case of parties voluntarily withdrawing themselves from the congregation. The claimants did not maintain that they were the original body, but they did not admit that the twenty-seven adherents of Ferguson were that body. There had, indeed, been no resolution to dissolve; but there may be dissolution of a body by dispersion of its members. Further, the claimants were put out of the church by the fault of the majority; and therefore they wanted back their subscriptions, having no wish to join the church again.

The respondents were not called on.

LORD PRESIDENT.—This is a multiplepoinding brought for the purpose of ascertaining the right in a particular fund subscribed for the purpose of erecting a place of worship. One of the parties before us claims it for the purpose of applying it

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be wondered at, that the others should exclude from their roll those who would not join with them in public worship, but set up a place of meeting of their own.

"In the judgment now pronounced the Lord Ordinary does not mean to decide, and he gives no opinion, whether Paul and Wright were properly or improperly expelled. If the expulsion was a nullity, and if the protesters themselves, as they allege, are still members of this congregation, they can have the benefit of that fact otherwise, and may claim a share in the use of the common place of worship when it is erected. But the Lord Ordinary is clear, that, even in that view, they are not the only members of the congregation, or the parties entitled to claim possession of the fund. If they would have no right to share in the use of the building when it is erected, this must be because they have lawfully ceased to be members of the congregation, and in that position they can have no right to the fund now.

"Neither does the Lord Ordinary think that, whether properly or improperly expelled, the protesters have any right to get back their individual subscriptions. These were irrevocably given for a purpose which still admits of being carried out in the sense which must be held to have been contemplated. A party who subscribes to a fund for building a chapel, or by which a chapel is built for the use of a congregation of which he is a member, seems to have no right to get back his money merely because he ceases to be a member, whether that is his own act or is the consequence of something which the congregation have the power to do. If a fraudulent or unlawful attempt has been made to eject him, the law will then give him protection, provided he seeks it in the proper way and in the proper time. But it will not, it is thought, allow him to recal his money, while he does not directly and substantively attempt to rescind the act by which his status has been affected. This seems to be the state of the case as to Mr. Ronald Wright. But still less do parties appear entitled to break up a subscription, in whole or in part, on the ground that some other member has been irregularly expelled, unless they can show such expulsion to involve a fundamental change of principles. Further, if the parties dissatisfied with such an act secede, as they did here, from the main body, they cannot complain of being afterwards excluded from it, and they will not be allowed to claim a right of control over the affairs of a community which they have first chosen to leave.

"On these grounds, the Lord Ordinary, in the whole circumstances, sees no reason for holding that the fund *in medio* either cannot, or ought not to be still applied to its original purpose."

for the object for which it was contributed. The other party claims the fund, or part of it, being their own subscriptions, in order to withdraw that part from the fund, and not apply it to any purpose. The Lord Ordinary has repelled that alternative claim I have last alluded to, and has preferred the other claimants to the whole fund, for the purpose of building a chapel. That is the terms of the claim, and the terms of the finding. I cannot go along with the view that those parties who are claiming in the opposite interest are entitled to withdraw their subscriptions, which they now say they are entitled to do, on the ground that the object for which they made them has been frustrated—that it has failed in execution altogether—that it cannot be carried through. That is not so; and the Lord Ordinary has sustained the claim of Ferguson and others, for the purpose of carrying through that object for which the subscriptions were made. No doubt there is a metaphysical argument, that the component members of the congregation are no longer the same as those for whom the church was originally intended to be built: Therefore, that the original purpose cannot be carried into effect. But that would lead to a result plainly untenable; for the separation of any one party from the mass would reduce matters to that position. I think that the funds were given as a donation, and no party is entitled now to reclaim his donation, on the ground that his interest in the fund to which he contributed has ceased, whether from accident, or his own fault, or from any other cause. It is not in this shape that he must seek for redress. *Prima facie*, these parties appear to have separated themselves from the congregation which continues to go on under the pastorship of Ferguson, who, along with Halket, has been preferred, for the purpose of carrying into execution that which the other claimants wish to see carried into execution, so that there is no ground for sustaining their claim. As to the objection that Ferguson had violated the constitution, and is therefore not entitled to claim the fund, I do not see that these parties have much interest in that if their own claim is repelled. But, independently of that, they have not made out that proposition so plainly as to make it an objection to this judgment, guarded as it is. The constitution, or rather the explanatory note to article 5, is not applicable to this sort of open contention raised among the body, but only to individual or personal delinquencies.

Lord Ivory concurred.

Lord Curriehill.—I am of the same opinion. I think that the principle of the Lord Ordinary's interlocutor is quite sound, that contributions, when they are made by a number of parties for a specific purpose of this kind, no longer belong to the contributors individually, but belong to those who are entrusted to carry out that purpose, in order that the funds may be applied to that purpose. In the case of Ewing *v.* the Trustees of the Pictou Academy, 20th May 1831, this principle was expressly recognised and carried out. There had been great losses from a fire at Miramichi, and large sums were subscribed in Glasgow and elsewhere, to relieve the sufferers. Long after the immediate sufferings had been relieved, it was found that there was a surplus balance of money lying in a bank in Glasgow, for which no demand had been made. The general body of subscribers became desirous to apply this surplus to a different purpose,—viz., towards building an academy at Pictou. This was opposed by a few individuals, and they were successful. It was shown that there were still some persons who were not so well off after the fire as they **[693]** were before; and it was held that, although the pressure of actual suffering had long ceased, none of the contributors to the fund were entitled to recover all or any portion of the sum subscribed by them. I think that the same principle should regulate this case.

Lord Deas.—I come to the same result, and that, very much, upon the same grounds as those which have been stated by your Lordships. The only thing about which I had any doubt was whether the purpose for which the fund had been collected was sufficiently instructed. It is not embodied in the subscription-paper, or any relative writing. But I find this want supplied by the protest which was taken by the advocators in May 1852, in which, after designing themselves as "Members of the Congregational or Independent Church, under the pastoral care of the Rev. Fergus Ferguson of East Regent Place, Blackfriars Street, Glasgow," they set forth that they "and those aforesaid acting with them and concurring herein, and adhering to this protest, did, along with others, subscribe, contribute, and collect a sum of L.840 or thereby, with the view of building or purchasing a place of worship for themselves and those whom they might enter into communion with." Here we have it distinctly

stated, that the purpose of the fund was to provide a church for the congregation meeting under the pastoral care of the Rev. Fergus Ferguson. The only thing left for inquiry, therefore, is, upon what ground do the advocators object to the respondents going on to apply the money to that purpose? We find that also in the protest. The advocators there say that there was an attempt made to exclude certain parties from the church, which attempt "was null and void." That plainly is of no moment. But they further go on to say that they "form and constitute the church aforesaid, holding, maintaining, and abiding by the principles thereof." This, however, was not maintained to us at the bar. They take now a different ground, and say that the purpose has become abortive,—which they explain to mean that the church has not been built. But the church may be built still, or a place of worship purchased. The fact that this has not yet been done does not show that the purpose has become abortive. Nor can the death or withdrawal of a number of the subscribers prevent the purpose from being carried through, unless those dissenting can show that they are the body, which is not now pretended. The advocators, in short, can neither claim the whole money, nor even the amount of their own subscriptions, which they have parted with for a purpose not now to be retracted.

The Court pronounced the following interlocutor:—"The Lords having advised the reclaiming note for Matthew Connell and others, No. 63 of process, and heard counsel for the parties thereon, and on the whole cause, Refuse the desire of the said reclaiming note, and adhere to the interlocutor reclaimed against, with this variation thereon, or addition thereto,—viz., inserting the words, 'or purchasing' after the word 'building' in the ninth line from the top after said interlocutor (manuscript): Find the said Fergus Ferguson and Thomas Halket, claimants, entitled to additional expenses of process from the other claimants, Connell and Wright and others; allow an account thereof to be given in," &c.

No. 105. **XXIII. Dunlop 693.** 6 Mar. 1861. 2nd Div.—Lord Kinloch.

WILLIAM THOMSON, Advocator and Defender.—*Macfarlane—Webster.*

JOHN GEEKIE, Respondent and Pursuer.—*Young—Rettie.*

Proof — Presumption — Writ — Parole — Loan. — (1.) *Held* (*aff.* judgment of Lord Kinloch, *diss.* Lord Justice-Clerk), that an acknowledgment bearing receipt of a sum of money, "as per agreement," implied that the money had been received in loan, and left upon the granter the *onus* of proving that the transaction was not a loan; (2.) Circumstances in which *held*, that the granter of such an acknowledgment had failed to prove that the money was received otherwise than in loan.

John Geekie, sub-contractor for the plaster work of the New Infirmary, Dundee, raised an action in the Sheriff-court of Forfarshire against William **[694]** Thomson, cautioner for Robertson, the principal contractor, for payment of a sum of L.30, alleged to have been "received by the defender from the pursuer on 4th September 1854, on agreement to repay the same," conform to a holograph acknowledgment in the following terms:—"6 Reform Street, Dundee, 4th September 1854.—Received from Mr. Geekie the sum of L.30 sterling as per agreement." (Signed) "WM. THOMSON."

The defender alleged that the sum of L.30 had been paid to him, not as a loan, but as a consideration for indorsing a bill for L.100, drawn by the pursuer upon Robertson, the principal contractor, on account of plaster work, and which bill the defender had agreed to guarantee to the extent of L.70. "At the same time, the defender and Mr. Robertson arranged with the pursuer, that the bill to carry out the transaction should be written for L.100, of which the defender should, when discounted, absolutely, so far as regarded the pursuer, receive L.30. This was the agreement referred to in the written document, produced by the pursuer. (Stat. 6). "The defender accordingly endorsed the bill, dated 26th August 1854, and payable four months after date, due 29th December 1854, drawn by the pursuer upon and accepted by Robertson. That bill had previously been blank endorsed by the pursuer. The bill was taken away by

the pursuer, and discounted with the Bank of Scotland's agent at Dundee, who paid the proceeds to him. He thereafter, as arranged, sent the L.30 to the defender, who gave to the messenger the acknowledgment, dated 4th September 1854, produced in process. That document was asked, and given as evidence, merely that the L.30 had been paid according to the arrangement above stated, and not as a loan, or on any other footing implying an obligation on the defender's part to repay the amount to the pursuer." (Stat. 7). "Mr. Robertson's circumstances, at the time the defender so endorsed the bill to the bank, were such that the pursuer, Mr. Robertson, and the defender, all knew and contemplated that the defender would have to retire the bill at maturity from the bank, his endorsees. Knowing this, the defender had stipulated, as aforesaid, that his new obligations in August 1854 should be limited to the said L.70."

The bill for L.100 was produced by the defender, who alleged that he had retired it, and had never received any part of the sum either from the pursuer (the drawer), or from Robertson (the acceptor), excepting the said sum of L.30, received as aforesaid, as the stipulated consideration for endorsing it.

The Sheriff allowed parties a proof of their averments. The following evidence was led:—

PURSUER'S PROOF.—The Pursuer—"I was sub-contractor for plaster to infirmary. My bargain with Robertson, principal contractor. Got a bill for L.100 from Robertson on 26th August 1854. I drew and he accepted: it was to account of my work. Thomson, the defender, endorsed this bill. The reason was, his name was necessary to its being discounted. We both went to defender's shop for the purpose. Defender asked if I would lend him L.30. I agreed. Nothing said of that being taken off the bill which he endorsed; it was to be a loan. Two days after I made the loan, I told my son John that I had agreed to lend defender L.30, and I sent him with the money. *Cross.*—I applied to Robertson for the bill for L.100; he said he would speak to defender to endorse it, as he had done with one before. I asked Robertson for payment of L.100; he said he would give me the money in a bill. Robertson did not propose that the bill should be for L.60 or L.70. I did then know that Robertson was in difficulties. He said the bill would be the better of another name, and that he would get defender. Defender did not say that the bill was to be for L.60 or L.70, and that he wanted L.30 for another debt due by Robertson to him."

John Geekie junior, pursuer's son.—"In 1854 got No. 3 from defender. [695] I paid him L.30 on date of receipt, 4th September 1854. My father sent me with the money, telling me at the time that defender wanted a loan of this L.30. Another receipt was written by defender and offered to me. I declined it, because he signed his name as for Robertson. I had no authority to recognise him in the transaction. He then gave me No. 3. Witness shown ledger of pursuer kept by him. An entry in defender's account under date 4th September runs thus:—'September 4, 1854.—Lent Mr. William Thomson in cash L.30.' The William Thomson there mentioned is the defender. That is an original entry, and was made immediately on my return from defender's."

DEFENDER'S PROOF.—The Defender—"Robertson's contract for infirmary was before '54. After that, price of wages and material rose materially, and the contract became unfortunate. He was in August '54 indebted largely to me, and to others besides me. He owed the pursuer money. Robertson applied to me as to money which pursuer wanted in August '54. I did not then pay such debts due by Robertson in connection with infirmary. Any advances I made were under special agreement. I objected to endorse the bill proposed to be given to pursuer. A bill of L.30 due by Robertson to Stewart was to fall due on 4th August, and Robertson told me he was unable to meet it. Robertson pressed me to accommodate the pursuer, and I said I would endorse a bill for L.60 or L.70, but that pursuer's bill should be for L.100; L.30 to be handed over by pursuer to me to meet Stewart's bill, and the full amount of the L.100 to be paid to the holder at maturity. Robertson went to tell pursuer of the arrangement, and Robertson afterwards told me he had done so, and that pursuer approved. After that pursuer brought me the bill and I endorsed it. I asked if he was satisfied with the agreement, and he said he was, and would send the L.30. He did so, and I granted No. 3. The agreement referred to in No. 3 is the agreement I have just spoken of. When the L.100 bill became due, I paid it all to Bank of Scotland, the holders, and the L.30 I applied to Stewart's bill. In January '56

pursuer first asked me for payment of the L.30. No. 6 is a correct copy of my answer." "6 Reform Street, Dundee, 21st January 1856. Mr. John Geekie.—Dear Sir,—With reference to the L.30 charged in the account just received, I have simply to remind you of our agreement thereon, verbal and written, and have no doubt you have fallen into the mistake quite inadvertently—it having been duly paid, as per said agreement, on the 28th day of December 1854. You can, therefore, put this right, as I have done in your account. Hoping this weary infirmary job will now be soon brought to a satisfactory conclusion—I remain, W. THOMSON." "I never agreed that I was to repay the L.30 to pursuer. *Cross.*—Geekie's son paid me the money. I tendered him, and he declined a receipt signed as for Robertson."

Andrew Hendry, Writer, Dundee.—"I was at one time agent for defender. I examined the late David Robertson in regard to pursuer's claim—first, after an action was threatened, and again after it was brought. Asked to state what David Robertson said about the pursuer's action. Pursuer objects. Objection sustained."

"Mr. Kerr, defender's present agent, tendered himself for a like purpose with Mr. Hendry. Objection stated and sustained."

On 9th November 1859 the Sheriff pronounced the following interlocutor:—"Finds that the pursuer sues the defender for payment of L.30, upon the following writing subscribed by, and holograph of, the defender:—'Received from Mr. Geekie the sum of L.30 sterling, as per agreement:' Finds, that a writing in those terms, *prima facie*, imports a loan, and that it lies, therefore, with the defender to prove, that, by the agreement referred to, he received the money upon some footing implying no obligation to repay: Finds that the defender has failed in this: Therefore, Repels the defences, and [696] decerns in terms of the conclusions of the summons: Finds the pursuer entitled to expenses," &c.[1]

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[1] "NOTE.—It consists with common sense, and is borne out by several decisions (Allan *v.* Murray, 13th June 1837, 15 S. & D., 1130; Martin *v.* Crawford, 4th June 1850, 12 Sess. Rep., 960; Fraser *v.* Bruce, 25th Nov. 1857, 20 *ibid.*, 115), that, where one acknowledges in writing to have received money of another, the money must be held to belong to that other, and to have been given to the receiver under an obligation of repayment. The circumstance, that, to the acknowledgment of receipt, there is here added the words, 'as per agreement,' cannot detract from this the ordinary and reasonable presumption of law; and, if any one is to be blamed for the seeming ambiguity which may be said to have been thereby produced, it is the defender who was himself the framer of the writing.

"Very properly, a proof was allowed by the Sheriff-substitute to both parties, and in this proof the defender has not substantiated sufficient to rid himself of the presumption referred to. The pursuer's averment on record is, that the money sued for was lent by him to the defender, out of the proceeds of a bill drawn by the pursuer upon, and accepted by, the late David Robertson, which bill (to make it pass at the bank) was endorsed by the defender, the relative of Mr. Robertson, and his cautioner in an extensive building contract then current. On the other hand, the defender's allegation is, that, before endorsing the bill, he stipulated for getting absolutely, and not as a loan, out of the proceeds of the bill, the sum of L.30, with which he intended to meet an obligation of his for Mr. Robertson, which had just become due.

"At the trial, the depositions of the parties were in agreement with their previous averments, and thus adverse the one to the other. It by no means, however, follows from this, that each was not speaking the truth; for, whilst nothing could be clearer, not only from what he swore in Court, but from his actings and book entries at the time, than that the pursuer regarded the payment of the money as a loan to the defender,—the defender himself may have looked on it in quite a different light; inasmuch as his arrangement was not made directly with the pursuer, but with the pursuer through Robertson, who may have misunderstood it, and so inadvertently misrepresented it to him. But, be that as it may, it is plain that, as the pursuer regarded the payment as a loan, and as the agreement of both parties in common consent and assent would have been required to make it anything else, the defender has necessarily failed in proving what was required to take him out from under the legal presumption."

Thomson advocated, and pleaded *inter alia*;—4. The party founding on a document alleged to be obligatory, referring to a separate agreement or contract, is bound to establish the terms of the agreement on which he founds. 5. The burden of proving that the sum sued for, was, as alleged by the respondent, an advance in loan by him to the advocator, ought to be laid on the respondent. 6. The Sheriff allowed incompetent evidence against the advocator, and refused to admit competent and important testimony tendered for him. 7. The evidence adduced by the respondent is insufficient to support the interlocutors brought under review.

The Lord Ordinary, on 28th June 1860, pronounced the following interlocutor:—"Advocates the cause: Finds it proved that, on the 4th September 1854, the defender William Thomson received from the pursuer John Geekie the sum of L.30 sterling, and granted for the said sum the acknowledgment No. 3 of the inferior Court process: Finds it not proved that the said sum was received by the defender otherwise than in loan, and under the usual obligation in the case of money advances, to repay the same: Of new, repels the defences, and decerns against the said defender, in terms of the conclusions of the summons: Finds the pursuer, the said John Geekie, entitled to expenses both in this and in the inferior Court."[1]

[697] Thomson reclaimed, and argued;—The document founded on was not a simple acknowledgment. It referred to an agreement, and could not be founded on by itself, or as importing a loan. The *onus* of proving that the transaction was not a loan had been improperly held to lie on the defender; but even if the *onus* were on him, it had been discharged. In any event, the Sheriff had erred in rejecting the evidence tendered for the defender, of statements by Mr. Robertson, who was now deceased; and also in admitting parole evidence of the alleged loan.[2]

Argued for the respondent;—The document implied an obligation to repay, for it proved receipt of the money. The addition of the words "as per agreement" was not inconsistent with the legal presumption of loan. Therefore, if there had been no

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[1] "NOTE.—The Lord Ordinary entertains great doubts of the admissibility of parole evidence in this case, although he has thought it right, in point of form, to throw the interlocutor into the shape proper to the case in which proof has been allowed. He has found enough in the case on which to rest his judgment in favour of the pursuer, irrespective of parole proof.

"The Lord Ordinary holds with the Sheriff, that where a sum of money is proved to have been received by one from another, and nothing appears to the contrary, the money is to be presumed to have been given in loan. Donation is never presumed; nor will any anterior obligation to pay the money be assumed, unless proved.

"The amount sued for is admitted, and proved to have been received by the defender from the pursuer. There is nothing in the acknowledgment granted inconsistent with the idea of a loan. To state a sum as received 'per agreement,' not unreasonably infers an agreement to give a loan; it does not necessarily, or even very probably, infer any other agreement; it is adverse, rather than otherwise, to the idea of an anterior debt.

"The *onus* lay on the defender, as the Lord Ordinary conceives, to prove that the money was received without an obligation to repay. The defender's statement on the subject is somewhat peculiar. He admits that the sum in question was part of the proceeds of a bill for L.100, granted by David Robertson to the pursuer in respect of a debt, and discounted by the pursuer *prima facie*, therefore the defender received from the pursuer money which was the pursuer's own. His allegation is, that it was agreed that of the sum of L.100 contained in the bill, he was himself to receive on the discount L.30 in part payment of his own advances from Robertson, thereby in reality reducing to the pursuer the available sum in the bill to L.70. It is not impossible that such a transaction might take place. But the transaction is evidently a peculiar one, and ought to have been embodied in some distinct writing at the time, being adverse to the natural construction of the bill referred to, not less than of the acknowledgment. It required to be established by very clear evidence, and none such has been presented."

[2] Erskine's Inst. iii. 3, 87; Stair's Inst. iv. 4, 21; Allan *v.* Murray, 13th June 1837, 15 Sh. 1130; Martin *v.* Crawford, 4th June 1850, 12 D. 960; Fraser *v.* Bruce, 25th Nov. 1857, 20 D. 115.

evidence on either side the pursuer must have prevailed. If the addition of these words were held to create ambiguity, the parole evidence showed that the facts were consistent with the legal presumption. The defender had failed to prove his allegations regarding the agreement said to be referred to. Doubtful clauses were always to be interpreted against the granter of the deed in which they occurred.[1]

LORD WOOD.—I cannot but regret that the proof which was allowed has not been taken with greater care, for it rather appears to me that had it been so, more light might have been thrown upon the opposing statements of the parties. But the case having been held not to be one in which the Court ought to exercise its undoubted discretion, notwithstanding the parties having agreed to close their proof, of allowing further proof unless both of them had been consenting to it, I have now to address myself to its consideration without that information as to the facts which possibly might have been obtained, and to adopt what, according to my judgment, appears to be the sound conclusion in law from the terms of the writing founded on by the pursuer.

[698] The summons concludes for payment to the pursuer of the sum of L.30, "received by the defender from the pursuer on or about the 4th September 1854, on agreement to repay the same, conform to holograph acknowledgment by the defender, with interest at the rate of 5 per cent per annum since the 31st day of December 1855, when payment of said sum was first refused." The writing produced to support the demand is dated 4th September 1854, and is in these terms:—"Received from Mr. Geekie the sum of L.30 sterling, as per agreement." (Signed) "WM. THOMSON."

Had the writing not contained the words "as per agreement," the case would have been attended with no difficulty,—any difficulty there may be arising solely from the addition of these words to the acknowledgment of the receipt of the money; for, although the writing is upon a receipt stamp, I should have been unable to hold that its being so would be sufficient to displace the legal conclusion otherwise deducible from its terms. Now the legal conclusion, had the words referred to not been added, would have been that the money was received by the granter in loan, or upon an obligation to repay it. To infer that obligation, all that is required to be proved is, that the money which passed between the parties was the money of the party to whom the acknowledgment of its receipt is granted. The writing, if it proves that,—and by the acknowledgment of the receipt it is held to be proved—is sufficient to enable the party suing upon it to recover, the legal presumption being that the money was received in loan or upon an implied condition of reimbursement, and not as a donation, or in discharge or liquidation of any prior obligation by the party from whom the money came to the receiver, or upon any other footing than that of repayment.

A writing, therefore, simply acknowledging receipt of money by the granter, taken by itself, is, in law, enough *prima facie* to entitle the granter to repayment—it being, however, competent to the granter to rebut the legal presumption by competent evidence, instructing that the money was paid over on a different footing—what is competent evidence depending on the nature of that which is proposed to be established.

But the writing may go further. Words may be added which are inconsistent with an obligation to repay, or which either weaken or take off the *prima facie* legal presumption, and make a case demanding explanation or inquiry; and where, it may be, that failing sufficient explanatory evidence on either side, a claim founded upon the writing must be rejected. Now, the question is, Is that in any respect the effect of the words "as per agreement," which are here added?

No doubt by these words it is explicitly stated that the money was received per agreement; and it is true, as I have already said, that when the money of one party passes to another, and receipt is acknowledged, that is enough in law to impose the duty of repayment, without any express agreement to that effect being necessary. It arises as a legal consequence, or by legal presumption; but still an implied agreement between the parties is the foundation of the legal presumption that that repayment is the footing on which the money was given and received. But if so, is the addition that the money was received per agreement sufficient to alter the legal aspect of the

[1] Ersk. iii. 3, 87; Stair, i. 11, 15; Ross *v.* Fidler, November 24, 1809, F.C.; Gaylor *v.* Crichton, Dec. 6, 1854, 27 Jur. p. 35.

case? Is it inconsistent with the construction which the law would otherwise put on the writing? In the one case as well as in the other, the condition on which the money passed may be quite different from that which the law, apart from evidence to the contrary, would infer. It may have been paid in discharge of a debt, or on some arrangement which may either be negative of all claim for repayment, or which materially qualifies or restricts it; and in the one case as well as the other, the legal presumption may be redargued by competent evidence. But if, in the case of a simple acknowledgment of receipt, the law implies an agreement, which, by legal inference or presumption, is held to be an agreement that the money is to be repaid, I apprehend that it cannot be legitimately or justly concluded, that an acknowledgment of receipt of the money is inconsistent with what would otherwise be the legal presumption arising upon it, because it expresses in words a fact which, if not expressed, would be implied. I cannot see why it should be taken to be so. There is, indeed, in words, an addition to the acknowledgment; but it is always to be kept in view that the addition is nothing more than the statement that there was an agreement, and not any expression indi- **[699]** -cative of some special agreement, the particulars whereof might require explanation, and which explanation, if required, it might be the duty of the pursuer to afford. That being the case, is the addition anything more than words, when it only states a fact which the law, without its being stated, would imply—viz. that at the time when the money passed there was an agreement between the parties? By the fact so stated upon the face of the acknowledgment, instead of being left to implication, it does not strike me that there is suggested or afforded any good reason why it should be supposed—till the reverse is proved—that the money was not received upon an obligation to repay, any more than that that should be supposed if the acknowledgment merely bore the receipt. On the contrary, I should say that it is in form rather than in substance that there is any difference between the two acknowledgments, and that there is nothing in the fuller form—supplying in words what the law would imply—which is at all irreconcileable, *prima facie*, with the idea of the money being to be repaid. That it was to be so, is, I conceive, just as agreeable to the one form of acknowledgment as to the other. At all events, I do not think that the difference in form is, *prima facie*, so adverse to the supposition that the money was to be repaid, as to create such an essential distinction between the two cases that the legal presumption in each respectively shall be entirely opposed the one to the other.

Now, not being satisfied, either on principle or authority, that the addition in question is inconsistent with the money having been given and received in loan, or that by the writing being in that form such an inference is excluded, or rendered unreasonable or improbable, I am unable to arrive at the conclusion that the pursuer's case, as it would have stood upon the writing without the addition, is destroyed, or that there is thereby raised any presumption contrary to the presumption which would otherwise hold. So that till it shall be proved by the party seeking to recover—the *onus* lying on him—that the money was given in loan, or on an obligation to repay, it is upon the document to be presumed in favour of the receiver and granter, and against the party seeking to recover, that the money was not received upon that footing. On the contrary, it appears to me that the *onus* of proof is not shifted, and lies upon the defender.

Then, looking to the proof, while I am of opinion that it was competent to the defender to relieve himself of the *onus* which remained with him, by parole as well as written evidence, I am also clearly of opinion that he has not done so; and I further think that had the *onus* been shifted and put on the pursuer, he would not have been discharged of it by the evidence which has been adduced. If, indeed, I were to indulge in conjectures or probable inferences, they would preponderate in favour of the pursuer; but all such considerations are of course immaterial in the view I have taken of the law of the case upon the writing libelled on, and of the proof as failing positively to establish the averments of either party, and more particularly those of the defender. I am, therefore, of opinion that the result at which the Lord Ordinary has arrived is the right one, and that the interlocutor reclaimed against ought to be adhered to.

Lord Cowan.—I am of opinion that the interlocutor of the Lord Ordinary ought to be adhered to. The principal, if not the only matter for consideration, regards the effect of the holograph acknowledgment in itself, as inferring or not an obligation to repay on the part of the granter. Supposing the words "as per agreement" had not been in the document, it does not admit of dispute that the principle would apply to

the case, that where the money of one party is proved to have been given to or received by another, he will *in dubio* be under an obligation to repay the amount, unless he establish that he received the money on some footing, or under some arrangement, not implying such obligation. The presumption is against donation; and when one acknowledges the receipt of money, it will be inferred that he got it in loan, or under an obligation to repay the amount, or apply it for behoof of the giver. This principle has been recognised from an early period; and Lord Stair, in noticing the case of Hume *v.* Jamieson, 15th June 1667, says,—"Generally the delivery of anything is not presumed to be a donation, but for recompense or loan"—(Stair, 1, 8, 2). In conformity with this general principle, although not expressed, there is implied in the very fact of granting an acknowledgment for the receipt of money, an agreement or obligation to repay the amount. Throughout all the cases that have occurred from the early decision mentioned by Lord Stair to the latest of those cited in the argument (Fraser [700] *v.* Bruce, 25th November 1857), this principle is recognised. As stated by Lord Jeffrey, in his note to the judgment in Allan *v.* Murray, 13th June 1837, "a marked acknowledgment of the receipt of money does *in dubio* import the constitution of a debt and a general obligation to repay."

This being the fixed principle, supposing the words "as per agreement" had not been in the acknowledgment, it is for consideration whether those words have the effect of destroying the presumption of loan, and the obligation to repay, to be inferred from the simple acknowledgment of the receipt of money. Without those words it would have been incumbent on the defender to prove that he got the money on some ground or footing not inferring obligation to repay, or this liability must have attached to him. Is he freed from this burden by the words "as per agreement?" And is it requisite for the pursuer, before he can recover, to prove that the agreement referred to in the receipt was, in fact, one carrying with it an express obligation to repay? The case resolves into this question, for if the *onus* continues with the defender, there is certainly nothing in the proof which he has led which removes from him the liability to repay, or to account for its application, which the acknowledgment must thus presumptively be held to carry with it.

Now, in the first place, I think any ambiguity which these additional words attach to the legal effect of the words, is justly said by the Sheriff to be ascribable to the defender, who was himself the framer of this writing.

But, in the second place, it seems to me that the words have not the effect which the defender attaches to them. The agreement to which the receipt refers may, no doubt, be different from one inferring obligation to repay; but as the legal presumption, without the words, is for an agreement of this latter description, I cannot hold that the party receiving the money can place himself in any different situation by stating in his receipt that the money was paid to him upon an agreement, the nature of which he does not specify. The law presumes, when the receipt is silent on the subject, that there was an agreement of loan, inferring an obligation to repay. To say, in express terms, that there was an agreement, and no more, only gives expression in words to what the law implies. In the one case as in the other the *onus* of proving that the agreement was such as did not infer obligation to repay lies with the receiver. It is his receipt, and he should have expressed himself otherwise if his acknowledgment was not intended to infer that the money he received was to be repaid.

The defender, in his record, sets forth an agreement, under which the L.30 was paid to him out of the proceeds of a bill of L.100, of which the pursuer was drawer, and he was endorser. But the bill bears to have been drawn for value received in plaster-work, for which the acceptor was indebted to the pursuer. The bill gives no support to the defender's statement, but rather contradicts it, and there is no proof except his own statement, that, under an agreement between the parties to it, the contents of the bill, to the extent of L.30, were to be paid to the defender. I concur in the observation of the Lord Ordinary, that the agreement stated by the defender is of a very peculiar kind, and required to have been supported by clear evidence; but there is nothing of the kind. On the contrary, there are, in the evidence of the pursuer's son, facts stated, and entries in the pursuer's books referred to, which so far corroborate the pursuer's statements, and aid the presumption arising from the terms of the acknowledgment libelled viewed by itself. But while I make this observation in reference to the evidence, my opinion on the case is formed on the same grounds as

that of the Lord Ordinary, viz., the presumption afforded by the document itself, that the money was received under an obligation to repay, and that this presumption has not been redargued by the defender.

LORD BENHOLME.—My opinion has been very much anticipated by those of your Lordships. I shall only add one or two observations. It appears to me that the addition of these words "as per agreement," suggest that the money must have been given either in solution of a previous obligation, or for the constitution of a new one. I think that the document, with these words, cannot be viewed as consistent with the former purpose; and, as intended to be evidence of the dissolution of a previous obligation, I am, therefore, of opinion that it must be viewed as importing the constitution of a new obligation. If so, was it a donation or a loan? Donation is not to be presumed. We never presume donation. We do presume [701] loan. Between donation and loan *in dubio* there can be no hesitation. Loan and not donation is to be presumed. Therefore I agree with your Lordships that the *onus* is not to be shifted by the addition of these words to the acknowledgment.

But then evidence has been led. If the *onus* had been the other way, and had been upon the pursuer, I do not say that it would have been discharged by the proof led by him. But I think that, on the whole, the pursuer's account of the matter is the more probable of the two. The evidence clearly establishes this, that the defender had been cautioner for the principal contractor in regard to the execution of his contract; and had previously endorsed for him, for the purpose of enabling the contractor to make a payment to the pursuer in regard to the sub-contract. Then here is another operation of the same kind. The pursuer in the execution of his sub-contract, will not go on without money. The defender again comes forward, and puts his name to a bill for L.100, bearing to be for plaster-work; and he now says, this payment must be reduced, and, that it was agreed that he should get L.30 out of the proceeds. You must suppose that the L.30 was advanced by the pursuer, either in loan or as a present to the defender. Now, I think the pursuer's statement, that it was a loan, is more probable than the defender's, to support which it is necessary to suppose that the pursuer had made him a present to the extent of L.30 of the money contained in the bill for plaster-work,—for the bill continues to stand as a payment to its full amount to account of plaster-work; of that there is no doubt. I think this supposition is improbable; and looking to the bill, the accounts kept by the pursuer, the document in question, and the whole circumstances, I am inclined to say that there is more evidence in support of the pursuer's statement of the agreement referred to, than there is in support of the defender's. But, at the same time, I would hesitate to say that, if the *onus* had been on the pursuer, the evidence would have been sufficient to discharge that *onus*.

LORD JUSTICE-CLERK.—This is a peculiar case, which I think we are all agreed that is not exactly ruled by any previous case. All previous cases have been laid upon acknowledgments simple in their terms. The present case differs from these in consequence of the addition of the words, "as per agreement." It is upon the effect of that addition that this case turns. I have been anxious to concur with your Lordships, and I had hoped, even down to this time, that I might have been convinced that my doubts were without foundation. But I am sorry to say this is not the case, and that I must therefore dissent from the judgment to be pronounced.

It admits of no doubt, that an acknowledgment for money generally presumes that the money was advanced in loan, and it follows that there is, first, an obligation on the party granting it instantly to repay the sum; and secondly, another obligation that, so long as the sum remains unpaid, the party shall pay legal interest. The acknowledgment itself does not express these obligations; but these are the obligations which result in law from the loan. This is the general case. It has been said, and justly, that if a party granting an acknowledgment means that it shall not imply a loan, but shall represent a transaction of a different kind, he ought to express this, and set forth what the transaction is. This is quite true. But then there is a third case, namely, where the words of the acknowledgment present an apparent ambiguity requiring to be cleared up,—as, for instance, an acknowledgment bearing, "received from A B to account," and where the question arises, to account of what? It appears to me that the addition of these words "to account" would take the case out of that class where the acknowledgment is simple. In this third case there is a reference to

something extrinsic, which needs explanation. Now I think the present is a case of this kind. What is the agreement referred to? Is it an agreement instantly to repay a loan, and to pay interest so long as the loan remains unpaid? I cannot hold that. That would be to give no meaning at all to these words, "as per agreement," for no more would be inferred if the acknowledgment were simple. I think, therefore, that the agreement referred to must be something different, and something which requires to be ascertained. I am fortified in this view by a consideration of the nature of the pursuer's claim, which is not founded on the view that this was a simple obligation to repay a loan, but is for the principal sum, with interest, not from the date of the alleged advance, but only from the date when payment was [702] asked and refused. If the acknowledgment had stood without these words, the pursuer would have been entitled to more than this. He would have been entitled to interest from the date of the obligation. But then it is said that this acknowledgment was written by the defender. I confess I think that observation is open to this answer, that, although written by the defender, the document was accepted by the pursuer, and that the acceptance is as much binding upon the pursuer as the writing of it is upon the defender. I observe that the terms of the acknowledgment were matter of discussion at the time. It appears that the pursuer's son refused to accept an acknowledgment in the terms first offered.

This shows that the son was authorised to arrange the form. I therefore think that, before the Court decide upon this claim, they ought to know what the agreement was. The Lord Ordinary suggests a way of getting out of the difficulty. He says:—"That where a sum of money is proved to have been received by one from another, and nothing appears to the contrary, the money is to be presumed to have been given in loan. Donation is never presumed; nor will any anterior obligation to pay the money be assumed, unless proved. The amount sued for is admitted, and proved to have been received by the defender from the pursuer. There is nothing in the acknowledgment granted inconsistent with the idea of a loan. To state a sum as received 'per agreement,' not unreasonably infers an agreement to give a loan; it does not necessarily, or even very probably, infer any other agreement; it is adverse, rather than otherwise, to the idea of an anterior debt." But I cannot accept this as a solution of the difficulty. For, if the agreement referred to was an agreement for a loan, we still need to know what were the terms of that agreement, and whether it is consistent with the claim made in the summons. I cannot agree that the document is to receive the same effect as if the words, "as per agreement," were not there.

That being so, the next question is, how is the matter to be cleared up, and upon whom is the *onus* to be laid? Now I think that the party founding on the document must show that the agreement referred to is consistent with his claim, and therefore that the *onus*, at least in the first instance, is upon the pursuer. Then I come to consider the evidence, and on that I agree very much with the observation of the Sheriff, that "it by no means, however, follows from this that each was not speaking the truth; for, whilst nothing could be clearer, not only from what he swore in Court, but from his actings and book entries at the time, than that the pursuer regarded the payment of the money as a loan to the defender, the defender himself may have looked on it in quite a different light,—inasmuch as his arrangement was not made directly with the pursuer, but with the pursuer through Robertson, who may have misunderstood it, and so inadvertently misrepresented it to him." I think there is no reason to doubt the honesty of both parties. It is quite possible that there was a misunderstanding—the one party thinking he was making a loan, and the other thinking that he was receiving payment of a debt.

On the whole, therefore, I think the pursuer is not entitled to decree, and that the Lord Ordinary's interlocutor ought to be altered. But, of course, after your Lordships' opinions, it is not without distrust in my own judgment that I have expressed these views.

The Court adhered, with additional expenses.

[Cf. *M'Keen* v. *Adair*, 2 M. 397; *Haldane* v. *Speirs*, 10 M. 552, 553, 557, 561, 565; *Duncan's Trs.* v. *Shand*, 11 M. 257; *Welch's Trs.* v. *Forbes*, 12 R. 859; *Paterson* v. *Paterson*, 25 R. 169; *Thiem's Trs.* v. *Collie*, 1 F. 779; *Pringle's Trs.* v. *Wright*, 5 F. 527.]

No. 106. **XXIII. Dunlop 702.** 7 Mar. 1861. 1st Div.

THOMAS STRUTHERS, Petitioner (in CRICHTON'S Sequestration).—*Muirhead.*

Bankruptcy—Second meeting appointed for electing Trustee—Nobile officium.—Alexander William Crichton's estates having been sequestrated by the Lord Ordinary on the bills, of date 5th February 1861, in terms of the Bankruptcy (Scotland) Act, 1856, and the Bankruptcy and Real Securities (Scotland) Act, 1857, a meeting of the creditors was appointed to be held in Glasgow on the 13th February 1861, for the purpose of electing a trustee and [703] commissioner, and a remit was made to the Sheriff to proceed in terms of the statute. The parties proposed as trustee were respectively objected to, and the objections being sustained, no valid election was made. There being no provision in the statute for the event of a second meeting being held, this petition was presented by one of the creditors, praying the Court to remit of new to the Sheriff to proceed therein in terms of the statute. The Court "of new appoint a meeting of the creditors of the said Alexander William Crichton to be held on Friday the 15th day of March 1861, at twelve o'clock noon," the day being so fixed for the purpose of enabling six days' clear notice of this appointment to be given by the petitioner in the *Edinburgh Gazette*, but no order to that effect was embodied in the interlocutor.

[Cf. *Steuart* v. *Chalmers*, 2 M. 1218.]

No. 107. **XXIII. Dunlop 703.** 8 Mar. 1861. 1st Div.—Sheriff-court of Lanarkshire.

MARGARET KELLY and her Tutor *ad litem* and Factor *loco tutoris*, Pursuers and Advocators.—*Young—Moncrieff.*

EDWARD KELLY and Others, Defenders.—*Sol.-Gen. Maitland.—Millar.*

Executor—Nuncupative Legacy—Accounting—Interest—Liability.—1. A nuncupative legacy will be sustained to the extent of L.8, 6s. 8d., though nominally a legacy to a larger amount. 2. In an accounting, executors having admitted liability to a certain extent, and lodged the amount in bank, resisted a motion for interim decree; —*Held* that they were liable in legal interest therefor from that date.

James Kelly died at Glasgow on 13th May 1853, leaving a settlement in the English form, but informal according to the law of Scotland, and by which he bequeathed his whole estate to the pursuer, then and still in pupillarity. The settlement contained no nomination of executors; but at the close of the writing, immediately after the testator's signature, there occurred the words,—"executor, Edward Kelly; executor, Hugh Kelly; executor, Daniel Keenan." On 14th January 1857 this action of count and reckoning was brought in the Sheriff-court of Glasgow against Edward and Hugh Kelly; and on Hugh Kelly's death, on 6th July 1858, it was transferred against his representatives. The action was raised in name of the pupil, to whom a tutor *ad litem* was appointed; and thereafter a factor *loco tutoris*, who appeared and now sued with and on behalf of the pursuer. Hugh Kelly denied intromission, and that he had accepted or acted as executor. Edward Kelly admitted his intromission, and also his liability to the extent of L.643, 14s. 9d., which sum was lodged in bank in names of the executors. On 2d July 1858 the Sheriff-substitute, "Having heard a motion for the pursuer for interim decree for L.600 sterling, Refuses said motion, in respect the defenders do not admit that they have any sum in their hands."

A great variety of questions were raised, which, after being disposed of in the Sheriff-court, and advocated, were arranged by the parties in the Court of Session. The only points involving any principle were contained in the following findings of the Sheriff-substitute (Steele), in an interlocutor dated 1st June 1859, and substantially adhered to by the Sheriff (Alison):—"Finds that the defenders have pled . . . that

the sum of L.25, 17s. 6d. was, to the extent of L.10, paid to their sister Bridget Kelly, to whom the deceased left that sum shortly before his death, as a token of friendship, as well as a recognition of her services to him on deathbed, and the remainder of the sum was used for the immediate purposes of the deceased's spirit and broker shops: That with respect to the items of interest, that as the defenders were paying out for the deceased's estate, as well as receiving monies, they were not bound to charge themselves with interest, seeing that they have not debited the estate with interest on these payments: Finds it proved by the receipt, of date 4th September 1857, produced with the [704] answers, No. 20, as well as by the deposition of the witness Bridget Kelly or M'Guire, that she did receive L.10 from the defenders, which she describes as a legacy left her by the deceased; but finds that the deceased's informal settlement contains no such legacy, there is no written evidence otherwise of any legacy in her favour, and it is incompetent to prove by parole a nuncupative legacy, exceeding L.8, 6s. 8d.: Repels the defences on the merits: Finds the said defender Edward Kelly and the said . . . as representing the said deceased Hugh Kelly, jointly and severally liable to the pursuer in the said sum of L.758, 3s. 1d., being the balance found due of their intromissions with the estate of the said deceased James Kelly as above, with legal interest thereon as concluded for, from the date of citation to this action on 15th January 1857 and until paid: Finds the defender liable in expenses, subject to modification."

Upon these points the interlocutor of the Court in the advocation was as follows:—"In the advocation at the instance of Edward Kelly and others, of consent find that the only portions of the judgment submitted to review, whereof the advocators now complain, are—(1.) That whereby the advocators have been refused credit for the payment of L.10, or any part thereof, made to Bridget Kelly, in respect of the legacy alleged to have been left in her favour by the deceased. . . . (3.) That whereby the advocators have been found liable in legal interest from the date of citation, on the ultimate balance, as found due on their whole intromissions with the estate of the deceased; and on these points—1. As regards the legacy, find it established, in point of fact, that the deceased did verbally leave a legacy of L.10 to the said Bridget Kelly, and that the advocators afterwards paid the same; but find, in point of law, that in the absence of writing, the said legacy can be sustained only as a nuncupative legacy to the extent of L.8, 6s. 8d., to which extent accordingly find that the same ought to have been sustained as an item of charge to the credit of the advocators. . . . 3. As regards the matter of interest, find, in point of fact, that the advocators, after they had given up all pretension to the character of executors, and when the estate of the pupil had been judicially placed in charge of a factor *loco tutoris*, still continued to resist payment, and this even after the date of 2d July 1858, when they obtained an interlocutor refusing interim decree: Therefore find, in point of law, that from and after this last date, the advocators justly subjected themselves in legal interest, and find them liable in such interest accordingly. . . . As regards the modification of expenses, find that the Sheriff's judgment ought not to be interfered with: Find that the pursuer is bound to concur with the defender Edward Kelly in uplifting and discharging the sum deposited by the defenders in the City of Glasgow Bank for her behoof: With these findings, and both parties respectively having stated that, as to all other matters disposed of in the interlocutors submitted to review, they simpliciter acquiesce, Of consent, remit the cause back to the Sheriff, that the said findings may be duly applied and given effect to, and final judgment pronounced between the parties, as accords: And finally, in the conjoined advocations, find no expenses of process due in this Court by either of the parties to the other, and decern."

No. 108. **XXIII. Dunlop 705.** 8 Mar. 1861. 2nd Div.—Lord Neaves.

Mrs. FRANCES HILTON MILLER or MARTIN, Pursuer.—*Macfarlane—Shand.*

JOHN BANNATYNE and Others (Major and Mrs. MARTIN'S Marriage Trustees), Defenders.—*Young—Mackenzie.*

Trust—Construction—Fee and Liferent.—By marriage-contract a husband disponed L.5000 to trustees, for payment of the annual proceeds thereof to the longest liver of himself and his wife, for his and her liferent use, and to the children of the marriage in fee, whom failing, to the husband, and his heirs and assignees. The wife and her father disponed L.2500 to the trustees for the joint liferent of the spouses, and "as an alimentary provision for the support" of the survivor and the children of the marriage, to whom the fee was destined, but failing children, to be held for the wife, and her heirs and assignees, in fee. The husband died without issue, and leaving his whole property to his wife;—*Held* 1, (*aff.* judgment of Lord Ordinary), that the widow was entitled to payment of the sum of L.5000 disponed to the trustees by her husband; and 2, (*alt.* judgment of Lord Ordinary), that she was also entitled to payment of the sum disponed to the trustees by her father and herself.

Mrs. Martin, the widow of the late Major Alexander Martin, raised this action against the surviving and assumed trustees under the antenuptial contract of marriage between her and Major Martin, concluding for declarator that, under and in virtue of her contract of marriage, and of a general disposition and deed of settlement granted by Major Martin in her favour, she had right, and was entitled to absolute and unconditional payment of the whole funds held by the defenders.

The marriage-contract of Major and Mrs. Martin, to which Mrs. Martin's father, John Miller, Esq. of Muirshiel, was a party, was dated 18th January 1844, and contained the following provisions:—In contemplation of the proposed marriage, Major Martin, on the one part, assigned to trustees two policies of insurance on the life of the late Marquis of Londonderry for the sum of L.1300 and L.2700 respectively, which, or the sums for which they were granted, were to be held by the trustees for behoof of Major Martin in liferent, and for payment to him of the annual proceeds thereof, and in the event of his decease, survived by his wife, then for her liferent use of the annual interest or proceeds thereof only, for the maintenance and support of herself and of the children of the marriage, if any, and for behoof of the children of the marriage in fee, divisible in case of there being more than one child of the marriage, in such shares and subject to such restrictions as Major Martin, or, whom failing, as Mrs. Martin might appoint, by any writing under his or her hand, which failing, equally among the said children,—the share of each child to be payable at majority, or, in the case of females, on marriage or at majority, whichever should first happen, with power to apply the interest for their education and maintenance during minority; with power to either Major or Mrs. Martin to restrict the portions of the children to an alimentary liferent, and secure the fee to their issue, and either to vest the same in the trustees appointed under the marriage-contract, or such other persons as Major or Mrs. Martin, or the survivor, might think proper to appoint,—excluding always, in the case of daughters, the *jus mariti* and rights of administration of husbands; failing issue of the marriage, the fee of the said sum of L.5000 to devolve on Major Martin, and his heirs and assignees whomsoever. Major Martin conveyed to Mrs. Martin, in the event of her survivance, his whole household furniture and plenishing. Farther, Major Martin bound himself and his heirs, and in the event of her survivance, Mrs. Martin bound herself to maintain, educate, and support the children of the marriage in a manner suitable to their rank in life, until their provisions, or the interest thereof, became payable. These provisions were accepted, and declared to be in lieu of terce, executry, **[706]** goods in communion, half or third of moveables, bairn's part of gear, legitim, and all other claims, legal or conventional, which Mrs. Martin or the children of the marriage might claim at its dissolution. On the other part, Mrs. Martin and Mr. Miller, her father, bound themselves to transfer to the trustees under the marriage-contract, twenty shares of the stock of the Western Bank of Scotland, standing in the name of Mrs. Martin, and twenty shares of Clydesdale Bank Stock, standing in the

name of Mr. Miller, in trust for her; and Mr. Miller also bound himself to invest, in the name of the trustees, thirty shares further of the stock of the Clydesdale Banking Company, all subject to the following declaration:—"Declaring that the said trustees, and their foresaids, shall hold and apply the said trust-funds for behoof of the said Frances Hilton Miller and Alexander Martin, in conjunct liferent, for their liferent use of the annual proceeds thereof, during their joint lives, and for the survivor of them also in liferent, as an alimentary provision for the support of himself, or herself, and the child or children of the said marriage, if any be, and for behoof of the children of the said marriage in fee, divisible in such proportions and subject to such restrictions as the said Frances Hilton Miller and Alexander Martin, and the survivor of them, may appoint by a writing under their, his, or her hand, which failing, equally among the said children, and payable after the decease of their parents at the first term of Whitsunday or Martinmas occurring after the majority of sons, and the majority or marriage of daughters," the interest, or such part thereof as may be necessary, being applied for their behoof during minority; "and failing a child or children of the said marriage, then for behoof of the said Frances Hilton Miller, and her heirs and assigns in fee."

The stock of the Western and Clydesdale Banks was transferred to the trustees, and realised by them. They also received, during Major Martin's lifetime, the sum of L.5000, secured by the policies of insurance on the life of the Marquis of Londonderry. These funds amounted together to L.7500, which was invested on heritable securities.

Major Martin died on 25th November 1857; there were no children of his marriage. He left a settlement, dated 15th February 1856, by which he conveyed to Mrs. Martin, in the event of her surviving him, his whole heritable and moveable property of every description, and appointed her his sole executrix and universal intromitter with his whole moveable estate, subject to the payment of his lawful debts.

In this action Mrs. Martin pleaded;—That in virtue of the provisions of her contract of marriage, and of Major Martin's deed of settlement, she was entitled to decree as concluded for.

The defenders pleaded;—(1.) According to a sound construction of the marriage-contract, the defenders were, as trustees, bound to hold the trust-funds as an alimentary provision for the support of the pursuer, in terms of that deed. (2.) At all events, the defenders were bound to hold, as an alimentary provision for the pursuer's behoof, that portion of the trust-funds which were conveyed to the trustees by the pursuer's father, in fulfilment of the obligation undertaken by him.

On 20th July 1860 the Lord Ordinary pronounced this interlocutor:—"Finds that of the funds conveyed to the defenders as trustees under the contract of marriage libelled, that portion which was conveyed by the pursuer's late husband, and which consisted of a sum of L.5000, then secured by the policies therein mentioned, is now vested in the defenders for the pursuer's free and absolute use in liferent, and not as a mere alimentary provision, and that the fee thereof is also held for the pursuer's behoof as in right of her said husband: Finds that no other party has any interest in the said sum of L.5000, and there is no purpose of the said marriage-contract which requires the same to be longer held in trust: Finds, in these [707] circumstances, that the pursuer, as being beneficially both liferenter and fiar of the said sum, and as having the full and sole right thereto, is entitled to have the same immediately paid or made over to her by the defenders; therefore, as regards the said sum of L.5000, finds, declares, and decerns in terms of the conclusions of the libel; but finds that the remainder of the said funds held by the defenders, consisting of the bank shares or stock conveyed to them by the pursuer and her late father, is vested in the defenders as an alimentary liferent provision for the pursuer's behoof, and must, under the said marriage-contract, be so held by them during her lifetime, without prejudice to her right of fee therein; therefore, as regards the proceeds of the said bank shares or stock, assoilzies the defenders from the conclusions of the action, and decerns: Finds the defenders entitled to expenses of process, to be retained, if necessary, out of the said sum of L.5000."[1]

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[1] "NOTE.—There seems no incompetency in creating a liferent alimentary provision in favour of the same party to whom the right of fee is also given. If this be done by

[708] Mrs. Martin reclaimed, and prayed the Court to alter the interlocutor, in so far as it assoilzied the defenders from the conclusions of the summons. The defenders also reclaimed, and prayed that the interlocutor should be recalled or altered, so far as regarded the findings with reference to the sum of L.5000 therein mentioned.

LORD JUSTICE-CLERK.—This case depends upon the construction of a marriage-contract between Major Martin and Miss Frances Hilton Miller, entered into in 1844,—

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the intervention of a trust, and under an onerous deed, such as a marriage contract, the law, it is thought, will give it effect.

"In such a case, however, it must be clear from the constitution of the right, that the liferent is given as a mere alimentary provision. No particular words may be necessary for this purpose, but the language used must be such as plainly to import that the liferent is given for aliment, and for nothing else.

"In the present case the Lord Ordinary thinks that as to the bank shares a liferent interest was constituted by the marriage-contract of a purely alimentary character. The liferent is declared to be created 'as an alimentary provision for the support of' the husband and wife and the children of the marriage. These words seem to impress upon the fund a purely alimentary character, and if so, the Lord Ordinary thinks they must receive effect. It seems of no consequence that the funds here come from the side of the wife, on whom the liferent as well as the fee has now devolved. The right is constituted by a contract of marriage, being an onerous and mutual deed, of which in general all the stipulations may be held as forming the considerations for each other. It was a natural object of importance to all parties, and in particular to the wife's father, who contributed a part of these funds, that his daughter should in any event be secured in some indefeasible means of subsistence, and such a stipulation duly embodied in a trust conveyance ought not, it is thought, to be disregarded as regards this part of the fund in dispute; therefore the Lord Ordinary has held that the trust must continue for the purpose of keeping up the alimentary provision, without prejudice to any ulterior rights of fee which the wife may otherwise have.

"With regard to the other and larger part of the funds, the Lord Ordinary is of opinion, that the constitution of a mere alimentary liferent is not declared by the contract in terms so clear and explicit as to produce such an effect. The language here used is different from that by which the bank shares are disposed of. The L.5000 contained in the policies is given to the wife for her liferent use, 'for the maintenance and support of herself,' and also of the children of the marriage; but the fund is not characterised as alimentary, and it is not given solely for maintenance and support. The object in giving it may have been, as in the case of every such liferent, that the wife and family should be maintained and supported. But such a statement does not seem sufficient to make the fund alimentary. In order to have that effect, the deed, it is thought, must declare that the fund is given solely for maintenance and support, or it must be exempted from the deed of the party, or the diligence of creditors, or there must be a clear announcement in some other way that the liferent is wholly appropriated to the specific and privileged purpose in question. The well known case of Gordon *v.* Blackburn (Mor. 10,394), seems to illustrate the distinction now taken.

"If the liferent of the L.5000 is now here made purely alimentary, it remains at the free disposal of the pursuer, particularly as there are no children of the marriage. The pursuer has also now the right to the fee of this fund, in consequence of her husband's will. But where a party is thus vested with the beneficial right to both fee and liferent, and there is no extraneous or conflicting interest involved, the continuance of any trust, constituted for other purposes, or in contemplation of other events, seems to become unnecessary. With regard to this part of the fund, therefore, the Lord Ordinary has found that the pursuer may bring the trust to an end, and demand possession of the money, which is wholly and solely her own.

"The trustees, of course, who have only been doing their duty, are clearly entitled to their full expenses."

under the circumstances that have emerged—viz. that the marriage subsisted till 1857, when it was dissolved by Major Martin's death without issue. The general plan of the deed is very simple and not unusual, the parties to the contract being the intended spouses and the lady's father. The provisions by the husband in favour of his wife and the children of the marriage occupy the first part of the deed. The disposal of the lady's portion is provided for in the second part of the deed. The husband assigns certain policies of insurance to trustees appointed under the contract, with power to these trustees to uplift the sums contained in the policies when they become due, with this provision, that the trustees shall hold and apply the said sum of L.5000 sterling, interest and consequents, in trust for behoof of the said Alexander Martin in liferent, for his liferent use of the interest or annual proceeds thereof only; and in the event of his decease, survived by his wife, then for her behoof in liferent, for her liferent use of the interest or annual proceeds thereof only, for the maintenance and support of herself, and also of the child or children of the said marriage, if any be, and for behoof of the child or children of the marriage in certain shares; and failing a child or children of the marriage, then the fee of the said sum of L.5000 shall fall and belong to and devolve on the said Alexander Martin, and his heirs and assigns whomsoever. It does not appear to me that there could be any difficulty about the meaning of this provision of the contract. It is of the usual kind, and is couched in distinct ordinary legal language. The liferent of the sum settled by the husband is in the first place reserved to himself; and in the event of the survivance of the wife, it is settled on her, for the maintenance of herself and children; and after serving these purposes, if there be no children to take the fee, the money is to revert to the estate of the husband; and the Lord Ordinary has found, "that of the funds conveyed to the defenders, as trustees under the contract of marriage libelled, that portion which was so conveyed by the pursuer's late husband, and which consisted of a sum of L.5000, then secured by the policies therein mentioned, is now vested in the defenders for the pursuer's free and absolute use in liferent, and not as a mere alimentary provision, and that the fee thereof is also held for the pursuer's behoof, as in right of her said husband: Finds that no other party has any interest in the said sum of L.5000, and that there is no purpose of the said marriage-contract which requires the same to be longer held in trust: Finds, in these circumstances, that the pursuer, as being beneficially both liferenter and fiar of the said sum, and as having the full and sole right thereto, is entitled to have the same immediately paid or made over to her by the defenders: Therefore, as regards the said sum of L.5000, finds, declares, and decerns in terms of the conclusions of the libel."

The husband having by his last will constituted his wife his universal legatee, the lady takes the L.5000 in fee absolutely; because, as there are no children of the marriage, there is no ultimate provision for satisfaction of which this sum requires to be held by the trustees. The liferent and the fee concur in the person of the wife, and constitute her the absolute and unconditional fiar of that sum.

[709] But there is more difficulty as regards the other portion of the property, and the Lord Ordinary has come to an opposite conclusion as to the disposal of the property of the lady. Part of it stood in her own name at the date of the contract, and therefore must be assumed to have been her own absolute property. A part was provided by her father. I do not think there is any ground for distinction between these portions, but that the whole of the money which comes from her side of the house must be dealt with as her property; and this part of the deed contains the settlement of her fortune, with a view to the relations constituted by the marriage. The manner in which her fortune is disposed of is this: It is declared that the trustees shall hold the trust-fund for behoof of the spouses and the survivor of them in liferent, "as an alimentary provision for the support of himself or herself and the child or children of the marriage, if any be, and for behoof of the children of the said marriage in fee," in such proportions as the spouses, or either of them, might appoint; "and failing a child or children of the said marriage, then for behoof of the said Frances Hilton Miller and her heirs and assigns in fee." Now, the ultimate destination of the fee, on the failure of issue of the marriage, has taken effect, and therefore the trustees hold this money for behoof of Mrs. Martin and her heirs and assignees in fee. The fee is thus an absolute and unconditional fee in her, with this qualification only, that it is at present an equitable fee, being as yet held by trustees for her. The trustees say, that not only do

they at present hold the fee, but that they are bound to continue to hold it, in order to secure for her the alimentary provision constituted by this clause, and that by parting with the money they would destroy the security intended to be created by the marriage-contract. There is certainly a distinction between this part of the contract and that by which the money of the husband is settled. Here there is a declaration that, after the marriage comes to an end, the liferent of this money is to belong to the survivor of the spouses, as an alimentary provision for the support of himself or herself and the children of the marriage; and the question is, first, Whether this constitutes it an alimentary provision, as distinguished from the liferent constituted in the other part of the deed? and, secondly, supposing it alimentary, Whether that alimentary character attaches to it under existing circumstances? Because it is possible that a fund may be alimentary for certain purposes, during a certain period, and in certain events, and yet lose its alimentary character in other circumstances. It seems to me that the object of making this alimentary provision, as far as the lady was concerned, was to protect the interests of the lady both as a mother and as a wife, so that no provision whatever or legal right, either of her husband or of children, should interfere with her receipt of this alimentary provision;—in short, it was intended to protect her in the relations arising out of the marriage, and in no other sense. This was her own fortune, which was settled for the purposes of the marriage, and as soon as these purposes were served or superseded, it was her own property as much as before.

When the marriage was dissolved, by the death of the husband without issue, the lady became *sui juris*, and as completely entitled and capable, in the eye of the law, of managing her own fortune, as if she had never been *vestita viro*; and, therefore, while I am disposed to read this as an alimentary provision with a view to the marriage relations, the moment these came to an end that alimentary provision came to an end also, and the lady became, as before, absolute and unlimited liar of her own fortune. Any other result would be very startling, because it is impossible to consider the words by means of which the fee is reserved to the lady as other than of the most absolute character. The trustees are to hold for her, and her heirs and assignees in fee; and although she is to have this money, in terms as absolute as any that the law knows, yet her beneficial enjoyment of it is to be limited so that she cannot assign the beneficial enjoyment, and it cannot be attached by her creditors unless they are alimentary creditors. That the money should be held to be tied up in the way contended for by the trustees is inconsistent with her having the absolute and uncontrolled right to the fee *de presenti*, and that is the meaning of the words in this contract; for I cannot read them otherwise than as giving a right of fee to Mrs. Martin on the marriage coming to an end by the death of her husband.

[710] LORD COWAN.—This is a case of much interest and importance, depending upon the effect of the antenuptial contract of marriage libelled. No class of deeds are more common; and any question affecting the principle of construction to be applied in judging of their provisions requires careful attention. On full consideration, I have formed the opinion, that while the first branch of the interlocutor of the Lord Ordinary is correct in principle, and ought to be affirmed, the other branch of it is not so, but ought to be altered.

The pursuer is the survivor of the spouses at the dissolution of the marriage in 1857 without issue. Her claim is for the whole funds held by the defenders, as trustees under the contract, as well for the L.5000 destined by her husband in terms of the contract, and whose general representative she is, in virtue of his last will and settlement, as for her own funds also, destined by the contract with a view to the marriage. The defences stated by the trustees are, that they are bound to hold the funds as an alimentary provision for the pursuer during her life, as stated in their first plea; and, at all events, that the part of the trust-funds conveyed by the deed which belonged to the pursuer's father are in that situation, as stated in the second plea. The Lord Ordinary has not sustained either the one plea or the other. His view is, that while the pursuer is entitled to the L.5000 which belonged to her father, the whole of her own funds, and not that merely which came from the father, has been created alimentary, and must be retained by the defenders as such during her life.

I may observe generally, with respect to the construction of such instruments, that regard is to be had to the purposes in view of the parties, and the object of the arrangements made by them. Every such deed is framed, and its provisions adjusted

intuitu matrimonio, and doubtful or ambiguous clauses must be read, with this in view, that the true intention of the parties may be satisfactorily ascertained. The object is to provide for the husband and wife, and the survivor of them, and for the issue of the marriage, if any; and when that object is fully satisfied it will not readily be presumed that any farther limitation on the funds or property of the one or other, settled by the contract, was in their contemplation. There may be independent settlements of property provided for in marriage contracts, especially where there are landed estates to be settled. This is not of unfrequent occurrence. Effect will be given to such destinations when clearly made, although not immediately affecting the spouses or their issue. This contract, however, is not of that description. All that it proposes to do is to regulate the life-interests of the spouses in the property of the one or other destined in fee to their issue. It is of the simplest description of a marriage settlement; the husband's fortune, after implementing the rights of liferent and fee created by it, being destined, on failure of the issue of the marriage, to himself and his own heirs, and the wife's fortune being similarly settled and destined.

As regards the L.5000 settled by the husband, there is no difficulty. In contemplation of the marriage, this sum is conveyed in trust for his liferent use only; and in the event of the pursuer being the survivor, "for her behoof in liferent for her liferent use of the interest or annual proceeds thereof only, for the maintenance and support of herself, and also of the child or children of the said marriage, if any be." And the fee is given to the children, if any; whom failing, it is declared to belong to the husband, his heirs and assignees whomsoever. The marriage has been dissolved without children, and the pursuer is the general assignee and executrix of her deceased husband. There can be no question as to her right to be preferred to the L.5000. In her own person she is both executrix and fiar.

Then, as regards her own fortune, the pursuer transfers to the trustees certain shares of bank stock which stood in her own name, and her father transfers certain other shares to them, to be held and applied for behoof of the spouses "in conjunct liferent for their liferent use of the annual proceeds thereof during their joint lives, and for the survivor of them also in liferent as an alimentary provision for the support of himself, or herself, and the child or children of the said marriage, if any be, and for behoof of the children of the said marriage in fee," and failing children, then for behoof of the pursuer, "and her heirs and assigns in fee." The pursuer is survivor, and there are no children. She claims her own fortune from the trustees. Can it be inferred from the terms of the contract that she and [711] her father have created an alimentary provision in the annual proceeds of funds, of which she is left the sole and absolute fiar? I cannot adopt that view. It seems to me that, as the husband, had he been survivor, would have had his estate entirely free under the first part of the deed, the wife under this part of it is in the same situation as regards her estate, there having been no issue of the marriage. There is no such difference in the expressions employed as to justify a different rule of construction being applied to the two parts of the deed. Take the case free of the specialty that part of the wife's funds came from her father. No doubt a party may, by means of a trust, tie up his or her property so as to constitute a proper alimentary fund; but when this is intended it must be clearly and explicitly done; and the fee over the proceeds, of which the alimentary interest is created, is not to be left at the absolute and unconditional disposal of the party. But, assuming that such alimentary settlement, when rightly done, will be good, the intention to effect that purpose must be unquestionable. In this case the proposed object of the parties was nothing of the kind. Their special and only object was to provide for those interests which their contemplated marriage would create, as regards the spouses, and might give rise if there were issue. The lady deals with her funds in that view, and for that purpose exclusively. Assuming the whole marriage relation to be at an end, the purposes of the contract were necessarily brought to a termination. There is not a word in the deed, even the word "alimentary," when read along with the context, and in the collocation where it occurs, that indicates any other end or purpose being in the view of the lady in this marriage settlement. On fair and reasonable construction, the trust created by the deed was created solely to preserve and secure the interests and rights under the contract of the married parties and their issue. When these came to an end, the trust, from its very nature, became revocable by the wife, there being no person whatever but herself having any interest

in the trust-funds. And this being the case as regards that part of the wife's fortune which belonged to herself before marriage, I cannot think that the specialty, that some of the bank shares conveyed to the trustees belonged to her father, should affect the construction of the deed. No separate or special object or purpose on his part, in settling these shares along with his daughter's own funds on the spouses and their issue, is set forth in the contract. I see no room for holding any such purpose to have been entertained by him. One rule or principle of construction must, in my opinion, be applied, and the pursuer be entitled to have her own funds, including what came from her father, placed as freely at her disposal as they were prior to her marriage. She is no longer *vestita viro*, but is in every sense *sui juris*, and entitled to the free disposal and management of her own funds.

The opinions delivered by the Judges in the case of Torry Anderson, 15 Shaw, 1075, are very instructive on this whole question. In that case the lady entered into a marriage-contract, and created a trust, which was declared irrevocable, and by which her estate was tied up, and the interests of children were provided for. There were no children of the marriage. Mr. and Mrs. Anderson executed a revocation of the trust created by the marriage-contract. The whole Court were consulted. Five Judges, including Lord Moncreiff and Lord Fullerton, were of opinion that the wife might recal the trust; the majority, however, held, that the trust being for her protection against her husband, she could not do so. But none of the Judges seem to have entertained any doubt that, after the dissolution of the marriage without issue, the lady would be entitled to deal with her property as freely as if she had never been married.

Lord Benholme.—This is a case involving principles of considerable importance as to the interpretation of marriage-contracts. The opinion I have formed is based on a consideration of the objects of such contracts. I hold that contracts of this description ought to be construed, generally, as limited to the rights of the spouses. The interests to be protected are those of the husband and of the wife, and the possible interests of children. When the necessity of protecting these interests comes to an end by the death of one of the spouses, and the failure of children, there is no reason for keeping up the protecting trust. The fortune of each spouse naturally reverts to the side of the house from which it came. The restrictions imposed by the contract are not to be carried beyond the purposes for which the contract was entered into. That is the general principle of construction, [712] in reference to which I think we ought to alter the interlocutor of the Lord Ordinary on the second branch of the case. We must suppose that it was the intention of the lady and her father that, after the interests of the marriage relation were provided for, she, if she survived, should be in the position of fiar of her own fortune. Now, that one in whom the fee is vested should be restricted by a mere alimentary liferent of her own fortune, is a position of things in the law of settlements altogether unprecedented, unless in the case of mental weakness and facility. It was only to provide for these marriage-contract interests that this trust was constituted. It is not to be supposed that when these had terminated, the rights of this lady were still to be controlled by the trust. I concur in thinking that in the marriage-contract itself there is a complete explanation of the reason why the right of liferent was specially given. It was to regulate the rights of the surviving spouse in reference to the children. The marriage being now dissolved, without children, it appears to me that the lady's fortune must be held to vest in herself *tanquam optimum maximum* free of all restrictions.

Lord Wood was absent.

The Court pronounced this interlocutor:—"Refuse the prayer of the reclaiming note for the defenders, and, as regards the reclaiming note of the pursuer, recal the interlocutor reclaimed against; repel the defences: Find, decern, and declare in terms of the conclusions of the summons: Find the defenders entitled to expenses; and remit to the Auditor to tax the same and to report,—the amount of said expenses to be retained by the defenders from the trust-funds in their hands."

[Cf. *Montgomery's Trs.* v. *Montgomery*, 15 R. 372.]

No. 109. **XXIII. Dunlop 712.** 8 Mar. 1861. 2nd Div.—Lord Jerviswoode.

CHARLES GEORGE ALVES and Others (HENRY SCOTT ALVES' Executors), Pursuers, Real Raisers.

Colonel CHARLES GEORGE ALVES and Others (Next of Kin), Claimants. —*Young—Fraser.*

AUGUSTA JANE ALVES and Others (Residuary Legatees), Claimants.— *Millar—John M'Laren.*

ARCHIBALD INGLIS and Others (Mrs. ALVES' next of Kin), Claimants.—*Clark.*

Testament—Legacy—Residue—Faculty—Vesting.—A truster directed his trustees to pay the residue of his estate, one-half to the family of each of two brothers, and appointed the children of these brothers residuary legatees. By a codicil he directed the residue to be divided into three parts—one-third to the children of each of his two brothers, and the remaining third to such person as his widow might direct, she having the liferent of the whole residue. She died without making any disposal of the third of the residue;—Held (*aff.* interlocutor of Lord Jerviswoode), that what was conferred on the widow was not the fee of the third of the residue, but a mere faculty of disposing of it; that the appointment of residuary legatees was not recalled by the codicil; and that they were entitled to the third share of the residue which the widow had failed to exercise her right to dispose of.

This action was raised for the purpose of determining the rights of the beneficiaries under the testamentary writings left by the late Henry Scott Alves. They consisted of a will in the form of a trust-disposition, and a codicil of subsequent date. The former was executed in 1854. By that deed he disponed to his wife and others as trustees, Mrs. Alves being a *sine qua non*, the whole moveable property of which he might be possessed at his death. The trustees were directed to make payment to Mrs. Alves of certain provisions in addition to those to which she was entitled under her marriage-contract; and, after bequeathing certain legacies, the trust-deed directed that, after payment of the provisions made in favour of Mrs. Alves by her marriage-contract and the trust-deed, and payment of the legacies, &c. **[713]** bequeathed by the deed, the whole free annual revenue of the trust-estate should be paid to Mrs. Alves, in trust, for the purpose of being applied by her in aid of the maintenance of the children of the truster's deceased brother William Alves, as she might think fit, and without being responsible in any way for the application thereof. The residue of the trust-estate, after the death of the longest liver of the truster and his wife, was directed to be paid in two equal shares, the one to the children of the truster's brother Lieutenant-Colonel Nathaniel Alves, in such proportions as he might appoint by any writing under his hand, failing which, equally; the other to the children of the truster's deceased brother William, share and share alike. The deed proceeded,—"and I hereby appoint the children of Nathaniel Alves, and of William Alves, to be my residuary legatees." The truster reserved his own liferent, with full power to revoke.

In April 1858 Mr. Alves executed the codicil which bore to be executed "in virtue of the power reserved to me by the before-written disposition and settlement of moveables, of altering, innovating, or revoking the same in whole or in part." He directed that certain legacies previously bequeathed should be increased, and made some additional bequests. He directed that his household furniture and effects should be transferred to Mrs. Alves, in terms of the provisions of her marriage-contract. The codicil concluded with the following clauses, relating to the provisions in favour of Mrs. Alves, and disposing of the residue, viz.:—"Further, instead of the increased annuity and additional trust-liferent of the free annual revenue of the residue of my moveable estate, provided under said settlement to the said Margaret Hope Inglis or Alves, I hereby direct that my said disponees and executors shall pay the said free annual revenue of the said residue to the said Margaret Hope Inglis or Alves, unconditionally for her own use and benefit, and, after her decease, I direct my said disponees and executors to divide the said residue and remainder of said estate into three equal shares or portions, and to pay the same at the first term of Whitsunday or Martinmas that shall happen after said event, as follows, viz.:—One share or portion among the

children of the said Lieutenant-Colonel Nathaniel Alves; one share or portion among the children of the said deceased William Alves, in the same manner as was provided in regard to their shares of the said residue under the foregoing settlement; and the remaining share or portion to such person or persons, and in such manner, as the said Margaret Hope Inglis or Alves may have directed by any testamentary or other writing under her hand."

The truster died on 19th March 1859. His wife survived him for about seven months, but did not execute any deed disposing of the third of the residue left at her disposal, under the codicil to his trust-settlement.

The next of kin of the truster, at the death of his widow, were his brothers Nathaniel and Colonel Charles George Alves; his sisters, Miss Mary Alves, and Miss Janet Alves; the representatives of his deceased brother William; and the representatives of his deceased sister Mrs. Elizabeth Montague Alves or Thomson.

The surviving trustees under Mr. Alves' settlement raised this multiplepoinding, in which the whole residue of the moveable estate was condescended on as the fund *in medio*. The truster's next of kin, and the children of Nathaniel Alves, and the children of William Alves, his residuary legatees, were called as defenders.

The next of kin claimed to be preferred to the third part of the residue, and pleaded;—The provisions of Mr. Alves' settlement in regard to the disposal of the residue having been revoked by the codicil, and the testator's widow having failed to exercise the power conferred upon her of disposing of one-third of the residue,—on a sound construction of the settlement and codicil, one-third of the residue of his moveable estate remained **[714]** undisposed of, and fell to be divided amongst his next of kin, as intestate succession. No right to the fee of the third of the residue having vested in the widow, her next of kin were not entitled to any part of the fund *in medio*.

Augusta Jane Alves and others, the children of Nathaniel Alves and of William Alves, claimed the whole fund *in medio*, as residuary legatees, the one-half being payable to the claimants, who were children of Nathaniel, the other half to the children of William. And in the event of its being found that the claimants were only entitled to two-thirds of the fund *in medio*, as residuary legatees, those of them who were children of William Alves claimed alternatively to be preferred to one-sixth share of the remaining third, equally among them. It was pleaded for the whole residuary legatees;—(1.) Mrs. Alves having died without exercising the faculty to dispone, conferred upon her by her husband's codicil, the claimants were entitled to be preferred to the whole residue. (2.) No part of the fee of the residue of the testator's estate vested in Mrs. Alves; and the residue, so far as not disposed of in the settlement and codicil, pertained to the testator's next of kin.

On 14th June 1860 the Lord Ordinary pronounced this interlocutor:—"Finds, 1st, That according to the sound construction of the disposition and settlement and relative codicil of the late Henry Scott Alves, the appointment of the children of Nathaniel Alves and William Alves (therein mentioned) to be his residuary legatees, remains unrecalled; 2, That the now deceased Mrs. Margaret Hope Inglis or Alves did not exercise the faculty conferred upon her under the said codicil, of directing, by any testamentary or other writing under her hand, the payment to any person or persons of the one-third share or portion of the residue and remainder of the moveable estate of the said late Henry Scott Alves, and that, in respect of the non-exercise of the said faculty, the said third share or portion of the residue and remainder of the said estate, as being otherwise undisposed of, falls to the children of the said Nathaniel Alves and William Alves, in virtue of their appointment to be residuary legatees as aforesaid; and 3d, That the raisers, as executors of the deceased Henry Scott Alves, are bound to account for the said third share or portion to the claimants, as residuary legatees, accordingly; and with these findings appoints the case to be enrolled with a view to further procedure."[1]

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[1] "NOTE.—The Lord Ordinary deems it to be unnecessary that he should enter into any detailed explanation of the grounds of his present judgment, as these, he thinks, must be apparent from the findings in the interlocutor. He has endeavoured to gather from the terms of the disposition and settlement and codicil, as containing together the will of the deceased, what that will truly was as regarded the destination of the portion of his moveable estate, which is alone here brought into question. It appears to the

The next of kin reclaimed.

After hearing parties in part, the case was continued to allow a claim to be lodged on behalf of the representatives of Mrs. Alves, the truster's widow. They claimed one-third of the residue, and pleaded;—1. On a sound construction of the disposition and settlement and relative codicil, one-third of the testator's estate vested in the truster's widow, Mrs. Margaret Hope Inglis or Alves, and belonged to the claimants, as her executors and next of kin. 2. The direction in the codicil to pay the free revenue of the residue to Mrs. Alves, and one-third of the residue as she might direct by [715] any testamentary or other writing, implied an absolute fee in Mrs. Alves in one-third of the residue. 3. Taking the provisions of the disposition and settlement in connection with those of the codicil, it must be held that the testator intended that the said third of the residue should not belong either to the other residuary legatees, the children of his brothers, Nathaniel and William, or to his next of kin *ab intestato*, but that the same should belong to his widow, and to her next of kin, failing her specially disposing thereof by testament or otherwise.

It was argued for the next of kin;—The codicil specially referred to the power of revocation reserved in the trust-settlement, and was really a revocation and new bequest of the residue of the trust-estate. The bequest of the whole residue was thereby altered, and the appointment of residuary legatees recalled.[1] To hold that where one-third of the residue was disponed to each of two families, that each had also right to one-half of the remaining third, was to dispose of the estate contrary to the apparent intention of the truster.[2] If intention was to be speculated on, it was more likely the testator's intention was, that failing the exercise of the power conferred on the widow of benefiting her own relations, the testator intended his own next of kin to have a portion of the residue of his estate. At the death of the truster there were three parties interested in the residue, the two families appointed residuary legatees, and the widow. She had the liferent of the whole, and the power of disposing of one-third, which gave her right to the fee of that third, in the event of her choosing to exercise her power of disposing of it,[3] for she could not have disposed of it so as to defeat the rights of her own creditors,[4] and in such a case a gift by a life-renter had been held to be a legacy from the liferenter.[5] The right not having been exercised, the next of kin were entitled to succeed.

It was argued for the residuary legatees;—The appointment of residuary legatees under the first deed was necessary, in order to provide for the event of the failure of either of the two families to whom the residue was bequeathed. The appointment of residuary legatees was as necessary as when the succession to the residue was divided by the codicil among three parties, as under the original deed when it was only shared by two. It could not, therefore, be assumed to be recalled. It was not to be presumed that the testator ever intended his estate to go to his wife's next of kin, to whom he was a stranger; and, failing her exercising her right of disposing of part, it was to be presumed that those for whom he showed his favour in the trust-deed, as well as in the codicil, were to be favoured. The liferenter here was not also fiar of the portion she had power to dispose of; to constitute her fiar, it was necessary that, failing her exercise of the power of division, the property should go to her heirs.[6]

Lord Ordinary, that although the testator meant, from favour towards his spouse, to confer on her, under the codicil, a faculty of disposal of a third of the residue, he had no further object, and never intended to revoke the appointment of the residuary legatees, who were parties for whom he had declared a preference as in competition with those to whom the law would have carried the right."

[1] Stair's Inst. l. iii., viii., sec. 33; 2 Domat., p. 198, Strachan's translation; Digest, l. xxx., t. i.; l. xxxiv., t. i.

[2] 1 Jardine on Wills, p. 656.

[3] Wilson *v.* Lord John Townsend, 31st July 1795, 2 Vesey junior, p. 693.

[4] Watt or Whyte *v.* Tawse, &c., 21st Nov. 1829, 8 S. & D. p. 107.

[5] Ness v. Waddell, 3d Feb. 1849, reported in the Reports of Decisions of the Court of Exchequer.

[6] Dirleton's Doubts, p. 57, *voce* Fee; Somerville *v.* Geddie, Elchies, *voce* Deathbed, No. 16, also Lord Cowan's note in Morris *v.* Tenant, *ante*, vol. xv. p. 716; Pursell *v.* Newbigging, 25th May 1856, *ante*, vol. xix. p. 71.

It was argued in support of the claim for Mrs. Alves' next of kin;—It was important to notice that the faculty of disposing of one third of the residue was not so limited that she could exercise it by testamentary deed only. She had power to do so by any deed; and had her liferent been renounced, any deed of hers conveying it would have been effectual. In such **[716]** a case she was clearly fiar, and the third share of the residue had vested in her.[1]

Lord Justice-Clerk.—This is a process of multiplepoinding raised by the executors of Henry Scott Alves, for the purpose of disposing of the residue of his estate, and when the case came first before us, the parties were his next of kin and his residuary legatees. In the course of the discussion, it became obvious that the next of kin were arguing the case of a party not represented, and we continued the case till a claim was put in for the executors of the widow of Henry Scott Alves. We have thus three competing sets of claimants. The question turns on the construction of the settlement and codicil of this gentleman, and to these deeds our attention must be specially directed.

The settlement which was executed in 1854, refers to the marriage-contract between the truster and the widow, under which she was entitled to an annuity of L.300; and, in the first place, the testator provides for her L.100 per annum additional, and he besides directs his executors to pay over to his widow, over and above the provision before mentioned, the free annual revenue of the moveable estate, that "free annual revenue being to be paid to her in trust, for the purpose of being applied by her" "in aid of the maintenance of the children of" the truster's deceased brother, "in such manner as she may think fit."

These being the provisions in favour of the widow, the deed goes on to make certain provisions in favour of the nephews and nieces of the testator; and lastly, directs the trustees "to pay over or convey the residue and remainder of the said estate in two equal shares" or proportions, as follows:—The one share or portion to the children of Nathaniel Alves, the deceased's brother, "in such proportions or shares as the said Nathaniel Alves may appoint by any writing under his hand, failing which equally, and the other share to the children of the deceased William Alves, equally. Now had this provision stood alone, it would not have been a complete and exhausting residuary bequest in every contingency that might occur. Because there was no provision for the event of the failure of one of the two families among whom the estate was to be divided, when the estate came to be divided. But then there follows this provision:—"I hereby appoint the children of the said William Alves and Nathaniel Alves to be my residuary legatees, the issue of children deceasing to represent their parents."

It was represented to us that this was but a repetition of the residuary bequest immediately preceding. But that is an entirely mistaken construction, because the whole children of the two families are called equally as residuary legatees, and any failure that might have taken place is thereby prevented from creating an intestacy, which it might have otherwise done. I do not see any difficulty in the construction of this settlement.

Four years afterwards the truster executed a codicil, the language of which creates greater difficulty. The leading purpose of that codicil was to make an alteration in the manner in which the truster's widow was to be provided for. He directs his executors to hand over certain property to her; and further, "instead of the increased annuity and additional trust-liferent of the free annual revenue of the residue" of the moveable estate, he directs his trustees to pay the "free annual revenue of the said residue" to her unconditionally, for her own use and benefit. So far the codicil is complete in itself, and substitutes one provision in favour of the widow for another contained in the settlement. She is to have a complete liferent of the residuary estate

[1] Waddell *v.* Ness, *ut sup.*; Pollock *v.* Morris, in H. L., 6th July 1855, 22 Scot. Jur. p. 546; Dirleton's Doubts, p. 141; Davidson *v.* Davidson, 17th Nov. 1787, Mor. p. 3255; Cumming *v.* The Lord Advocate, 10th Feb. 1756, Mor. p. 4268; Bayley *v.* Clark, 23d February 1809, F.C.; Hyslop *v.* Maxwell, 11th Feb. 1834, 12 Sh. & D. p. 413; Hales *v.* Margerum, 3 Vesey junior, p. 299; Langham *v.* Nenny, 3 Vesey junior, p. 467; Hoy *v.* Master, 14th March 1834, 6 Simon, p. 568.

for her own use and benefit instead of L.400 per annum, and the trust-liferent of the rest for the children of the deceased William Alves. Then the codicil proceeds thus, —"After her decease, I direct my said disponees and executors to divide the said residue and remainder of said estate into three equal **[717]** shares," one share to be payable to the children of Nathaniel Alves, another to the children of William Alves, "and the remaining share or portion to such person or persons as" his widow "may have directed by any testamentary or other writing." Now the direction as to the period of division of the residue is the same as before, though differently expressed. It is that, on the death of the widow, and not till then, the trustees are to deal with the residue, and, as was previously directed, they are then to divide it. Under the codicil it is to be divided into three shares, one to be paid to the children of Nathaniel Alves, another share to the children of William Alves. Then follows the provision that creates the greatest difficulty, that the remaining share or portion is to be paid to such person or persons as the widow may appoint. It may be observed here, in the first place, that as regards the third share of the residue, there is no gift to the widow directly; the gift is to such person or persons as she may have directed, and not to herself. 2dly, That this bequest could not by possibility take effect till after her death. And 3dly, That the value and amount of the gift remained uncertain and contingent till after her death; because it was not a gift of a sum of money, but of a certain share of an unascertained residue; and not only the words of gift show that the gift cannot take effect till after the decease of the widow in favour of these nephews and nieces, but this is made certain by the consideration that neither she nor her assignees during her life could demand any part of it; for the other two partners in the division of the residue might say, we cannot tell what the residue shall consist of when the death of the widow shall happen; and till then it is impossible to allow one of the three sharers to carry away a part, for the effect of that might be, that he should carry away more than he was entitled to.

Therefore the division of the residue, and the payment of the shares of it, is, from the nature of the subject, as well as the express terms of the deed, postponed till the death of the lady. The provision in the deed is, that the third share shall be paid to such person or persons as the widow may have directed; and therefore the deed of direction is contemplated as to be made by her before the period of division, because otherwise this bequest could not receive effect, and that deed, therefore, must have been made during her life. But it is also clear that that deed could not take effect till after her death; and therefore I attach no importance to the words, "by any testamentary or other writing;" because, while a writing not strictly testamentary might have been sufficient, it must needs have been a deed *mortis causa*, and the words, "any testamentary or other writing," mean merely any writing to take effect after death. That expression, however, is not, in one view, unnecessary, because a deed *mortis causa* is, in one sense, not necessarily a testamentary writing; a proper testamentary writing being ambulatory and revocable till the death of the testator. But a deed *mortis causa* may be irrevocable, and, in one sense, a testamentary deed; but in a more strict and proper sense not so.

This leads me to observe, in the next place, that the kind of deed contemplated here is a deed of nomination or appointment, and not a deed of assignation. It contemplates that she was to give a direction to somebody—it may be a direction to the trustees under this settlement. I do not say that a deed of assignation would necessarily have been, in form, a bad exercise of the power conferred by this settlement; but it would not have operated as an assignation *de presenti*, and could not give a right to take till after the death of the cedent, and thus words of assignation or conveyance are inapplicable, because there is nothing to assign or convey.

No doubt when the liferent of an estate and the absolute *jus disponendi* concur in the person of one individual, it may not be an unfair inference that that person is the full proprietor of the estate, because it is difficult to see what other right a proprietor can have than the full right of enjoyment, and the full right of disposal. But no deed will give that right which confers anything short of the full right of liferent, and the absolute *jus disponendi*.

Tried by that test, what was the widow's right here? She never could acquire the fee to herself. She might have sold it, but only as an expectancy, which could never be

realised in her own person, and never except after her death; and applying that test, this case falls far short of those in which a party has all the rights of a proprietor without the name. All that she had was a right of disposal [718] by a deed *mortis causa*, and was not that *jus disponendi* which is the peculiar and highest badge of property.

Therefore the conclusions at which I arrive are, 1st, that there is a good nomination of residuary legatees in the original settlement; 2dly, that that nomination is not recalled or interfered with by the codicil; and 3dly, that the codicil which gives a larger power to the widow during her lifetime, and a larger right of disposal, gives no more than a power of disposal by a deed *mortis causa*, and gives no fee; and therefore I am for repelling the claim of the next of kin of the widow, and am of opinion that the Lord Ordinary has come to a just and true conclusion on the question between the residuary legatees and the next of kin.

LORD COWAN.—Two questions have been argued,—the one between the residuary legatees under the deed and the next of kin of the testator,—and the other between the residuary legatees and the next of kin of the testator's widow.

1. By the settlement the testator bequeaths the one-half of the residue of his estate to the children of his brother, Nathaniel Alves, and the other half to the children of his deceased brother, William Alves; and farther, by a separate clause, he appoints the children of Nathaniel and William Alves to be his residuary legatees. It is plain that, if there was a child of either brother alive at the opening of the succession, there could not under the deed be any intestacy. Then by the codicil the testator divides the residue into three parts, one to the children of Nathaniel Alves, another to the children of William Alves, and the third to such persons, and in such manner as his widow may have directed by any testamentary or other writing under her hand. The first question is, whether the effect of that codicil was to alter or recal the general clause destining the residue under the settlement. I have little doubt that it does not. In order to put an end to the general residue clause, it would be necessary that there should be found in the codicil some provision or declaration inconsistent with its subsistence. But nothing of the kind is to be found in the codicil, and all its provisions can receive full effect without touching the general residue clause in the settlement. I am of opinion that all which the codicil does is merely to provide that the residue should be divided into three portions instead of two, as provided by the settlement,—two of the portions being destined to the children of the brothers respectively, and the third left to be disposed of by the widow. The additional clause in the settlement, calling the children of the two brothers to be residuary legatees, must therefore receive full effect, and there is consequently no room for intestacy, so as in any view to let in the testator's next of kin.

2. This leaves the second question, as to the effect of the provision in the codicil relative to the third left at the widow's disposal. As to that clause, I entirely concur with your Lordship. This case is not to be viewed as within the operation of the principle which prevailed in Cumming *v.* the Lord Advocate, and cases of a similar kind, and to which the passage cited from Dirleton applies. Such authorities have no application to a case like the present. In questions belonging to that class, although the fee may not *ex figura verborum* be in the father, the liferenter, yet the deeds are so expressed as in substance and effect to give the fee to him. This is the case of a faculty or power conferred on a third party, and the inquiry regards the legal effect of such faculty or power, and the right it confers on the party to whom it is given. That is an essentially different question from that involved in the cases to which it has been attempted to assimilate it. There is given to the widow a power which she may or she may not exercise. No gift is made to her by the testator. The gift is to parties to be named by her. The widow might have executed a deed directing that certain persons were to take; but if so, they would have taken as legatees of the truster. It is said that the right of the widow to name legatees, and to dispose of the fund after her death, might have been attached by creditors. There might possibly have been steps taken to compel her to exercise her power. I doubt if that could have been effected by any diligence. At all events, nothing of the kind was attempted; and if she did not exercise the power, I think even her creditors had no remedy or right to attach the fund after her death. In reference to the prior decisions, I think they are all reconcileable with the prin-

ciple on which this case is to be decided. The case of Somerville *v.* Geddie, in 1753, is important. There a party reserved power to "dispone, assign, and convey," *etiam in articulo mortis*. That power was executed on deathbed. A reduction was [719] brought, and the question came to be, whether the act of the party was in the exercise of a right of fee or of a mere faculty. In the one view the deed was reducible, in the other it was not. The Court sustained the deed, on the ground of the testator having possessed only a faculty. In the case of Hyslop, in 1834, there was a power "to dispose of and convey, as she may think proper, after her decease," "by will or other deed under her hand," and there it was held that the fee was not in the party. And, to the same effect, are the cases of Weddell's executors, in 1848, and of Morris *v.* Tennant, in 1855. The whole authorities were reviewed in this Division of the Court in Pennycook *v.* Sprott, decided 12th June 1855, and the same principle was recognised and acted on as we have adopted in this case. The power there conferred was to take and use or appropriate the funds for her more comfortable living, or as she desired to have for her own purposes and disposal. A *mortis causa* disposition by her was held *ultra vires*. On the whole, I am clearly of opinion that the power left to the widow was a mere faculty which she did not exercise, and therefore that the residue must go to the residuary legatees.

LORD BENHOLME concurred.

LORD WOOD was absent.

The Court pronounced this interlocutor:—"Having resumed consideration of the reclaiming note against Lord Jerviswoode's interlocutor of 14th June 1860, with the condescendence and claim for Archibald and John Inglis, next of kin of the said Mrs. Margaret Alves, repel the said claim: Refuse the prayer of the reclaiming note, and adhere to the interlocutor reclaimed against, and remit to the Lord Ordinary: Of consent allow the expenses of all the claimants to be paid out of the fund *in medio;* and remit to the Auditor to tax the same and to report."

[Cf. *Rattray's Trustees* v. *Rattray*, 1 F. 512.]

No. 110. **XXIII. Dunlop 719.** 9 Mar. 1861. 1st Div.—Bill Chamber.

MARGARET MACLACHLAN or MACDONALD, and Another, Petitioners.—*Hunter.*

Bankruptcy—Nobile Officium—Election of Trustee—Stat. 19 *&* 20 *Vict. c.* 79, *sect.* 67.—The estates of Margaret Maclachlan or Macdonald, who resided at Lochmaddy, were sequestrated by the Lord Ordinary on the bills, upon 21st January 1861, and a meeting of the creditors was appointed to be held on Friday, 1st February 1861, at one o'clock afternoon, at Lochmaddy, to elect a trustee and commissioner, in terms of the 67th section of the "Bankruptcy (Scotland) Act 1856." The bankrupt's agents duly transmitted by post a certified copy of the petition and deliverance thereon; but in consequence of the mail-packet having been detained for seventeen days by adverse winds, their communication was not received until 8th February, being subsequent to the date of the intended meeting. A certificate, as to the detention of the mail, by the Sheriff-Clerk at Lochmaddy, was produced, along with a petition to the Inner-House by the bankrupt, with consent of the concurring creditor, praying the Court of new to appoint a meeting to be held for the election of a trustee, and to renew the warrant of protection till after the meeting. In respect of the difficulty of communicating with Lochmaddy, the Court was prayed to allow twenty-five days to elapse before the meeting, although the statute required it should take place not later than twelve days from the *Gazette* notice of sequestration. The Court, under the circumstances, granted the prayer of the petition; and expressed an opinion, but did not order that intimation of the renewed meeting ought to be given in the *Gazette*.

[Cf. *Steuart* v. *Chalmers*, 2 M. 1218.]

No. 110. XXIII. Dunlop 720. 9 Mar. 1861. Lord Jerviswoode.—Bill Chamber.

The Reverend WILLIAM PATERSON and his CURATOR and Others, Complainers.—*A. R. Clark—A. Moncrieff.*

The PRESBYTERY of DUNBAR, Respondents.—*Cook—Lee.*

Church—Jurisdiction—Interdict.—A minister having been served with a libel, charging him with intoxication, lodged defences, and was thereafter cited to appear personally at a certain meeting of Presbytery, on which occasion he was represented by counsel and agent who pleaded intervening insanity, of which he offered to lead evidence at a future diet, in bar of any farther procedure. The Presbytery, in respect of his having given in defences, and thus sisted himself as a party to the cause, and also in respect of the vagueness of the crave, refused to sist proceedings. A note of suspension and interdict was presented against the Presbytery adopting farther procedure until the plea of insanity should have been considered and disposed of. The Court (*aff.* judgment of Lord Jerviswoode), holding that in the circumstances stated there was no ground for interference, refused the note, without answers.

On 18th June 1859 a *curator bonis* was appointed to the Reverend William Paterson, minister of Dunbar, on the ground of insanity. He was then in an asylum. On 22d March 1860 he was discharged, and thereafter attended partially to his parochial duties.

On 3d January 1861 he was served with a libel charging him with various acts of intoxication from drink, alleged to have been committed at various periods from the year 1851 to the year 1859 inclusive. To this libel he put in defences.

On 6th February 1861 he was cited to appear personally before the Presbytery, at a meeting to be held on the 25th February 1861. At that meeting Mr. Paterson did not appear, but was represented by counsel and agent. Mr. Paterson's counsel then stated for him, that he "had this morning received two medical certificates, of this day's date, signed by Dr. Gairdner and Dr. Skae respectively, certifying that the Reverend Mr. Paterson is at present in a state of unsound mind; which certificates he produced, and pleaded the insanity of the Reverend Mr. Paterson, of which he offered to lead evidence at a future diet, anterior to any farther procedure in the cause, in bar of any farther procedure in support of the charges in the libel." But "the Presbytery, in respect of the defender having already given in answers to the libel against him at the instance of the Presbytery, and thus sisted himself a party in the case, and also in respect of the vagueness of the crave made by the defender's counsel, refuse said crave, and proceed to appoint a day for the probation of the libel."

A note of suspension and interdict was then presented in name of Mr. Paterson, his wife, and *curator bonis*, against the Presbytery, praying the Court to interdict them "from adopting any farther procedure in support of the charges, so long as the said Reverend William Paterson continues in a state of unsound mind, and until it shall be ascertained that he is in a state of soundness of mind; or otherwise, to interdict, &c. the respondents from adopting any farther procedure in support of the charges contained in the said libel until the plea of insanity, of which a proof was offered anterior to any farther procedure in the cause, shall have been considered and disposed of."

On 2d March 1861 the Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having considered the note of suspension, and heard counsel thereon, and on the caveat lodged for the respondents, the Presbytery of Dunbar, refuses the note, and finds the complainers liable to the respondents in the expenses of process."[1]

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[1] "NOTE.—The Lord Ordinary has been pressed for immediate judgment in the present note of suspension, and he confesses he was, at first sight, somewhat startled by the statements in the note, and by the terms of the deliverance of the Presbytery of the 25th February last, which forms the more immediate subject of the present complaint. But, on consideration, he has come to the conclusion, that the

[721] The complainers reclaimed, and argued;—That the right of an insane person to be protected against any criminal or *quasi* criminal prosecution being proceeded with during his insanity was a civil right, for the maintenance of which he was entitled to appeal to the Court of Session. Here a *prima facie* case of insanity had been fully made out, both by the medical certificates, and by the fact that a *curator bonis* had been appointed by the Court of Session. It was therefore totally incompetent for the Presbytery to resolve to proceed. The complainer was at all events entitled to have it tried whether he was in such a condition as to require protection or not.

Replied—The statements of the complainer, and the proceedings referred **[722]** to, disclosed no appearance or averment of excess of jurisdiction on the part of the Presbytery. It belonged to the Presbytery, before whom the insanity was pleaded, to dispose of it, subject to the review of the superior church courts; and, in disposing of it, they were obviously entitled to consider and decide upon the sufficiency of the statement on which the plea was founded, also the relevancy of the plea in the circumstances; and also to investigate the merits of the plea, and of the statements on which it

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subject-matter of the complaint is one with which he cannot, on any of the grounds stated, interfere, and on the merits of which he, therefore, offers no opinion. The leading facts are—That the complainer was charged, under a libel, with an offence of a character clearly cognisable by the Presbytery, as the ecclesiastical court to the jurisdiction of which the complainer Paterson was amenable. He pleaded to that libel by lodging defences. The Presbytery pronounced a certain deliverance, against which the complainer appealed to the Synod; and the Presbytery farther appointed a meeting to be held on the 25th February last, for the purpose of dealing with the said complainer according to the form of process, or of resolving to proceed to the probation of the libel, according to law.

"At the meeting thus appointed, some procedure took place with reference to the reasons of appeal for the said complainer against previous findings of the Presbytery; and the said complainer was therefore called, and did not personally appear; but appearance was made on his behalf by counsel, who stated that he had that morning received two medical certificates of that date, certifying that the said complainer was then in a state of unsound mind, and he pleaded the insanity of the said complainer, 'of which he offered to lead evidence at a future diet, anterior to any farther procedure in the cause, in bar of any farther procedure in support of the charges in the libel.'

"The Presbytery disposed of this plea in the manner complained of, and resolved to proceed to probation of the charges in the libel, and appointed their next meeting to be held at Dunbar on the 4th March for that purpose.

"The prayer of the note of suspension is directed against this resolution, and against any farther procedure on the part of the respondents against the complainer while he continues in a state of unsound mind, or until it is ascertained that he is in a state of soundness of mind; or otherwise, to prohibit procedure on the libel until the plea of insanity shall have been considered and disposed of.

"It is not, however, alleged on the part of the said complainer, that the plea of insanity thus put forward on his behalf, was one with which it was beyond the competency of the Presbytery as a court to deal; his complaint is, in reality, that that Court has not dealt with that plea as he maintains they ought to have done. Now, it appears to the Lord Ordinary, taking the present case on this footing, or on any footing on which it can be placed consistently with the facts, as disclosed in the note of suspension, that it is one with which the Presbytery, as the judicial tribunal having jurisdiction in the subject-matter of the libel, was and is entitled to deal—subject always to the review of the superior judicatories of the church, but free from all control or review on the part of the civil court, so long as the procedure is not in excess of the powers with which the Presbytery, as an ecclesiastical court, is, by law, invested.

"The Lord Ordinary sees no such excess here; and if this be so, he thinks it out of the question to interfere by granting any interdict, or even so far as by passing the note. In thus disposing of the present application, and in arriving at his present judgment, it has appeared to the Lord Ordinary that he is supported by the authority of Lockhart *v.* the Presbytery of Deer, July 5, 1851, and by the opinions of the Lord Ordinary and of the Court in that case, which are of the greatest cogency, and of the highest authority."

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On 3d January 1861 he was served with a libel charging him with various acts of intoxication from drink, alleged to have been committed at various periods from the year 1851 to the year 1859 inclusive. To this libel he put in defences.

On 6th February 1861 he was cited to appear personally before the Presbytery, at a meeting to be held on the 25th February 1861. At that meeting Mr. Paterson did not appear, but was represented by counsel and agent. Mr. Paterson's counsel then stated for him, that he "had this morning received two medical certificates, of this day's date, signed by Dr. Gairdner and Dr. Skae respectively, certifying that the Reverend Mr. Paterson is at present in a state of unsound mind; which certificates he produced, and pleaded the insanity of the Reverend Mr. Paterson, of which he offered to lead evidence at a future diet, anterior to any farther procedure in the cause, in bar of any farther procedure in support of the charges in the libel." But "the Presbytery, in respect of the defender having already given in answers to the libel against him at the instance of the Presbytery, and thus sisted himself a party in the case, and also in respect of the vagueness of the crave made by the defender's counsel, refuse said crave, and proceed to appoint a day for the probation of the libel."

A note of suspension and interdict was then presented in name of Mr. Paterson, his wife, and *curator bonis*, against the Presbytery, praying the Court to interdict them "from adopting any farther procedure in support of the charges, so long as the said Reverend William Paterson continues in a state of unsound mind, and until it shall be ascertained that he is in a state of soundness of mind; or otherwise, to interdict, &c. the respondents from adopting any farther procedure in support of the charges contained in the said libel until the plea of insanity, of which a proof was offered anterior to any farther procedure in the cause, shall have been considered and disposed of."

On 2d March 1861 the Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having considered the note of suspension, and heard counsel thereon, and on the caveat lodged for the respondents, the Presbytery of Dunbar, refuses the note, and finds the complainers liable to the respondents in the expenses of process."[1]

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[1] "NOTE.—The Lord Ordinary has been pressed for immediate judgment in the present note of suspension, and he confesses he was, at first sight, somewhat startled by the statements in the note, and by the terms of the deliverance of the Presbytery of the 25th February last, which forms the more immediate subject of the present complaint. But, on consideration, he has come to the conclusion, that the

[721] The complainers reclaimed, and argued;—That the right of an insane person to be protected against any criminal or *quasi* criminal prosecution being proceeded with during his insanity was a civil right, for the maintenance of which he was entitled to appeal to the Court of Session. Here a *prima facie* case of insanity had been fully made out, both by the medical certificates, and by the fact that a *curator bonis* had been appointed by the Court of Session. It was therefore totally incompetent for the Presbytery to resolve to proceed. The complainer was at all events entitled to have it tried whether he was in such a condition as to require protection or not.

Replied—The statements of the complainer, and the proceedings referred [722] to, disclosed no appearance or averment of excess of jurisdiction on the part of the Presbytery. It belonged to the Presbytery, before whom the insanity was pleaded, to dispose of it, subject to the review of the superior church courts; and, in disposing of it, they were obviously entitled to consider and decide upon the sufficiency of the statement on which the plea was founded, also the relevancy of the plea in the circumstances; and also to investigate the merits of the plea, and of the statements on which it

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subject-matter of the complaint is one with which he cannot, on any of the grounds stated, interfere, and on the merits of which he, therefore, offers no opinion. The leading facts are—That the complainer was charged, under a libel, with an offence of a character clearly cognisable by the Presbytery, as the ecclesiastical court to the jurisdiction of which the complainer Paterson was amenable. He pleaded to that libel by lodging defences. The Presbytery pronounced a certain deliverance, against which the complainer appealed to the Synod; and the Presbytery farther appointed a meeting to be held on the 25th February last, for the purpose of dealing with the said complainer according to the form of process, or of resolving to proceed to the probation of the libel, according to law.

"At the meeting thus appointed, some procedure took place with reference to the reasons of appeal for the said complainer against previous findings of the Presbytery; and the said complainer was therefore called, and did not personally appear; but appearance was made on his behalf by counsel, who stated that he had that morning received two medical certificates of that date, certifying that the said complainer was then in a state of unsound mind, and he pleaded the insanity of the said complainer, 'of which he offered to lead evidence at a future diet, anterior to any farther procedure in the cause, in bar of any farther procedure in support of the charges in the libel.'

"The Presbytery disposed of this plea in the manner complained of, and resolved to proceed to probation of the charges in the libel, and appointed their next meeting to be held at Dunbar on the 4th March for that purpose.

"The prayer of the note of suspension is directed against this resolution, and against any farther procedure on the part of the respondents against the complainer while he continues in a state of unsound mind, or until it is ascertained that he is in a state of soundness of mind; or otherwise, to prohibit procedure on the libel until the plea of insanity shall have been considered and disposed of.

"It is not, however, alleged on the part of the said complainer, that the plea of insanity thus put forward on his behalf, was one with which it was beyond the competency of the Presbytery as a court to deal; his complaint is, in reality, that that Court has not dealt with that plea as he maintains they ought to have done. Now, it appears to the Lord Ordinary, taking the present case on this footing, or on any footing on which it can be placed consistently with the facts, as disclosed in the note of suspension, that it is one with which the Presbytery, as the judicial tribunal having jurisdiction in the subject-matter of the libel, was and is entitled to deal—subject always to the review of the superior judicatories of the church, but free from all control or review on the part of the civil court, so long as the procedure is not in excess of the powers with which the Presbytery, as an ecclesiastical court, is, by law, invested.

"The Lord Ordinary sees no such excess here; and if this be so, he thinks it out of the question to interfere by granting any interdict, or even so far as by passing the note. In thus disposing of the present application, and in arriving at his present judgment, it has appeared to the Lord Ordinary that he is supported by the authority of Lockhart *v.* the Presbytery of Deer, July 5, 1851, and by the opinions of the Lord Ordinary and of the Court in that case, which are of the greatest cogency, and of the highest authority."

was founded. In the present case, no ground whatever had been set forth for the interference of the Court with the Presbytery's judgment, which was rested on the vagueness of the crave, and implied no absolute refusal to entertain and dispose of a plea of insanity properly stated and supported. Besides, the proper court for reviewing the judgments of a Presbytery in a case of ecclesiastical discipline, was the Synod. If their judgment in this case had been erroneous, the presumption was, it would be reversed by the proper court of review, and would therefore do the complainer no harm. The case of Lockhart, referred to by the Lord Ordinary, was conclusive.

LORD PRESIDENT.—I think the Lord Ordinary has arrived at the right conclusion in refusing this note of suspension and interdict. I think the matter which is endeavoured to be brought before this Court is a matter proper for the court before which the proceeding has taken place. I do not go into the particulars of this party's case. He seems to have been in a sort of intermittent state,—sometimes sane and sometimes not, according to the defence lodged for him; but the cause is going on under a certain libel against him for intemperance, which is called an ecclesiastical crime or offence, and defences have been put in. Upon the 6th of February certain proceedings had taken place, against which an appeal was entered, and reasons of appeal were lodged for him on 11th February. The Court was to proceed on the 25th with farther steps in the cause; and on the 25th, when the case came on, objection was taken to farther procedure,—his counsel "stated that he had this morning received two medical certificates, of this day's date, signed by Dr. Gairdner and Dr. Skae respectively, certifying that the Rev. Mr. Paterson is at present in a state of unsound mind; which certificates he produced, and pleaded the insanity of the Rev. Mr. Paterson, of which he offered to lead evidence at a future diet, anterior to any farther procedure in the cause, in bar of any farther procedure in support of the charges in the libel." Then there is an answer made to that; and the deliverance of the Presbytery is, that "in respect of the defender having already given in answers to the libel against him at the instance of the Presbytery, and thus sisted himself a party in the case, and also in respect of the vagueness of the crave made by the defender's counsel, refuse said crave, and proceed to appoint a day for the probation of the libel." Then his counsel protested for all remeid competent in law, and appealed, and took instruments and craved extracts, which were granted. Then the Presbytery fixed 4th March for proceeding. The counsel for the prosecutors then tendered, and craved leave to put in an additional list of witnesses with reference to the defence of insanity or unsoundness of mind; and it is in that state of matters that the present application is presented to us, which seeks an interdict against the Presbytery proceeding. I think that Mr. Moncrieff now limits his demand to the second of the alternatives contained in the prayer, and which is thus expressed—"or otherwise, to interdict, prohibit, and discharge, or to remit to the Lord Ordinary to interdict, prohibit, and discharge the said respondents from adopting any further procedure in support of the charges contained in the said libel, until the plea of insanity of the said Reverend William Paterson, which was put forward on his behalf at a meeting of the said Presbytery, held on the 25th day of the present month of February 1861, and of which a proof was offered anterior to any further procedure in the cause, shall have been considered and disposed of." He does not say by whom considered and disposed of, but until it shall have been considered and disposed of. It appears to me that we cannot interfere in this matter. I think that the Presbytery were the proper judges, in the first place, of whether the plea was stated to them in a proper form, and I think they were also the proper judges as to when they were to take it into consideration. They were the **[723]** proper judges as to the stage at which it should be proceeded with—as to the course of their own proceeding; the proper judges as to whether that matter should be investigated at the same time (the 4th March), which they had fixed for farther inquiry,—in short, to regulate their own order of procedure in regard to the matter. It might turn out on 4th March that this gentleman was not in a condition to lead any evidence of insanity. It might turn out, if his malady was of an intermittent nature, that he was perfectly competent to go on. We do not know what course might have been adopted. But, if there was anything wrong or irregular in what the Presbytery

did, I think the proper appeal was not to this Court, but to the superior church tribunal. It is said that in the meantime, evidence might have been led in support of the charge. But that would have raised a question of the order of procedure in the ecclesiastical court, with which we do not interfere. If the Presbytery tried to do what was incompetent or irregular, their ecclesiastical superiors are the proper parties to check them in that course of proceeding. It would be a strong thing to say that, whenever a Presbytery does anything which a party considers to be wrong regarding an ecclesiastical rule of procedure, this Court is to be at once resorted to. I think it would be out of the question that we should interfere at such a stage of the proceedings, and upon such an application. It is said we ought to interdict the Presbytery till this defence is disposed of. When disposed of? The Presbytery repel it. An appeal is taken to the Synod; the Synod repel it; and the Presbytery are to be interdicted from proceeding with the proof, however consistent with ecclesiastical form that might be; or are the Presbytery, however extravagant the application of the defender may appear, to be interdicted from taking a step which they consider right in ecclesiastical procedure, to preserve evidence or otherwise, till the final disposal of this plea of insanity? It is quite contrary to any authority which we have, and it certainly is contrary to the principle on which the case of Lockhart was decided, that we should interfere here at all.

LORD IVORY.—I am of the same opinion, and have been so from the moment I read the papers. If we arrived at any other result it would be going contrary to the whole principles of independent jurisdiction, which separate the ecclesiastical from the civil courts. Each is independent of the other, and each has its own exclusive field of jurisdiction, and within that field is paramount. No more can we interfere with an ecclesiastical jurisdiction, keeping within its competency, than the ecclesiastical jurisdiction could interfere with us, keeping within our competency, or with the Court of Exchequer or Court of Justiciary in matters proper for these Courts. They must, therefore, have equally exclusive and independent power and right of explicating their jurisdiction. The cause is well before them; all that is necessary for the judgment of the cause is also before them; and the mode of coming to the issue is equally theirs. That is the principle which was laid down in the case of Deer and various other cases. It is totally out of the cases prior to 1843, where the courts went out of their jurisdiction and usurped functions which did not belong to them. But this is an act within the jurisdiction of the court in a cause which is within their exclusive jurisdiction. I hold that every supreme court (and this Presbytery is a supreme court within its own sphere), has, because of its jurisdiction, every power necessary to explicate that jurisdiction. They are entitled to regulate their own rules and forms of process; they are entitled to regulate the nature and extent of the proceedings which should be taken before them, and it does not seem to me that the Presbytery here has done anything beyond that. I do not think I am entitled to form any opinion as to whether that which they have done was a thing which they ought to have done. I think this Court has no power to interfere in the matter, and I am therefore of the same opinion as your Lordship.

LORD CURRIEHILL.—I understand the state of this case to be simply this:—There is a suit depending in the ecclesiastical court, which is quite within the competency of that court, and which has been brought before it in a regular manner. On the 25th of February last, when that case was being moved, at a certain stage in the course of procedure, the counsel for the parties appeared, and stated that, in consequence of the state of mind of the accused, the proceedings should be delayed, and he offered proof, at a future diet, of that state of mind; and the plea he maintained was, that that proof should be led in bar of any farther **[724]** procedure in the cause. The court took that motion into its consideration after hearing counsel for the parties, and they pronounced a judgment by which they refused "said crave, and proceed to appoint a day for the probation of the libel." On the part of the defender there is an appeal entered against that judgment to the proper ecclesiastical tribunal. That is the state of the case. The judgment complained of is at this moment under appeal to the proper tribunal, where it will be dealt with in the proper form. The appeal will be either sustained or repelled. If that tribunal affirm the judgment, we cannot interfere with that; if they alter it, of course anything that takes place in the meantime will go for nothing. It appears that by a regulation of the ecclesiastical courts, it is competent, notwithstanding

an appeal of this kind, to go on in the meantime. All that is perfectly competent, in consistency with the law of the church—with the form of procedure of the court in which this case is depending. So that everything here is quite regular in point of form. In that state of matters, I do not see how it is possible for this Court to interfere, unless we are to assert a jurisdiction to interfere with ecclesiastical courts in cases that are competently before them, and where they have not even gone wrong in point of form, and where the party is seeking his redress according to the laws of the church. I have not the slightest hesitation in saying that I think the Lord Ordinary has come to a right decision.

LORD DEAS.—In disposing of this case it is necessary to attend to the nature of the proceedings sought to be interdicted, and to the precise circumstances under which our interposition is sought. The Reverend complainer, the minister of Cockburnspath, was served with a libel on 2d January last, charging him with certain ecclesiastical offences. To this libel he lodged defences, with a list of exculpatory witnesses annexed, on 6th February, when he was heard by counsel and agent against the relevancy, which, however, the Presbytery sustained, and appointed their next meeting to be held on 25th February, for dealing with the complainer or allowing probation, and appointed him to appear personally that day, which appointment was intimated to his agent *apud acta*, and to himself by letter. He did not appear on the 25th, but his counsel and agent appeared for him, and produced certificates of that date from two medical men, bearing that he was then, and had been for some time past, "in a state of unsound mind," of which fact they offered to adduce evidence at a future diet, and pleaded insanity in bar of any farther procedure on the libel. It was answered that the certificates afforded no evidence of such unsoundness of mind as incapacitated the complainer from giving instructions for his defence, and further, that, having pleaded to the libel, there was in the circumstances, and looking to the vagueness of the offer of proof of unsoundness of mind, no good ground for delaying procedure, so far, at least, as regarded fixing a diet for probation. The Presbytery resolved to proceed to appoint a day for probation, whereupon the complainer's counsel protested and appealed, took instruments and craved extracts, which were allowed. Monday, 4th March, was then appointed for proceeding to probation. No list of witnesses to prove insanity in bar of trial was lodged or tendered on behalf of the complainer. In these circumstances, in place of following out his appeal to the superior church courts, the complainer at once comes here, by note of suspension and interdict, craving that we shall interdict the Presbytery from proceeding further upon the libel, so long as the complainer continues in a state of unsound mind, or until the plea of insanity, in bar of trial, shall be considered and disposed of.

I am humbly of opinion that the note of suspension and interdict presented in these circumstances has been rightly refused. The Presbytery is an ecclesiastical court, invested with undoubted jurisdiction to try the offences set forth in the libel, subject to review of the superior church courts. It is within the jurisdiction of every competent court to entertain and decide upon a plea of insanity in bar of trial, equally with a plea of insanity at the time the alleged offences were committed, or any ordinary defence upon the merits. What the Presbytery do or fail to do in these respects will be subject to review by the Synod and General Assembly. If the church courts exceed their jurisdiction, we may interfere to correct them. But we are not to presume, beforehand, that there will be such excess. How the matter might stand if, throughout the whole procedure, the individual libelled had been notoriously an idiot or a maniac, utterly incapable of knowing what was going on, and the church courts, successively, refused to allow **[725]** that incapacity to be inquired into, I shall not presume to say. The question in such a case might come to be whether the church courts could be said to have had a party before them at all, whose civil rights could be affected through their ecclesiastical sentence. It will be time enough to deal with a question of that sort when it arises. The case here is very different. The complainer, when in a sane state, was served with a libel, and lodged defences. The plea that he had become insane has been as yet supported only by certificates, which are not legal evidence of their contents. These certificates do not bear, nor was it explicitly offered to be proved, that the alleged insanity is such as to incapacitate the complainer from giving instructions for his defence. No list of witnesses was tendered by whom the objection was proposed to be proved; and all that the Presbytery have hitherto done is to hold that

there has been nothing, as yet, put before them which ought to prevent them from going on with the case. In this they may have exercised a sound or an unsound discretion. But they were entitled to exercise their discretion; and for the way they have done so, they are amenable only to their ecclesiastical superiors. Whether in point of law, civil or ecclesiastical, insanity bars all procedure on a libel of this kind to which the party has pleaded, or whether it may go on, with or without a curator to conduct the defence, I shall not presume to say. Neither shall I inquire, until the point arises, what would be the effect of an absolute refusal to entertain or consider a plea of insanity in bar of proceedings terminating in a final sentence which necessarily affected or took away the complainer's civil rights. It is enough that, as the case stands (whatever may occur hereafter), there has been as yet no excess of jurisdiction requiring and entitling us to interfere.

The Court pronounced the following interlocutor:—"Adhere to the Lord Ordinary's interlocutor submitted to review, and refuse the desire of the note: Find additional expenses due, and remit," &c.

No. 114. **XXIII. Dunlop 729.** 15 Mar. 1861. 1st Div.—Lord Kinloch.

ALEXANDER M'CALLUM, Pursuer.—*Young—Fraser.*

Mrs. AGNES THOMSON or STENHOUSE and Others, Defenders.—*Sol.-Gen. Maitland—A. R. Clark.*

The FORTH IRON COMPANY, Defenders.—*Sol.-Gen. Maitland—Monro.*

Process—Res Judicata—Title to Sue—Reparation.—A lease of minerals in certain lands having been granted, with power to char and calcine—which power was exercised—a feu of a portion of the lands was some years thereafter granted to a third party for erection of a dwelling-house, under reservation of minerals. In a suspension and interdict by the feuar, against the lessees calcining in the neighbourhood of his dwelling-house, interdict was refused by the Lord Ordinary, but the note was passed;—*Held* (*aff.* judgment of Lord Kinloch)—1, that this was not *res judicata* in an action of damages by the feuar against the mineral lessees and the lessor; 2, that the feuar's right to sue was not excluded by the reservation in his charter; nor, 3, by the terms of the mineral lease anterior to his feu-right.

In 1851 Mrs. Stenhouse and others having interest in the fee of certain lands called Stevenson's Beath, and Mowbray's Beath, in Fifeshire, let the minerals in the lands to the Forth Iron Company for thirty years from Martinmas 1849, with power to char and calcine the same, but providing that no pit should be sunk within one hundred yards of any farm-steading on the lands, and that the company should pay surface damage. Immediately after the lease was granted the lessees commenced to work and calcine the minerals. In 1858 Mrs. Stenhouse, and the other parties interested in the lands, granted to the pursuer Alexander M'Callum, grocer and provision merchant, Cowdenbeath, a feu-charter of a piece of ground for the erection of a dwelling-house, under reservation of minerals. In September 1859 M'Callum brought this action against Mrs. Stenhouse and others, and against the Forth Iron Company, concluding that the action should be conjoined with a depending process of suspension, raised by the pursuer against the Forth Iron Company, and referred to below, as also for L.500 sterling of damages, sustained in consequence of the defenders, the Forth Iron Company, charring and calcining heaps of ironstone at or near to the pursuer's dwelling-house, with the authority and under powers granted by the other defenders, &c., with the legal interest of said sum till paid. He stated "in terms of the right under his charter, the pursuer erected a shop and dwelling-house, which he now occupies; but at the date of the charter he was entirely ignorant of the terms of the lease which had been granted in 1851, and the feu-charter of 1858 did not reserve power to char and calcine in any part of the lands, or in any part that might damage the pursuer's property, or be prejudicial to health, or be otherwise injurious to the

pursuer." (Cond. 4) "After the pursuer had erected his dwelling-house and shop, and about the end of September or beginning of October 1858, the defenders, the said Forth Iron Company, erected a heap of ironstone or other minerals, distant only about eighty-five yards from the pursuers dwelling-house, and set it on fire, and this fire continued burning for about two months, and in consequence of the noxious vapours and dense smoke issuing therefrom, the pursuer and his family suffered severely both in health and property." "These operations complained of are so hurtful to health and so destructive to property that the pursuer will be obliged to quit his house unless the defenders are restrained. The defenders' operations constitute a nuisance to the neighbourhood, and particularly to the pursuer."

The pursuer had in 1859 directed a note of suspension and interdict against the Forth Iron Company "firing any heap of ironstone at or near Cowdenbeath, so as to be offensive to, and prejudicial to the health of, the complainer and inhabitants of the village, and injurious to their property." This he said he had done in ignorance "of the terms of their lease, without calling the other defenders, the granters of the lease and feu-contract."

The suspender, describing himself as provision merchant in Cowden- **[730]** -beath, said that the defenders' pit was in the immediate vicinity of the village; that they were "in the habit" of calcining, an operation which was "most prejudicial to the health, and destructive of the property of those living in the neighbourhood;" that before he had built, the Forth Iron Company had burnt ironstone near their pit,— "In particular, about the end of December 1856, a heap was accumulated and set fire to by the respondents. This heap was to the south-west of the pit, and was two hundred and fifty-four yards or thereby from the dwelling-house then occupied by the complainer, which was considerably to the north of his present residence, from which it was distant about two hundred yards. Although this heap was of considerable size, measuring seventy yards long and forty broad or thereby, and continued burning for four or five weeks; and although the smoke, sulphureous and other exhalations, were very offensive and prejudicial to the health of the inhabitants of Cowdenbeath, still the complainer was at that time not so much exposed to the injurious effects of that operation, and his attention was less called to it than has since been the case in regard to the subsequent operations of the respondents of a like nature, carried on by them after the complainer entered into possession of his present premises."

In that process Lord Ardmillan pronounced the following interlocutor:— "1st July 1859.—1st, Repels the 1st plea in law stated for the respondents (which was directed against the competency of the application as too vague), and finds that, having regard to the suspender's averments the note of suspension cannot, without inquiry, be held incompetent on the ground there set forth. But, 2d, on the merits, repels the reasons of suspension: Finds the proceeding complained of orderly proceeded: Refuses the interdict, and decerns: Finds the suspender liable in expenses, subject to modification," &c. Against this interlocutor the pursuer reclaimed. The actions were not conjoined. The interdict was refused on the ground "that there were no relevant averments to support the note of suspension and interdict."

In the declarator the defenders, Mrs. Stenhouse and others, denied that the calcining of ironstone was injurious. They averred that "at the time of taking the said feu, and also before and while building the said house, the pursuer well knew that he would be subjected to discomfort and annoyance from the operation of calcining ironstone at the said pit, and he was likewise warned of this by the defender, the said James Stenhouse junior, and he voluntarily incurred all risk and damage thence arising." They pleaded, *inter alia*, "(1.) In consequence of the reservation contained in the pursuer's charter, he is barred from maintaining the present action." They also pleaded, that the process of calcining ironstone was not a nuisance, and that the existence of the calcining operations was known to him before he took the feu.

The Forth Iron Company pleaded;—(1.) By the judgment in the process of suspension and interdict, it is *res judicata* that the proceedings founded on in this action are not wrongful or illegal on the part of the present defenders. (3.) The operations in question being carried on in accordance with the defenders' lease, which is prior and preferable to the pursuer's feu-right, the pursuer has no right or title to claim damages on account of these operations. (6.) The pursuer is barred from the present action by the terms of the reservation of minerals in his own title; of which

reservation the defenders, in virtue of the lease from the pursuer's superior, are entitled to the full benefit.

On 12th July 1860 the Lord Ordinary pronounced the following interlocutor:—"Repels the plea of *res judicata*, stated by the defenders, the Forth Iron Company: Repels also the plea stated by the defenders Mrs. Stenhouse and others, that in consequence of the reservation contained in the pursuer's charter, he is barred from maintaining the present action: Repels also the plea of the Forth Iron Company, that the right and title of the pursuer to insist in the present action, is excluded by the terms of the [731] lease granted to the Forth Iron Company, anterior to the date of the pursuer's feu-right: Reserves to the defenders all their pleas, except in so far as stated to the effect above specially set forth; and appoints the parties to lodge, within eight days, the issues or counter-issues, which they respectively propose for the trial of the cause."[1]

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[1] "NOTE.—Generally speaking, the judgment pronounced in a possessory process of interdict is not *res judicata* in any after action, declaratory or petitory, relative to the same matter. The reason is obvious. The interdict is often granted or refused, on grounds not necessarily importing an adjudication of the merits of the case. The course of the process may conceivably be such as to have the true point at issue raised and determined. But this is the exceptional, not the normal case.

"In the present case, the interdict was refused on the express ground 'that there were no relevant averments to support the note of suspension and interdict.' In order to give this judgment the effect of *res judicata*, it would at the least be necessary that the present record should be the same with the former. The Lord Ordinary perceives several important differences, particularly in the omission of those statements and admissions out of which it might formerly be gathered that the complainer came to the locality in the full knowledge of the subsisting nuisance. Whether the omissions tend to the furtherance of truth, or will ultimately prove serviceable to the complainer, needs not be inquired. The Lord Ordinary cannot take the record in the former process as the record in the present. In the matter of relevancy, he can only have regard to the record in the case before him; and whatever may ultimately turn out to be the true state of the fact, he cannot doubt the relevancy of the statements in the revised condescendence, and in the agent's letter, comprised in article 5th, which by reference is made part of the averments.

"The defenders, Mrs. Stenhouse and others, plead that the action is excluded by the reservation in the pursuer's charter. By that charter, the pursuer had disponed in feu thirty-nine falls of ground, specially described, with a reservation to the disponers of the mines and minerals 'within the ground hereby conveyed,' and with liberty 'to search for, work, win, and away carry the same.' The defenders contended that this implied a reserved power 'to char and calcine.' The Lord Ordinary cannot so read the clause. To char and calcine is a very different and a much ampler privilege than to work and carry away. The argument, besides, if valid at all, infers a reserved right to char and calcine 'within the ground hereby conveyed,' for it is only to this ground that the reservation applies; and this it is mere extravagance to suppose intended. With regard to the right of the disponers to char and calcine on their own ground, it may or may not subsist otherwise, but it cannot be made to rest on the clause of reservation in the pursuer's charter.

"It was further argued in defence, that the pursuer having acquired his feu posterior to the date of the lease to the Forth Iron Company, under which that company had given them the whole minerals in the lands, with power *inter alia*, 'to char and calcine the same, and to take ground for that purpose,' he must be held excluded from his present claim by the limiting force of a previous real right. Here again, as in the argument derived from the pursuer's charter, if the argument was of any value, it would go to give the Forth Company power to char and calcine within the bounds of the pursuer's small feu, which the defenders will scarcely maintain. The argument involves a misapprehension in both the applications of it. There is no doubt of the right, abstractedly considered, of the Forth Iron Company, to char and calcine within the bounds of their mineral lease. It may be equally said, in almost every case whatever, that no doubt exists of the right of the party to do the things complained of as a nuisance, abstractedly from the question of nuisance. The question of nuisance

[732] Mrs. Stenhouse and others reclaimed. The Forth Iron Company also reclaimed, and prayed the Court to sustain their first, third, and sixth pleas, and to assoilzie them with expenses.[1]

The Court pronounced the following interlocutor:—"Vary the interlocutor reclaimed against, in so far as to omit the words 'Repels also the plea of the Forth Iron Company, that the right and title of the pursuer to insist in the present action, is excluded;' and to substitute for these words the following words:—'Repels also the third plea of the Forth Iron Company, in so far as it imports that the right and title of the pursuer to insist in the present action is excluded;' and with this variation, adhere to the interlocutor reclaimed against, and refuse the desire of the notes: Find the reclaimers liable to the pursuer in expenses incurred since the date of the Lord Ordinary's interlocutor reclaimed against: Allow an account thereof to be given in," &c.

No. 115. **XXIII. Dunlop 732.** 15 Mar. 1861. 2nd Div.—Lord Kinloch.

DAVID RITCHIE and Others (MAITLAND'S Trustees), Pursuers, Real Raisers.

AGNES M'NAUGHT or M'DERMAID and her HUSBAND, Defenders, Claimants. —*Gordon—Duncan.*

JAMES STEEL and Others (A. MAITLAND'S Trustees), Defenders, Claimants.—*Sol.-Gen. Maitland—Anderson.*

JANET M'ALISTER and Others, Defenders, Claimants.—*Sol.-Gen. Maitland—Anderson.*

Trust-Settlement—Legacy—Vesting.—A truster directed that the whole residue of his estate should be divided among his children on the youngest attaining majority. He had three children. One predeceased him, the other two died before attaining majority; the last survivor left a settlement disposing of his share of the residue;—*Held* (*alt.* judgment of the Lord Ordinary), that the whole residue had vested in the last surviving son, and was carried by his testament.

The late William Maitland, spirit merchant in Glasgow, who died in 1849, left a trust-settlement, dated in 1844, by which he conveyed his whole heritable and moveable property for the following purposes:—First and second, For payment of debts, funeral expenses, &c.; for payment of an annuity of L.20 per annum to his wife, so long as she continued unmarried, and directing that during her viduity she should have the use of his household furniture. The settlement then proceeded:—"In the third place, I direct and appoint my said trustees to hold the residue and remainder of my said estate for behoof of my children, Archibald, John, and William, and any other lawful child or children hereafter to be born to me, and to invest the same in the way

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assumes right, and avers restraint. The question is not of right, but of its exercise. Whatever is the right given by the title, there is never power legally conferred to use the right in such a way as will constitute a nuisance to the vicinity. For anything that appears, the Forth Iron Company may exercise their right of charring and calcining, in such a way, or at such a distance from the pursuer, as to do him no harm. If, in the exercise of their right, they commit a nuisance, there is nothing in their title which either does or legally can justify them in so doing. The circumstance of their previous charter, may afterwards afford a strong piece of evidence in support of the position that the pursuer came to the nuisance, and not the nuisance to him. But at once to argue, from the possession of a previous right to char and calcine, to the necessary possession of a right to char and calcine so near to the pursuer, or in such a mode as to inflict on him a nuisance, is a legal solecism on its bare statement."

[1] Marquis of Huntly *v.* Nicol, 9th January 1858, *ante*, vol. xx. p. 374; Caledonian Railway Company *v.* Lockhart, 26th May 1855, *ante*, vol. xvii. p. 775 (Opinion of Lord Ivory).

they shall think most advisable; and I direct my said trustees to pay such sums of money as they shall consider necessary for the maintenance, clothing, educating, and upbringing of said children, and of any other lawful child or children hereafter to be born to me, until the period of division of my means and estate shall arrive, as aftermentioned. In the fourth place, Upon the youngest of my children attaining the age of twenty-one years, I direct my said trustees, after providing [733] for the payment of the said annuity in favour of my said wife in the event of her remaining unmarried, to divide the residue and remainder of my said estate among, or to dispone and convey the same to my said children, and to any other lawful child or children hereafter to be born to me, share and share alike; and in the event of the death of any of my children before the youngest shall have attained the said age of twenty-one years, the share which would have belonged to such child or children shall go and belong to his or their lawful children, failing which, shall be divided equally, share and share alike, among the surviving brothers or sisters of such deceaser or deceasers: And in the fifth place, I hereby authorise my said trustees, if they shall deem it expedient, to advance to any of my children who shall have attained the age of twenty-one years, a portion of the share effeiring to them of my said estate on the occasion of their entering into business, or at any other time at which it may appear to my said trustees to be for their benefit." The deed then declared that these provisions to the widow and children should be accepted by them as in full of all their legal rights, and the usual powers of management were conferred on the trustees.

The truster's only children were the three sons mentioned in the deed. William predeceased the truster. Archibald died intestate, and without issue, in 1851, at about sixteen years of age, and John died in 1854, at about the same age. John left a will leaving his whole property to his mother, who had entered into a second marriage with John M'Dermaid.

On John Maitland's death a number of parties claimed the property held by William Maitland's trustees, which was all moveable, with the exception of a small property at Cowlairs, which they sold for L.200. This multiplepoinding was raised, in which there appeared—(1.) Mrs. M'Dermaid, who claimed to be preferred to the whole fund *in medio*, or as much thereof as was moveable at the date of the truster's death. (2.) Mrs. Janet M'Alister and others, children and representatives of two sisters of the truster who had survived him, but died before this action was raised, and two surviving sisters of the truster. They claimed the whole fund. And (3.) The trustees and representatives of Archibald Maitland, the truster's only brother, who claimed the whole heritable estate, and alternatively, if the estate was held to be moveable, claimed to be ranked for a fifth share thereof.

Mrs. M'Dermaid pleaded;—On the sound construction of William Maitland's trust-settlement, the whole property had vested in his son John, and was conveyed to her by his will.

On 1st June 1860, the Lord Ordinary pronounced this interlocutor:—"Finds that the deceased John Maitland not having attained majority prior to his death, there was no right vested in him, or capable of being conveyed or assigned by him, to the residue of the trust-estate of his father, William Maitland, which forms the fund *in medio*, and appoints the cause to be enrolled, in order to be proceeded with consistently with this finding."[1]

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[1] "NOTE.—The competition now arises between Mrs. M'Dermaid claiming the residue of the trust-estate by virtue of this will, and the next of kin of the testator. And the question in substance is, whether the right to the residue had vested in John, and was so within his power of disposal.

"The Lord Ordinary is of opinion that this question must be answered in the negative.

"Had the settlement been simply on the sons, with only the period of payment postponed till the majority of the youngest, there might have been little difficulty in holding the right to have vested in each by his survivance of the testator. But the trustees are not instructed to hold simply for the sons. They are to hold contingently for others, who are to come in room of the sons, in the event of any of them predeceasing the appointed period. These conditional institutes are—first, the issue of any deceaser; and secondly, if he should die without issue, his surviving brothers and

[734] This interlocutor was reclaimed against. It was argued for Mrs. M'Dermaid;—The will left by William Maitland was entirely of the nature of a **[735]** family

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sisters,—that is, those who should be alive when the appointed period should arrive. It appears to the Lord Ordinary that none of the sons could disappoint this conditional right by any deed executed by him prior to the period arriving. The Lord Ordinary cannot put on the words any other construction than this. But this is just to say, in other words, that no right vested till the arrival of the specified period.

"The Lord Ordinary entertains no doubt, that the clause already quoted comprehends the case of the youngest son equally with that of the others. It applies indiscriminately to 'the event of the death of any of the children.' In the case of the youngest son, it was emphatically reasonable that he should not have power to convey away the property at pleasure till he had attained majority. His hands were tied; in other words, the vesting of his right was suspended till that period. A more reasonable doubt might be raised as to the older brothers, during the period elapsing between their own majority and that of the youngest. But as to the youngest himself, the Lord Ordinary conceives the matter to be plain.

"If John Maitland could not, anterior to his majority, disappoint by deed the right of the conditional institutes, it cannot alter the legal character of his position that he did not in fact leave either children or a surviving brother. His hands were equally tied, till the specified period arrived. The question of vesting must be ruled by the terms of the deed, not by the emerging circumstances.

"The argument for the claimant, Mrs. M'Dermaid, proceeded on an alternative view.

"First, she pleaded that the right vested in each son *a morte testatoris*. If this were true, then every son who had passed pupillarity could, immediately on his father's death, have conveyed his right, and disappointed both his own possible issue, and his surviving brothers. The Lord Ordinary conceives this view to be clearly untenable.

"Another and more plausible argument was, that the right vested *a morte testatoris* on the children as a class, with the benefit of survivorship exclusively as amongst themselves; and that whenever one survived all the others, the object of the clause was satisfied, and the right to the whole residue vested in the sole survivor.

"But although in itself, and in reference to presumable intention, this may appear not an unreasonable view, the Lord Ordinary is of opinion that it cannot be made accordant with the words of the deed. In the first place, it implies a double period of vesting—viz. that which was applicable when more than one survived, and that which was produced by the fact of sole survivance; it assumes, in fact, a shifting period of vesting in one and the same individual. Nothing of this kind is contained in the words of the deed, and these would require to be altered, in order to evolve the view. But further, the view assumes that, whenever any son became the sole survivor, he could at once test on the right (for this is of the essence of vesting), and so could before majority defeat the rights of his children, actual or contingent. This supposition appears to the Lord Ordinary to be adverse to the terms of the settlement. To meet this alternative view, the clause would require to have inserted in it words something to this effect:—'Declaring that, if any one of my children shall survive all the others, he shall immediately on such survivance, and notwithstanding his not having attained majority, be vested with the full right and disposal of the whole said residue.' The Lord Ordinary cannot take on him to alter the settlement by the implied introduction of such words.

"The same argument as to the effect to be given to the survivance of a single child, was strongly urged in the recent case of Boyle *v.* Lord Glasgow's Trustees, 14th May 1858, 20 D. 925. The fund in that case was provided to parents in liferent, and the fee was on the death of the survivor 'to be made over and accounted for to the child or children then existing of the marriage.' There was only one child of the marriage, who survived one parent and predeceased another. It was argued with great force, that, according to the true conception of the provision, the right was given to children generally, with the benefit of survivorship *inter se;* and that when the dissolution of the marriage left only one child without the possibility of more, the true object was followed out by holding the right to vest at once in that child. But the

settlement; and it was not to be assumed that the truster intended, by the use of the word "youngest" in the fourth purpose, to disappoint the children's interest altogether, had they all died in minority.[1] The object of the fourth purpose was to prevent the disponees of predeceasing children from disappointing those who might survive when the youngest attained majority; but, in the circumstances that had occurred, its provisions were inapplicable, and the deed should be construed as if it had been expunged.

To which it was answered;—The truster evidently did not intend that the shares of his estate bequeathed to his children should vest till the period of distribution. The youngest child having attained majority, was set out in the very first words of the clause containing the bequest of residue, shewing the importance attached by the truster to that condition on which the bequest was granted.[2]

The following additional pleas were lodged for Mrs. M'Dermaid:—"(1.) In the event of its being held that the residue of the estate of the truster did not, in virtue of the provisions contained in the said trust-disposition and settlement, vest in his son, John Maitland, the whole of said residue vested in the said John Maitland, in respect that the same was undisposed of residue, and that he was one of the two surviving children and next of kin of the truster, and sole next of kin of his said brother Archibald. (2.) In respect that none of the counter claimants were the next of kin of the truster, either at the date of his death or at the date of the death of his said son Archibald, they have no title to insist in their present claims."

At advising,—

LORD JUSTICE-CLERK.—If I had entertained any serious doubt as to the grounds on which our judgment should rest, I should have proposed that we should take time to consider this case, particularly as I, in common with your Lordships, take a different view from that of the Lord Ordinary. The case can hardly, I think, have been presented to his Lordship as it has been to us, from the views expressed in the note to his Lordship's interlocutor; and it seems there was another disturbing element in his Lordship's mind, viz., a desire to carry out so proper a destination of this young man's property, as that in favour of his mother. I cannot, however, say whether this is a proper or commendable purpose for him to have had in view, for we know nothing of these parties, or of the mother, except this, that, having contracted a second marriage, she has forfeited the provisions secured to her by her first husband. Therefore I come to the decision of this case with nothing to interfere with my single desire to discover the true intent of the testator as expressed in the deed we have to construe.

The first thing I notice is, that there is a conveyance of the whole residue of the [736] truster's estate to his trustees for behoof of his children. I take it to be beyond all doubt that the beneficial interest in the truster's estate was vested in his children as a class. By the provisions of other clauses that vesting may be postponed as regards some of the children, and as regards others it may suffer defeasance. As regards the gift to the children of the truster of the whole residue and remainder of his estate, it is clear that he had in his mind two events as likely to occur. The one being, that at his death he should be survived by his children; and the other, that some of them

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Court rejected this argument, and held that survivance of the appointed period was a condition of the right vesting. They denied effect to a deed executed by the child, conveying the fund after her mother's death to an uncle, and preferred the testator's representatives as to undisposed of estate.

"In like manner, in the present case, the Lord Ordinary feels himself compelled to deny effect to John Maitland's deed, considered as an attempted conveyance of the residue of his father's estate. A desire will naturally arise (and the Lord Ordinary has not been wholly free from it), to carry out a deed so proper as one executed by a son in his mother's favour. But the propriety of the deed cannot rule its legal efficacy. The same legal principles must be applied as if the deed had been in favour of an utter stranger, or in favour of the most worthless object of misplaced affection."

[1] Boyle *v.* the Earl of Glasgow's Trustees, 14th May 1858, *ante*, vol. xx. p. 925.

[2] Campbell *v.* Reid, 12th June 1840, *ante*, vol. ii. p. 1084; Newton *v.* Thomson, 27th Jan. 1849, *ante*, vol. xi. p. 452; Stewart *v.* Stewart, 17th July 1851, *ante*, vol. xiii. p. 1386; Pretty *v.* Newbigging, 2d March 1854, *ante*, vol. xvi. p. 667.

should be in minority. It is clear that he had the likelihood of these two events in his mind, for he directs his trustees to "pay such sums of money as they shall consider necessary for the maintenance, clothing, educating, and upbringing" of his children. This clearly imports an expectation on the part of the truster that he was to leave a family of several children, and that at least some of them would be in minority on his decease. The next clause (the fourth direction), suggests the same idea, because it directs that the division of the residue shall take place when his youngest child attains majority; and, in like manner, by the fifth direction, the trustees have power, "if they shall deem it expedient, to advance to any of" the "children who shall have attained the age of twenty-one years, a portion of the share effeiring to them, on the occasion of their entering into business, or at any other time at which it may appear to" the "trustees to be for their benefit." It is a singular feature of this deed, that when the truster had made up his mind, as to what should be the state of his family on his decease, he makes provision for that state of his family, and for no other. He also takes it for granted, that he must leave a widow, just as he seems to take it for granted that he is to leave several children, and some of them in minority.

Such being the general scope and plan of this trust-deed, the next question for our consideration comes to be, whether, according to the true construction of the clause of the deed beginning with the words "in the fourth place," such provision is made regarding the residue of the estate as would prevent it from vesting in the truster's son John at the time John made his settlement. The truster, at the date of the execution of his settlement, had three children, Archibald, John, and William. William predeceased his father. Of the two survivors, Archibald died in minority in the year 1851, and from that time John, who was originally the second son, came to be the only surviving child of the truster; he died in July 1854, at the age of seventeen, leaving the will, in respect of which his mother claims, in this multiplepoinding.

It appears to me that the clause of the trust-disposition, commencing "in the fourth place," is entirely inapplicable to the state of the facts with which we have now to deal. That he did not foresee that the condition of his family might have been other than that for which he provided is incredible, for to suppose that he believed that only the special circumstances he provided for could emerge, is to ascribe to him something too irrational. The case he contemplated was, his leaving several children, some of them in minority; but he could not have banished from his mind the idea, that at his death he might be survived by only one child, or, if several children should survive him, that all his children should have attained majority. These events, as well as that which was provided for, cannot have been considered by him impossible. Suppose, in the first place, that all his children had survived him, and were major, is it possible to say that this clause could apply to a case of that kind? Let us consider for a moment what was the object of the testator in inserting this clause. It was to postpone the division of the residue to some period subsequent to his own decease. But why was the period of division to be postponed? It was to be on the youngest attaining majority, but that was as taking place after the testator's decease. If his children had all reached majority at the time of his death, it is plain that this clause could have had no application. In like manner, supposing him to have been survived by only one child, and that that child was in majority, I think it must be plain that, in that case, the clause could have no operation. For what could have been the object of postponing the vesting, and directing the trustees to hold for behoof of that child only? To this case also the clause is clearly inapplicable. It is conceded that by the youngest child is meant the youngest child at the period of division, and there cannot be a "youngest [737] child" if there is only one. "Youngest" is a word of relative meaning, and the youngest must have that inherent property of greater youthfulness than another at the period of division. Suppose that more than two children were left, and that they were, as was contemplated by the testator, in minority at the time of his death, and that all of them die but one, and at the point of time when he becomes the last survivor he is in majority, who would then be the youngest child? There is no such person: therefore, to that case also, the clause is inapplicable. Suppose there is one survivor, and that he is in minority, how are we to apply the clause then? When the only survivor is a minor, and he attains the age of twenty-one, is that the event referred to by the testator, when he directs the division to take place "upon the youngest of my children attaining the age of twenty-one years?" The sole survivor cannot be the

youngest child at the period of division, and may not be a child who ever was the youngest child. To that case also the clause is inapplicable. I come, in the last place, to the case we have in hand, where the testator has been survived by two children, both in minority, and that one has died while both were still in minority. The youngest attaining majority is then an impossible occurrence. Therefore, I come to the conclusion that this clause, which, at its outset, sets forth a condition that, in the circumstances, can never be purified, is inapplicable.

But when we go on to consider the other expressions of the deed, I think they confirm this impression very strongly, and show that the testator never intended that it should apply to the case we are here dealing with, for he directs his trustees "to divide the residue and remainder of my said estate among, or to dispone and convey the same to my said children, and to any lawful child or children hereafter to be born to me, share and share alike." In that clause the existence of a plurality of children is contemplated, and the testator provides for no other event; he provides that his moveables shall be divided, and that is all he provides concerning the disposal of his moveable estate, and the point of time at which this is to be done is called, in other parts of the deed, the period of division. Then there is also a so-called survivorship clause, which is not properly a survivorship clause, but contemplates something else also; it is in these terms,—"And in the event of the death of any of my children before the youngest shall have attained the said age of twenty-one years, the share which would have belonged to such child or children shall go and belong to his or their lawful children." So far that is not properly a survivorship clause, but a conditional institution of grandchildren, who are to take in the place of children deceasing; but then it goes to direct that, failing the children of deceasers, the estate "shall be divided equally, share and share alike, among the surviving brothers or sisters of such deceaser or deceasers." Here, again, the only words of direction are applicable to division. The clause provides for division only, and for division among many, for a plurality of persons is distinctly expressed. This phraseology becomes more remarkable when it is contrasted with the terms in which the event, to give the grandchildren an interest in the division, is described, for it is said that, in the event of the predecease of "any" of the children before the period of division, the share of such "child or children shall go and belong to his or their lawful children." In the whole clause it is contemplated that the recipients are to be a plurality of children, and not one. I think every word and syllable of this clause contemplates the existence of a plurality of children at the period of division, and that case only. It is clear that it was intended to apply to what the testator considered the most probable event, viz., his leaving several children, some of whom should be in minority, and that during the subsistence of the trust some of them should attain majority.

The clause has been inserted in the deed in order to meet an event which has not occurred. If that clause had been removed by a codicil, how would matters have stood under the directions contained in the clause commencing "in the third place." I think that, under that clause, there would have been a gift of the fee which the law would easily interpret when the family came to take the gift. I can attach no weight to the argument addressed to us, that this is not a gift. I can conceive no stronger character of a gift of residue than that the testator should wish his trustees to hold it for behoof of his children, and to pay out of it such sums as should be neccessary for their maintenance, clothing, education, and upbringing. I am, therefore, of opinion that the fourth clause has no application to **[738]** the case which has occurred, and that the residue vested in John, as sole survivor of the family of the testator, and is carried by his settlement.

This deed differs from any that has been made the subject of judicial discussion. The case that comes nearest to the present is that of Boyle *v.* The Earl of Glasgow's Trustees, 14th May 1858. The question in that case was, whether a fund had so vested in Miss Augusta Fitzclarence as to be conveyed effectually by her settlement, and arose in these circumstances:—By a trust-deed executed by her grandfather, the Earl of Glasgow, he made this provision for her parents and herself. He conveyed property to trustees, to be held by them for payment of the interest to his daughter, Lady Augusta Fitzclarence; and on her death to her husband, Lord Frederick Fitzclarence; and on the death of the survivor of Lady Augusta and Lord Frederick, he directed the fee to be made over to the child or children of the marriage. Miss Fitzclarence, their

only child, survived her father, but predeceased her mother, leaving a will, whereby she bequeathed the fee of the property held by her grandfather's trustees to her uncle, the Hon. Mr. Boyle. The ground of the judgment, holding the settlement ineffectual, seems to have been, that the only words of gift directed the trustees to make over the money to the child or children of the marriage on the death of the surviving parent. There was no clause in the deed making any gift, except to the child or children of the marriage, and except after the death of the last surviving parent. Therefore I think that case is in contrast to the present. Therefore I am for altering the interlocutor reclaimed against; and finding that the residue vested in John Maitland, and was effectually conveyed by his settlement.

LORD COWAN.—The view we take of this case makes it unnecessary that we should consider the additional plea. It would have been needful to do so only, if we had held that there was here a case of intestacy; and in that event I shall merely say, that having regard to the principles recognised in the recent case of Colvin *v.* Lord, it would have been difficult for the respondents to have got rid of this objection to their title as the deceased's next of kin. On this point we are not called on to enter. I concur in thinking that, in his father's trust-deed, there is enough to satisfy us that John Maitland was entitled to dispose of his share of the residue of the estate by the deed he executed in favour of his mother. With regard to the survivorship clause, we must consider the whole deed before we can determine its effect in the question of vesting. The mere existence of such a clause does not necessarily postpone the vesting, when there are in the deed elsewhere terms sufficient to confer a vested right, irrespective of possible survivorship interests, but which, from emerging circumstances, can never come into existence. There is a distinction to be observed among deeds in which such clauses occur. In some, the gift, whether of special legacy or of residue, is conferred nowhere else in the deed, except in the very provision or clause in which is embodied the condition of survivorship. But, in other deeds, there is first a clear gift of legacy or residue, independently altogether of any condition of the kind, but followed by a separate provision of survivorship, so as to secure certain rights and interests given by the deed, and which can be protected only by means of such a provision. I think it is material to keep this distinction in view. By the present deed, the gift of residue is by a clause which is independent of the survivorship clause. The deed falls under the latter of the two classes of deeds to which I have referred. And in such cases I am not aware of the effect of the provision conferring the gift being held to be controlled by the clause of survivorship, unless where its operation is evoked to protect some contingent or expected right or interest conferred by it. Where there exists, and can exist, no such right or interest,—and the survivorship clause has become inoperative and effete as regards the special purpose to save which it was inserted in the deed,—effect will be given to the words of gift, and the party be held entitled to the legacy, special or residue as it may be, as if the gift had been bestowed unqualifiedly. And where the question is between the subsistence of the gift and intestacy, the intention of the granter, unless otherwise clearly indicated, will not be presumed to have been such as to void the gift, where no contingent possible right or interest under the deed requires to be secured.

This case must be decided upon a consideration of the deed presented to us, and we must determine whether the fee is conferred by the deed. It would be an extraordinary result, if we were compelled to say that this was a case of intestacy, **[739]** considering the nature of the deed, and of its provisions. This testator confers an annuity on his widow; and the rest of his estate is disposed of in favour of his children. There is nothing given beyond the members of the testator's own family. The third purpose of the deed is a direction, in the usual terms, by which the fee of a trust-estate is conveyed. It just amounts to this, that a beneficial fee is conferred upon the children. But for the fourth purpose of the deed, the children would have been entitled to the fee, whenever the death of the testator occurred, subject, of course, to the widow's annuity. There is nothing to limit that right, except the provision contained in the fourth purpose of the deed. The question resolves into the effect of that provision. There is no separate interest or right under it requiring to be protected. The claimant is the last surviving son, and, excepting his own issue, no third party exists to claim anything in competition with him. But I view the object and effect of that clause in the same light in which it is regarded by your Lordship. We have no

indication that, by that clause, the testator intended, where there was only one child, that his interest should be tied up till his attainment of majority, for the sake of his issue, in the event of his predeceasing that age. Had this fourth purpose of the deed concluded with the words directing that the division was to be between the children, share and share alike, I would have been inclined to hold that the clause was merely intended to operate the suspension of the period of payment, but not of the vesting. But there follow the words embodying the condition of survivorship. The intention of the granter in inserting this condition must be considered. It plainly was to protect the rights of surviving brothers and sisters, and no more. The declaration as to the deceaser's own issue taking in place of their parent, is just the conditional institution which the law would have effected without any such declaration. The conveyancer has just done *provisione hominis* what would have been done *vi legis*. And, as to the clause generally, it is clear to me that this declaration of the deed was intended to provide for the event of the testator being survived by two or more of his children. He did not contemplate, and did not provide for the case of there being only one survivor. This purpose of the deed, therefore, as the case stands, is inoperative, and cannot restrain the effect of the third purpose, conferring the gift of the residue, and under which the sole survivor of the children became entitled to the trust-estate.

On the whole, I think the sound construction of this deed requires that the interlocutor of the Lord Ordinary should be altered, and the fee held to have vested in John Maitland, so as to entitle him to bequeath the funds to his mother, the claimant Mrs. M'Dermaid.

LORD BENHOLME.—This case is different from any that I have ever heard or read of. The terms of the deed we have to construe have a general resemblance, and at the same time present a contrast with those that have been under the consideration of the Court in previous cases. I do not think there is any case we can say is directly a precedent. Had the fourth purpose of this trust been wanting, there would have been a fee given by the rest of the deed to the children of the testator in the whole residue. It would have been an absolute gift of fee, subject to the ordinary rules. Had the third clause not existed, the operation of the fourth clause standing alone would have given rise to questions of extreme difficulty; and the difficulty, in my view of it, would have been still the greater, because I do not think the fourth clause was intended to apply in all the events that were possible. I think it was intended to apply to the case of a division having to take place among several of the testator's children, but that it had no application where there was to be no division, and where the whole estate was to go to one child. I gather that not only from all the expressions that are contained in the fourth clause itself, but also from the terms in which that clause is referred to in the preceding clause. And I arrive at that conclusion with satisfaction, when I find that it is in accordance with the views of both your Lordships. I go even this length, that had John Maitland, who died in minority, and left a testament, also left children, there is no provision in the fourth clause under which his children could have successfully competed with the legatee under his settlement. I think the decision in this case would require to be given as if this fourth clause was expunged from the will, it being, in truth, inapplicable to the circumstances of the case. Much of the argument adduced to us was founded on the effect sought to be given to the sur- **[740]** -vivorship clause. Such clauses are of two kinds. One class, in which the benefit is conferred on the longest liver of two or more persons: In these cases there can never be intestacy; the longest liver must always take. The clause is used with the view of conferring the whole benefit on the longest liver. There is another class, in which a peculiar event is referred to, as that which is to be survived. In such cases, there may be intestacy, where none of the persons survive the event. But as to such intestacy many nice questions have arisen; and I specially notice the case of Newton *v.* Thomson (reported 11 Dunlop, p. 452). There is always a leaning on the part of the Court to favour a last survivor, although the event contemplated may not have arrived, and to hold, in favour of such sole survivor, that vesting will take place; for there is then no longer any interest to protect by delaying the vesting. In the present case, it is clear that the interest of the last survivor was all that was intended to be protected.

LORD WOOD was absent.

The Court pronounced this interlocutor:—"Alter the interlocutor reclaimed against: Find that the residue of the estate of the testator William Maitland vested in the now deceased John Maitand, as sole surviving child of the testator, and was effectually conveyed, so far as moveable, by his testament: Remit to the Lord Ordinary to proceed further as shall be just and consistent with the above finding."—The reclaimer was found entitled to expenses since the date of the interlocutor reclaimed against.

[Cf. *Rogerson's Trs.* v. *Rogersons*, 3 M. 689, 694; *Smith* v. *Wighton's Trs.*, 1 R. 365; *Duncan's Trs.*, 4 R. 1097; *Purves' Exr.* v. *Purves*, 25 R. 1088; *Begg's Trs.* v. *Reid*, 1 F. 501.]

No. 116. **XXIII. Dunlop 740.** 15 Mar. 1861. 2nd Div.—Lord Jerviswoode.

ROBERT BLAIR MACONOCHIE (GRAHAM'S *Curator Bonis*), Petitioner.—*Ross.*

Curator Bonis—Special Powers.—Application by the *curator bonis* of a person of unsound mind, proprietor of an heritable estate, for authority to borrow on the security of the estate a sum of money for the purchase of a commission and outfit in the Scots Fusilier Guards for the only son of the proprietor,—*granted*, on condition of the son granting bond to indemnify his sister (the only daughter of the lunatic, and who had right to a provision out of the estate), against any loss which she might sustain through the arrangement.

Mr. Maconochie was appointed in 1851 *curator bonis* to William Graham, Esquire, the proprietor of heritable estates yielding a rental of about L.2800 per annum, and who had recently become insane. He now presented a note to the Lord Ordinary, setting forth that Mr. Graham had been married in 1839; and previous to his marriage had entered into an antenuptial contract, whereby he conveyed his estates "to and in favour of himself and the son or sons to be procreated, successively in order, according to their seniorities, and the heirs whatsoever of their bodies respectively;" whom failing, to his sons of any subsequent marriage, and their heirs whatsoever; whom failing, to the daughter or daughters to be procreated of the then contemplated marriage, excluding heirs-portioners. Two children had been born of the marriage—a son and a daughter; the latter was now of the age of twenty-one, and the former attained his twentieth year in November last. He had completed his education, and having chosen the army for his profession, he had passed the examination required, preparatory to entering that service. With the advice of his friends, the necessary application had also been made for procuring him a commission in the Scots Fusilier Guards, and they had good reason to expect that he would be preferred to the first vacancy. The sum required for his commission was stated to be L.1200, and L.300 for outfit—together L.1500. For payment of this sum from his father's estate, whenever his appointment should take place, an application had been made on the son's behalf to the curator. It had been stated to the curator that Mr. Graham, when in a sound state of mind, intended that his son should enter the Guards, and that with this object in **[741]** view, the young gentleman's education and training had been of such a character as to qualify him for the military profession, which he preferred to any other. The curator stated that he was willing that the Court should authorise a commission to be purchased, and an advance for outfit to be made in the way proposed; but that, at the same time, it was his duty to mention that the funds necessary for the purpose exceeded very much the amount in his hands, and, accordingly, if the expenditure for a commission and outfit were authorised, that authority must be accompanied with power to the curator to borrow the amount, and burden the estate therewith. It was also stated that it was mainly to the savings from the estate that the daughter had to look for payment of the provision settled on her as a younger child by her father and mother's contract of marriage, and that her interests must therefore be considered in judging of the propriety and necessity of the expenditure proposed on behalf of her brother. The note concluded with a prayer for authority to borrow the sum of L.1500, to pay for the price of the commission and outfit for the ward's son, and to grant a bond and disposition in security therefor over the lands and estate under the curator's manage-

ment; and upon receiving the amount, to pay over the same to the son of the ward, to be applied to the said purpose; further, for authority from the date of the commission, to increase his allowance from the sum of L.250, at present payable, to the sum of L.300 per annum, to enable him to maintain a proper position in the Guards, and to grant warrant upon the curator for payment of the same out of the rents of the estate or other funds in his hands.

The following report by the Accountant of Court was lodged along with the note:—

"Since the curator's appointment he has been paying off debt, of which there remains L.2050. He has of cash in bank L.700, and the annual surplus over the expenditure is about L.600.

"But this surplus of L.600 per annum is after paying for the ward about L.400 per annum; for his wife and her two children, about from L.800 to L.850 per annum; and premium of life-assurance, L.41; and all these being terminable, the available return to the proprietor from the estate is about L.1030, without noticing the present extra expense of management.

"It is stated that the ward expressed a wish that his son should enter the Guards when he became old enough.

"The annual cost of the young gentleman's education is at present about L.250 per annum, and L.50 more is all that it is proposed to allow him for his maintenance in the Guards. But meantime, and on the other hand, provision suitable for the daughter is dependent on the present accumulation from the estate.

"Whether or not the Court should allow an advance of L.1500, and also an annual allowance of L.300 per annum to the son from the estate of his father, to enable him to maintain a proper position in the Fusilier Guards, the Accountant feels is not a question on which he is entitled to offer an opinion. It occurs to him, however, that if that be done, the interest of the daughter would, in justice, require at the same time to be carefully protected. But, in so far as the ability of the estate is concerned, the powers craved by the curator may be granted."

The Lord Ordinary reported the case, and stated that the daughter of the lunatic had given her consent to the petition.

The petitioner, in support of the petition, referred to Howe, 12th Feb. 1859, *ante*, vol. xxi. p. 486; and Hamilton, 23d May 1860, *ante*, vol. xxii. p. 1095.

The opinion of the Court was delivered by

Lord Wood.—The application now to be disposed of is presented to the Court by Mr. Maconochie, as *curator bonis* of a gentleman who became insane in 1850. The lunatic was married in 1839, and, by antenuptial contract of marriage, pro- **[742]** -vided and secured, and under certain conditions and declarations, conveyed and disponed his estate to and in favour of himself, and the son or sons of the marriage successively in order, and the heirs whatsoever of their bodies, whom failing, to his sons by any subsequent marriage, and so on.

His wife, between whom and her husband a contract of separation was entered into in 1842, is still alive, and there are two children of the marriage, a son and daughter. The latter, the elder of the two, is now twenty-one years of age; the former attained his twentieth year in November last.

The party's wife has an allowance from the estate, and she has also had an allowance of L.250 a-year for each of the children for their maintenance and education.

The son now wishes to enter the army, and it is proposed to purchase for him a commission in the Scots Fusilier Guards; and the curator states that he has been informed that it was his father's intention, when in a sound state of mind, that his son should enter the Guards, and that the young gentleman's education has been conducted with a view to carry out that intention. But it is represented, first, that, in order to do so it is necessary that a sum of L.1500, the price of a commission and outfit, should be borrowed upon the estate, the curator not having funds in his hands which can be applied to that purpose; and, secondly, that it is also necessary that, from the date of his appointment, the son's present allowance of L.250 from the estate should be increased to L.300, as being required to enable him to maintain a proper position in the Guards. The object of the curator's note is to obtain the authority of the Court to borrow L.1500 on the security of the estate, and to pay the increased annual allowance to the son from the date of his appointment.

Looking to the position in which things are placed by the ward's unfortunate condition, and to the explanations given by the curator of the situation of the estate—its rental and burdens—it occurs to me that, although the point may be attended with some delicacy, there is no difficulty attending it which ought to prevent the Court granting the prayer of the note, if it were not for the effect it might have upon the interests of the daughter. The debt affecting the estate has been paid off to a considerable amount; there is a free rental of L.604, 0s. 11d., after providing for the same necessary expenditure on account of the ward as formerly, the allowances to his wife, son, and daughter, and L.41 of a premium of life insurance for L.1000 on the ward's life,—all terminable burdens; and the interest on the debts, exclusive, however, of a preferable additional claim to the amount of L.11,000, but for which it is mentioned that the ultimate liability is expected to fall on another party, who is mentioned. These explanations by the curator are confirmed by the Accountant of the Court, before whom the state of the affairs under the curator's management had been laid, in compliance with the 7th section of the Pupils' Protection Act, and who, accordingly, reports "that, in so far as the ability of the estate is concerned, the powers of the curator by the Court may be granted."

But then how does the matter stand, when the position and interests of the daughter are kept in view? It is true that she is a consenter to the application by the curator. But, although that is so, I concur—and I presume your Lordships will also concur—in the observation of the Accountant, that if the arrangement proposed by the curator is to be sanctioned, "the interest of the daughter would in justice require to be at the same time carefully protected."

Now, the interest of the daughter arises in this way—that the provision settled upon her as a younger child, by her father and mother's contract of marriage, may possibly be entirely dependent for its payment on her father's personal obligation. She may have no claim upon the estate of Airth and others, as settled on the sons by the contract of marriage, or upon the person succeeding to that estate, in respect of his having done so. She may, consequently, have nothing to look to for her provision except the moveable or personal estate of her father, which at present mainly consists of an insurance on his life for L.1000, upon which the curator pays the premiums, and the household furniture, &c., at the mansion-house. In this state of matters, the payment of her provision may eventually come to depend entirely upon the amount of the personal estate, as it shall stand at her father's death, by the savings and accumulations from the surplus rents, during his life, of his heritable property. It is, therefore, evident that every encroachment made upon these rents—every sum of annual burden to which authority is given to sub-
[743] -ject them—may, to that extent, affect or diminish the fund which would be forthcoming to meet the provision for her. Now, the result of granting the curator's application would be to withdraw annually, in addition to the existing payments from the rents, L.50, the proposed increased amount of allowance to be given to the son, and the interest of the L.1500 to be borrowed on the security of the estate, and, to that extent, while it lasted, to affect prejudicially the daughter's interests by lessening the sum which she might otherwise be entitled to as her provision. This, to her possibly prejudicial result, I think the Court ought, as far as it can, to protect her against. And, in order to do so, I would propose that, while, on the one hand, the prayer of the note is granted, it should be granted upon the condition of a bond being given by the son, binding himself to pay or make up to his sister, to the extent of the sum of L.50 per annum, and the annual interest of L.1500 while the same continues to be paid, all loss which it shall eventually be ascertained has arisen to her by the payment of these sums to him or on his account.

I am of opinion that, in the whole circumstances of the case, the Court, by following this course, will do that which is most desirable—I may almost say necessary—for the interests of the son, and will, at the same time, pay due regard to the interests of his sister, which it is their special duty to protect.

The Court, on 22d February 1861, pronounced the following interlocutor:—"The Lords, upon report of Lord Jerviswoode, grant warrant and authority to the *curator bonis* to borrow, on the security of the estate, L.1500, to pay for the commission and outfit of the ward's son, Thomas Philip Graham, as prayed for; and further authorise

the curator to increase the amount of allowance of the said Thomas Philip Graham from L.250 to L.300, but on condition that the said Thomas Philip Graham and his curator *ad litem* shall grant bond to indemnify his sister against any loss which she may sustain through the present arrangement, and before farther answer, appoints draft of such bond to be lodged."

And the draft bond being lodged, the Court remitted to James Robertson, Esq., W.S., to examine it; and he having reported that the bond was correctly framed,

The Court pronounced the following interlocutor:—"Approve of the revised draft bond, and appoint the same to be executed and recorded; and on the same being done to the satisfaction of the reporter, remit to the Lord Ordinary on the Bills in vacation to grant the prayer of the note."

No. 117. **XXIII. Dunlop 743.** 16 Mar. 1861. 1st Div.—Lord Ardmillan.

ANDREW MILLAR, Pursuer.—*Millar.*

Mrs. JEAN MACADAM CATHCART and HUSBAND, Defenders.—*M. Napier—Gifford.*

Property—Process—Title to sue by pro indiviso Proprietor.—Held (*aff.* judgment of Lord Ardmillan) that one *pro indiviso* proprietor has no title to sue a declarator of marches against the proprietor of lands adjoining the common property.

Andrew Millar, farmer in the parish of New Cumnock, Ayrshire, brought this action against Mrs. Cathcart of Craigengillan and husband, to have it declared that the march or boundary between the lands of Nether Barbeth, belonging to the pursuer, and the lands of Dalcarney, belonging to the defenders, at and through the Bogton Loch and meadow, is the old course of the Dalcarney Burn, as it formerly flowed through the Bogton Meadow, which is now partly covered with water, and called Bogton Loch, to the point where the said Dalcarney Burn, when running in its old course, [744] joined the river Doon, near to what is now called the Isle; and for having the boundaries marked off and defined.

It appeared that the late Mrs. Millar and Mrs. Ramsay succeeded to the lands of Nether Barbeth, as heirs-portioners to their mother. It was alleged by the pursuer, but denied by the defenders, that in 1818 the heirs-portioners divided the lands, by deed of agreement, "and each of them thenceforward, and their respective successors since their decease, have possessed the half which came to her and them by this division."

Admittedly, Mrs. Millar had executed a disposition and settlement on 1st October 1842, whereby she disponed, in favour of the pursuer, her son, "all and whole my just and equal half of all and whole the thirty-three shilling and fourpenny land of Nether Barbeth." The pursuer now claimed to be proprietor of one half of these lands, by virtue of that disposition, and "the titles in favour of him and his predecessors and authors," "and also conform to the prescriptive possession which has followed thereupon." It also appeared that the defender, Colonel Macadam Cathcart, was tenant of the subjects for many years; and in the tack by Mrs. Janet Baird or Millar to him, which is dated 12th and 15th July 1830, reference was made to the division of the lands of Nether Barbeth between her and her sister, Mrs. Ramsay, and to the deed of agreement by which that was accomplished. It was averred that, after a flood "a great many years ago," the Dalcarney Burn, which was the march between the two properties, had changed its course,—that the old course was nevertheless regarded as the march, but that recently the new course was the march.

The defenders averred, on the other hand, that the entire loch and *solum* thereof formed part and pertinent of their lands, although the lands of Dalcarney adjoined it, and that at the point mentioned in the summons the Dalcarney Burn never had been the march—it had from time immemorial flowed in its present channel. It was also averred that the lands of Nether Barbeth had never been divided so as to give the

pursuer exclusive right to that portion of them to which the present action has reference. "No infeftment has been produced by the pursuer. The pursuer has only a personal right to a *pro indiviso* share of the lands of Nether Barbeth, and the other *pro indiviso* proprietors are not parties to the present action."

They pleaded, *inter alia*;—"1. In the circumstances set forth, the pursuer has no title to sue or maintain the conclusions of the summons."

On 6th June 1860 the Lord Ordinary pronounced the following interlocutor:—"Sustains the first plea in law stated by the defenders, and, in respect thereof, dismisses this action, and decerns: Finds the pursuer liable to the defenders in expenses," &c.[1]

[745] The pursuer reclaimed. At advising,—

LORD PRESIDENT.—I do not mean to express any opinion upon the effect of what has taken place under the alleged proceedings, for the purpose of dividing the estate, in 1818. But I do not think that the pursuer has a good title to sue this action; and although the Lord Ordinary has alluded to the case of Johnston, as one in which action by a heritable proprietor, containing conclusions for removing, may be sued by one of several proprietors, it does not touch this case in the least. That case was peculiar. It was a case in which the Lord Ordinary had rejected the title to sue; but it was not a case containing conclusions for removing, in the ordinary sense of that term. It was an action for having certain erections made on the territory removed; not to remove a tenant from possession of the lands. The tenant was making encroachments on the territory; and I do not say that a *pro indiviso* proprietor may not defend the territory from encroachment. That was the point that was there raised. Then, again, that tenant was in the peculiar position that he had derived all his rights from the party pursuing that action to remove the erection; and then, again, the other *pro indiviso* proprietor was furth of the country, and had not been heard of for years. Further still, the other *pro indiviso* proprietor, so absent, was cited as a defender in the action, so that it was quite out of the ordinary rule of law, that a *pro indiviso* proprietor cannot pursue a removing of a tenant. I think that the Lord Ordinary, in

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[1] "NOTE.—This is an action of declarator of property, with conclusions for declaring marches. The pursuer is seeking to enlarge the area of the property, of which he appears to be, according to the titles produced, one of two *pro indiviso* proprietors. There is no title in this process in respect of which the pursuer has any right other than a *pro indiviso* right to the property. As an owner of one-half *pro indiviso* he now stands, and as such he must sue. Whether he may or may not have materials for compelling a division it is not necessary here to inquire. The defenders are not bound to meet him on that question. Usurpation or encroachment by the defenders on the pursuer's property or possession is not alleged, and, more especially, recent encroachment is not averred.

"The action has not originated in any alleged act of the defenders, to meet which a declarator to fix the marches and define the extent of the property in which the pursuer is interested can be supposed to be necessary. The pursuer is *in petitorio*, not contending *de damnum vitando*. It is thought that the defenders cannot be called on to contend for the boundary of their estate in such an action as this, first with one *pro indiviso* proprietor of neighbouring lands, and then with another.

"After the decision in the case of Johnston *v.* Crawfurd of Cartsburn, 3d July 1855, the Lord Ordinary must acknowledge that some actions regarding heritable property, even though containing conclusions for removing, may be pursued by one of several *pro indiviso* proprietors. In that case the title was sustained.

"But the nature of the action as set forth must be considered in each case. The rule laid down by Erskine, and recognised in several decisions, has not been disclaimed, though, in the particular circumstances of the case of Johnston, that action was allowed to proceed. (Erskine, 2, 6, 53; Murdoch *v.* Inglis, 23d July 1679, 3 Brown's Sup., 297; Bruce *v.* Hunter and Leith, 16th November 1808, F.C.)

"The Lord Ordinary is of opinion that, in the present case, the pursuer is on the titles a *pro indiviso* proprietor, and that as such, and having regard to the nature of the action and of the averments made by him on record, he is not entitled to maintain the conclusions of the action against the defenders."

using that term, has not adverted sufficiently to the use of that term in the discussion of that case; and I do not think that that case in the least trenches on the ordinary rule of law, or gives any support to the case of the present pursuer; and I am afraid that there is no alternative here but to adhere to the interlocutor of the Lord Ordinary. This case is peculiar in this respect, that the defenders here, or at least one of them, appears to have had a transaction with this party, and recognised his possession; and it is very sharp to turn round and maintain this plea against him now. At the same time, when it comes to be in the matter of the interest of the estate, we cannot deny effect to the plea when it is stated.

LORD IVORY.—I concur in the conclusion, but I do so very reluctantly. There is a distinction to be taken in all this class of actions between a party who is in possession on a *talis qualis* title, and a party who is entered in the subject. I do not understand that, if anybody comes from the street and intrudes on a subject, of which I am one of the *pro indiviso* proprietors, I cannot defend the subject against such an usurper. If he be tenant, or have any other title under which he is possessor—if he has a possessory judgment, or is in possession on a title which he is prepared to defend, a *pro indiviso* proprietor has no title to deal with it, because it would make him run the gauntlet of all these other proprietors. And there is a good deal here in the view that this person is an intruder. But, on the whole, I am rather constrained to come to the conclusion that calling on him to straight marches is calling on him to do something which is recognising his title, and if it be so, then I think that a *pro indiviso* proprietor does not fulfil the whole measure of the instance, which is necessary in order to properly discuss what is the boundary. This is not truly a case of intrusion. I come to this conclusion unwillingly, looking to the circumstances in which this defender is here possessing.

[746] LORD CURRIEHILL.—This is an action brought for the purpose of having the marches of property settled. I think that the party pursuing such an action must be the owner of the property, and, indeed, the exclusive owner of it; for this reason, that the decree would not be *res judicata* against any other party to whom it might in part belong. The pursuer alleges he is exclusive proprietor; but, according to the title, he is only *pro indiviso* proprietor. It is said that the title may be supported by proof of *rei interventus*. But the party with whom that question must be tried is that other *pro indiviso* proprietor himself, and no judgment pronounced in this action would be binding against him. It is on that ground that I am constrained to concur in the result at which your Lordship has arrived.

LORD DEAS.—I am of the same opinion. This is not an action for straighting marches, but an action to have it found and declared that the ancient and true line of boundary between the lands of the respective parties is different from the line recently observed by the defenders,—the consequence of which is said to be that a portion of what is possessed as the lands of Dalcarney falls to be held part and portion of the lands of Nether Barbeth. It is conceded that the Dalcarney Burn forms the boundary between the properties, but it is said that the present course of that burn is different from the old course, and that the old course ran through Bogton Meadow or Bogton Loch, in a line different from its present line. Bogton Loch is stated to be about three-quarters of a mile long, and a quarter of a mile broad. How much land is in dispute between the parties we do not know. It seems to be of considerable extent, and the action is undoubtedly an action of declarator of property. The question is, can such an action be pursued by one of two *pro indiviso* proprietors without the concurrence of the other? I quite agree that it cannot. The only way in which it was attempted to support the title was by saying that there had been a division of the property into two halves, and that the pursuer had been in possession since 1848 of his own half. I do not wish to say what would have been the effect, in an action of this kind, of a division by a writing, although informal, which had been possessed upon ever since if the case had stood there. It might be that the document produced would have been entitled (on being stamped) to receive a certain effect in the meantime, had the possession, since its date, been distinctly and exclusively attributable to that document. But the thing that appears to me conclusive against the title of the pursuer is, that he is not in possession upon that document, but upon a disposition and deed of settlement made by his mother in 1842. I presume, however, that she died at a much more recent date, for the deed was not recorded till 1st October

1858. But, be that as it may, the title on which he possesses, and on which he comes here, is this disposition and settlement, which conveys to him, not a divided half, but a *pro indiviso* half of the estate, in precisely the same terms which had been used in the previous titles, the terms of which I have looked into. I think, therefore, it is impossible to say that he comes here in any other character than that of a *pro indiviso* proprietor suing an action of declarator in reference to the *pro indiviso* property. The general rule undoubtedly applies to an action of that kind,—that one *pro indiviso* proprietor cannot pursue without the concurrence of the other or others. The case referred to by the Lord Ordinary does not trench on that rule in the least degree. There were various things to be inquired into in that case connected with the title, and all that the Court did was to refuse to throw the case out of Court until these things were inquired into. The case was quite special, and does not affect this in the least. The course which this party ought to have adopted was to have obtained a disposition to the *pro indiviso* half. He is perfectly entitled to compel a formal division, and therefore there is no permanent difficulty in his position. I would recommend him not only to get a disposition, but before he comes back again, to take infeftment upon it; and so not to raise the question, whether, in order to entitle him to raise a declarator of property, infeftment is necessary. He has all this in his own hands; but, at all events, it is the usual course to sustain the objection to his title as it stands.

The Court adhered to the interlocutor reclaimed against, with additional expenses.

[Cf. *Laird* v. *Reid*, 9 M. 701.]

No. 119. XXIII. Dunlop 755. 16 Mar. 1861. 1st Div.—Lord Kinloch.

EDWARD HAINING, Pursuer.—*F. W. Clark.*

The COMMISSIONERS of POLICE for DUMFRIES, and WILLIAM LOCKERBIE, Defenders.—*Sol.-Gen. Maitland—Pyper.*

Process—Title to Sue—Statute 3 *&* 4 *Will. IV., cap.* 46, *sect.* 36.—Commissioners of police entered into a contract with one of their number for furnishing clothing to the police force,—he having lodged estimates along with other tradesmen in answer to an advertisement by the commissioners. One of the competing tradesmen brought an action of reduction of the contract, with conclusions for damages;—*Held* (*aff.* judgment of Lord Kinloch) that he had a good title to sue for damages, but the question of his title to sue the reduction reserved till the merits came to be disposed of.

Edward Haining, tailor and clothier, Dumfries, brought this action against the Commissioners of Police for the burgh of Dumfries, and William Lockerbie, tailor and clothier there, as an individual, concluding for reduction of, "first, An estimate dated on or about the day of March 1860, prepared and lodged by the defender William Lockerbie, with William Martin, writer in Dumfries, and clerk to the other defenders, whereby the defender offered to furnish clothing to the police force of that burgh on the terms therein specified; and second, A pretended minute of contract made and entered into between the said commissioners and the said William Lockerbie, dated on or about the 13th day of March 1860, whereby the said William Lockerbie, as an individual, agreed and became bound to furnish, on certain conditions, the usual number of suits of clothing and top or overcoats, for the Dumfries burgh police force, for the current year, or of whatever other dates, tenor, or contents the same may be."

There was also a conclusion for L.50 of damages.

The pursuer averred that Lockerbie had been, since November 1859, a commissioner of police of the burgh of Dumfries, that in March 1860, an advertisement was issued for estimates for clothing the burgh police force, in consequence of which, he (the pursuer) had gone to the trouble of preparing an estimate, which he lodged in terms of the advertisement. "William Lockerbie, while he was acting as a commissioner of

police as aforesaid, and on or about the day of said month of March 1860, illegally, and in violation of the provisions of said statute 3 & 4, Will. IV., cap. 46, section 36,[1] lodged an estimate for said contract, and the said estimate was illegally received by the said commissioners, or at least by their clerk. On or about the 13th of said month of March, a committee of said commissioners met for the purpose of opening the estimates lodged with their clerk, and, after considering the same, they, in contravention of said statute, declared their acceptance of the estimate lodged by the defender, William Lockerbie; and, accordingly, by a pretended minute or contract, which was written in one of the books of said commissioners, dated on or about the 13th day of said month, illegally preferred him to the contract. Thereafter, and on the same date, the said minute or contract was subscribed by the said William Lockerbie, by which he agreed, in terms of his estimate, on certain condi- [756] -tions, to supply said clothing. At that time the defender, Lockerbie, was a commissioner of police. Through these illegal acts and proceedings, the pursuer alleged he was deprived of said contract, or at least of the chance of obtaining it, and he has thereby sustained considerable loss and damage, for which the defenders are bound to indemnify him."

The defenders admitted the contract with Lockerbie, and that he had been paid, but explained "the estimates consisted of sealed parcels containing samples of cloth, with prices affixed, and a sealed tender, in which was the competitor's name." "The sample alleged to have been lodged by the pursuer not having been approved, the Commissioners of Police had no means of knowing, and did not know that he had made a tender when Lockerbie's sample was preferred."

They pleaded that the pursuer had no legal title or interest to maintain the conclusions libelled for reduction and damages, or either of them.

On 13th February 1861 the Lord Ordinary "Sustains the objection to the pursuer's title, dismisses the action, and decerns: Finds the pursuer liable to the defenders in the expenses of process," &c.[2]

The pursuer reclaimed, and pleaded;—That the cases referred to by the Lord Ordinary did not apply. The pursuer not merely sued as one of the public, but concluded for pecuniary damages; and if he had no title to sue, it would be impossible to bring the magistracy to account for malversation of office. Therefore there was here a good instance, both *ad vindictum publicum*, and also for personal damage.

Replied.—There was no ground for presuming intentional malversation. The transaction was admittedly irregular, and the contract in such circumstances was worthless, but it was not declared by the statute to be null. There might be a penalty attached, but there was no nullity. The damage concluded for was merely the damage arising from the chance that the pursuer's offer would be accepted.[3]

After avizandum,—

Lord Ivory.—The Court is of opinion that the Lord Ordinary has gone a little too

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[1] By section 36 it is enacted, "That none of the commissioners, for the purposes of this Act, shall directly or indirectly derive any emolument or profit, for any business or work of any description, performed or to be performed by them, under this Act. Nor shall any commissioner be capable of acting as such during the time he shall enjoy any office of profit to be created or established by virtue of this Act, or while he has any share or interest in any contract relating to the execution thereof; nor shall any such commissioner be capable of standing as a candidate for any such office, or be a competitor for any such contracts, save and except contracts entered into with any chartered or joint-stock company, of which such commissioner may be a partner."

[2] "Note.—It appears to the Lord Ordinary, that by whomsoever the present question may be raised, or whatever may be its merits when raised, the pursuer, as merely one of the rate-paying public of Dumfries, has no title to sue. Ewing *v.* Glasgow Commissioners of Police, 19th January 1839, Shaw 15, 389, H. of L. Robertson & M'Lean, 847; Morrison *v.* Glasgow Commissioners of Police, 13th June 1837, Shaw 15, 1128, H. of L. Robertson and M'Lean, 868.

"The fact of the pursuer being a rival tailor, who sent samples of cloth to the Commissioners of Police to look at, will not vest him with a title and interest not otherwise possessed."

[3] Ramsay *v.* University of St. Andrews, June 23, 1860, *ante*, vol. xxii. p. 1328.

fast. The case stands in a peculiar position. It is not a simple process of reduction, as in an ordinary action, but a process of reduction combined with an ordinary action. In the reduction there are two sets of defences which the party defender is entitled to give in, if he means to object to title, or to state any other objection against satisfying the production. He should have stated a defence confined to these points, and that is given in *in initio litis*. The Lord Ordinary has sustained the objection to title, both in the claim for damage and in the reduction. Now, as to the first part, it is difficult to say why he should do so. It is the allegation that damage has been sustained that gives the pursuer an interest to sue, and there is no possibility, at this stage, at which no defence is given in by the defenders, to say that there is no title for claiming damages. It may be apparent that there is no real claim for damage when you come to the merits; but as to the title of every man to sue, if he thinks he has sustained damage, there can be no doubt. Therefore the action should not have been dismissed *quoad* that part of it, and if so, it comes to be a question whether it should have been dismissed as regards the reduction, for the claim of damage may be connected with **[757]** the reduction in such a way that certain documents must be cleared away before you can get at the damage. But you cannot see how that will stand till you get to the merits. In short, with regard to the action as a claim for damage, the title is clear, and ought to have been sustained.

With regard to the reduction it is not clear that there is any title; and till you see what are all the merits of the case in point of fact, and defences are put in, you cannot very well see whether the reduction was not a reduction which this party was not entitled to bring, and therefore it appears to me that the fair course to follow is to recal the interlocutor, and remit to the Lord Ordinary to allow the production to be satisfied, to receive defences on the whole case, and to allow a record to be made up, reserving all objections to title when the case comes to be heard on the merits, and likewise reserving all questions of expenses. There is one thing that I would call the attention of the pursuer to, which he will understand if he looks to the case of Ross *v.* Heriot's Hospital, 19th March 1846, 5 Bell's App. p. 37. This is an action against trustees. Now, the pursuer may have a claim of damages against the wrongdoers, but an action against the estate which is under the management of these wrongdoers has been negatived, both by Duncan and Findlater, as well as this case of Heriot's Hospital. The action may therefore fail on its merits.

The Court pronounced the following interlocutor:—"Recal the interlocutor of the Lord Ordinary submitted to review, and remit to his Lordship to allow the production to be satisfied, to receive defences on the whole merits, and to allow a record to be made up, reserving all objections to the pursuer's title till the same comes to be heard on the merits, and meanwhile likewise reserve all questions of expenses."

No. 120. **XXIII. Dunlop 757.** 19 Mar. 1861. 1st Div.

ROBERT MUIRHEAD, Pursuer.—*A. R. Clark—D. M. Smith.*

Mrs. RACHEL WOOD or MUIRHEAD, Defender.—*Fraser—M'Ewan.*

Expenses—Process.—This was an action of divorce at the instance of a husband against his wife, in which the husband was successful before the Lord Ordinary. After a reclaiming note was lodged, but before it was heard, she changed her agent. The agent originally employed by the wife refused to supply the new agent with copies of the printed record and proof, except on payment of the expense of printing. The new agent, before the hearing, applied to the Court to grant interim decree for a sum to enable him to comply with this demand, and for additional funds to cover the future expenses of the reclaiming note. At the hearing of this motion the pursuer offered to supply copies of the printed papers, and the Court pronounced an order on the husband for L.10 toward the defender's expenses. The case was heard, and the decree of the Lord Ordinary was adhered to. A few days thereafter the case was enrolled at the instance of the wife, for the purpose of obtaining decree for L.6, 6s. of additional expense incurred, over and above the L.10 which had been

paid to her in terms of the above order. The pursuer founded on section 2d of the Judicature Act, and contended that, as the merits had been disposed of, the question of these expenses could not be entertained by the Court. It was held that the case was exhausted by the interlocutor disposing of the merits, and therefore no farther order could be pronounced.

The LORD PRESIDENT remarked,—I do not hold this to be the expense of process at all. The case is out of Court; but the defender's agent has still his action.

No. 121. XXIII. Dunlop 758. 19 Mar. 1861. 2nd Div.—Lord Kinloch.

ALEXANDER JOHNSTON, Pursuer.—*Patton—Shand.*

GEORGE SMITH & PATRICK STRACHAN, Defenders.—*Sol.-Gen. Maitland—Millar.*

Jurisdiction—Origin—Contract—Delict.—A company established in Scotland for carrying on business in America, employed a Scotchman to proceed to America and manage the business, under the orders of a committee of management of the shareholders, his proceedings to be reported to the committee of management, and the profits of the business to be remitted to the cashiers in Scotland. The business of the company was unsuccessful. A shareholder raised an action of damages in the Court of Session against the manager, who had returned to Britain, and had resided during a summer in Scotland. The summons was, after his departure, served at the house the defender had occupied as summer quarters. He had no funds in Scotland. The pursuer averred that by misrepresentations made by the defender as to the flourishing state of the company affairs, he had been induced to buy stock; and, by the fraudulent acts of the defender in America, the company's funds had been lost. *Held* that the damage claimed arose, not *ex contractu*, but *ex delicto;* that the delict averred was committed in America, that the defender was not subject to the jurisdiction of the Scotch Courts, and the action dismissed.

The Illinois Investment Company was a society or copartnership established in Aberdeen in the year 1837,—the members of the copartnery being principally resident in the north of Scotland. The contract of copartnery, subscribed on 7th March 1837, set forth that the proper object and business of the company should be the purchasing of lands and other property, real and personal, and the granting loans thereon, or on any sort of approved security in the United States of America, particularly in the State of Illinois, and other Western States, and drawing the rents, interest, and profits thereof, and dividing the same among the partners. The capital stock of the company was fixed at L.40,000, to be divided into L.20 shares, with power to the committee of management to increase it to L.100,000. The endurance of the copartnery was declared to be for ten years from 1st March 1837, but with power to prorogate the contract, if deemed advisable by the majority in value of the shareholders at the annual meeting to be held eight years after the commencement of the contract. On the affairs of the company being wound up, the assets to be realised and divided among the shareholders. It was agreed that Messrs. Adam and Anderson, advocates in Aberdeen, should be the cashiers and agents of the company in Britain, and that Patrick Strachan, farmer in Mains of Laithers, should be manager, and William Donaldson Scott, accountant to the Aberdeen Fire and Life Assurance Company, should be accountant of the company in America.

On 8th March 1837 an agreement was subscribed at Aberdeen by Mr. Strachan and Messrs. Adam and Anderson, on behalf of the company, by which, on the narrative that Messrs. Adam and Anderson had been appointed agents and cashiers of the company in Great Britain, and Strachan had been appointed manager in America, and was about to proceed to that country, he, on the one part, bound himself to perform the duties of the office of manager of the company, to obey the instructions sent to him by the committee of management of the company or their cashiers in Britain, and well and truly account for the funds, &c., to the cashiers and agents of the company in Britain, keep

correct accounts, and pay over and transmit to them the whole profits derived from the business of the company; and, on the other part, Messrs. Adam and Anderson, on behalf of the company, agreed to pay Mr. Strachan a certain salary for the period of five years, and, unless he intimated an intention to resign the office at the end of that period, during the remaining five years of the existence of the company. The deed contained a clause consenting to registration in the books of Council and Session.

Mr. Strachan and Mr. Scott went to America, accompanied by George Smith, who had subscribed for a considerable number of shares, and was [759] appointed a director. They arrived at Chicago on 29th April 1837, and commenced business there on 2d May. For some years the reports sent to the shareholders from America of the business done were of a very flattering description, and large dividends were paid to the shareholders. The company were induced to increase their capital, and, by doing so, were able, between 1837 and 1841, to send about L.90,000 in all to America for investment. After the first increase of the capital, the stock was converted into L.1 shares. After a time the affairs of the company were reported not to be so prosperous as before; and the remittances to the cashiers in Britain, and the dividends paid to the shareholders, were reduced. Mr. Alexander Johnston, a shareholder, went to America in 1844, in order to examine into the affairs of the company. A special general meeting of the company was held at Aberdeen on 18th March 1845, after Mr. Johnston had reported on the state of the company's affairs; and it was resolved that the business should be given up, and the company dissolved as from 30th April 1845.

The greater part of the assets were realised and divided; the dividend on each L.1 share was about 7s. 8¼d. A final dividend of 11½d. per share was paid to some shareholders, who agreed to grant a discharge to Strachan and Scott of all their actings and intromissions, that dividend being paid by a sum of L.4929, 14s. 5d., offered by Strachan and Scott for the unrealised assets of the company, on condition of obtaining such a discharge. To those shareholders who accepted this dividend, the loss upon each L.1 share of the stock amounted to 12s. 3½d.; but a considerable number of the shares had been, when the capital was increased, taken at a premium of 10s. per L.1 share. Mr. Johnston and other partners refused to concur in this arrangement, and protested against any discharge being granted to the office-bearers of the company.

Mr. Smith and Mr. Strachan returned to Britain. Mr. Smith purchased the property of Westhall, in Aberdeenshire; and Mr. Strachan became tenant of Badenscoth, also in Aberdeenshire.

Mr. Johnston was an original shareholder to the extent of twenty-five shares, and on the capital being increased he acquired 100 L.20 shares of the additional stock, which were afterwards changed to 2000 L.1 shares. He raised this action against Mr. Smith and Mr. Strachan, concluding for decree against them, jointly and severally, or severally, for L.3000 sterling, being the amount of the price paid by him for his shares of the additional stock of the Illinois Investment Company on 1st March 1841, with interest on said sum, at the rate of 5 per cent per annum, till payment, under deduction of all dividends received by him on his shares; or otherwise, that the defenders should be ordained, jointly or severally, or severally, as might be determined, to make payment to him of the sum of L.4988, 19s. 8d., or such other sum, more or less, as might be ascertained to be the amount of the loss or damage sustained by him as holder of the said 2000 shares of the additional stock of the Illinois Investment Company, by and through the illegal and fraudulent conduct of the defenders, as sole director resident in America and manager respectively of the said company, with interest thereon from the date of citation till payment.

Mr. Strachan having pleaded that he was not subject to the jurisdiction of the Scotch Courts, the Lord Ordinary ordered a record to be made up on that preliminary question. Revised condescendence and answers were given in, and the record closed.

A proof was allowed to both parties. The following are the facts as stated in the note to the interlocutor reporting the case on this preliminary question:—"The defender Patrick Strachan is a Scotsman by birth, and, anterior to the year 1837, was settled as a farmer in Aberdeenshire. In 1837 he was appointed manager, in America, of a joint-stock company formed in Aberdeen, called the Illinois Investment Company. He in [760] consequence proceeded to the United States, and entered on the administration in that quarter of the company's affairs. He remained in America, with the

exception of occasional visits to this country and elsewhere, till the year 1857, having, after the company was dissolved in the year 1845, engaged, as he states, in the prosecution of business on his own account. He was married in 1849, when on a visit to this country, and his wife accompanied him to the States, and continued to reside with him till his return in 1857.

"In this last mentioned year they finally left America. It is proved by the defender's evidence, and that of his relatives (and the Lord Ordinary thinks satisfactorily), that the defender's intention, on reaching this country, was to establish his residence permanently in London. A leading reason for this was to obtain for his wife, who was a confirmed invalid, the medical attendance of her brother Dr. Anderson, who was established in practice in London. The arrangement was, that the defender and Dr. Anderson should buy or rent a house jointly, should pay the servants equally, and share the expenses of housekeeping, whilst living in family together. This arrangement was carried into effect. A house was jointly taken by them, on a long lease, at No. 27 York Place, Portman Square. The defender furnished that part of it required for the accommodation of himself and his wife. The expense of servants and living was shared as proposed. And here, as the Lord Ordinary thinks proved, was fixed the defender's ordinary dwelling-place.

"In the spring of 1859, the defender took, avowedly for summer quarters, the house of Badenscoth, in Aberdeenshire. His lease was for six months from Whitsunday of that year. He had an option of retaining the house for other six months, but this option he intimated, by letter dated 13th October 1859, that he exercised in the negative. He arrived with his wife and two servants, in the beginning of June. Certain other servants were hired in Scotland for the period of their stay. Early in November—he himself says on the 8th of the month—the defender and his wife left Badenscoth, and, with their English servants, returned to London. The Scottish servants remained only a few days afterwards, to put the house into order.

"On the 17th December following (admittedly within forty days of the defender's departure, but a good while after he had entirely vacated the house) the present action was executed, or attempted to be executed, against him at the house of Badenscoth. The messenger's execution bears that citation was made 'by affixing and leaving a full double of the summons to the will, and of the condescendence and note of pleas thereto annexed, having a just copy of the citation thereto subjoined, for the said Patrick Strachan, defender, within the keyhole of the most patent door of his dwelling-place at Badenscoth, in the county of Aberdeen, and that after knocking six several audible knocks upon said door, as use is, because I could neither find the said Patrick Strachan, defender, personally, nor get access to the said dwelling-place.'"

The pursuer pleaded;—1. In the circumstances stated, Strachan, was domiciled in Scotland, and subject to the jurisdiction of its courts. 2. At all events, he was subject to the jurisdiction of the courts of this country in the matter of the action, and has been well and duly cited as a defender thereto.

Strachan pleaded;—In the circumstances of the case, the defender was not subject to the jurisdiction of the courts of this country when the summons was served.

The Lord Ordinary, on 9th February 1861, pronounced an interlocutor reporting the case.[1]

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[1] "NOTE.—The Lord Ordinary has reported this case in consequence of the stress laid on two recent decisions of their Lordships of the Second Division, in regard to the application of which to the present case the parties were not a little at variance.

"The facts raising the question of jurisdiction lie within a narrow compass, and are not susceptible of much controversy." (After the statement quoted in the text):—

"The defender now states the plea, that, 'in the circumstances of the case, the defender was not subject to the jurisdiction of the courts of this country when the summons was raised.' It is on this plea that judgment is now to be given.

"I. The first question which naturally arises is, whether, at the date in question, the defender had his true domicile in Scotland, either by retention or reacquisition of the domicile which, beyond a doubt, he had originally possessed in this country.

"It is maintained by the defender that his original Scottish domicile was abandoned and lost by his removal to America, and residence of about twenty years in that

[761] After hearing counsel in part, the Court allowed the pursuer to add the following pleas to the record:—1. The defender is subject to the jurisdiction **[762]** of

country. The Lord Ordinary thinks it would be difficult to resist this conclusion. Though the defender went to America on a contract for a limited period of years (afterwards extended), he still went for the purpose of settlement in business, not for a mere visit. The Lord Ordinary perceives no substantial difference between going as manager for five years, and going for five years as partner resident abroad. The dwelling-place was entirely changed. The family altar was transferred. If the defender had died in America during the period of his first five years' engagement, the Lord Ordinary sees no room to doubt that his succession must have been regulated by the laws of the United States. His after residence abroad, which, whether in the service of the company or when in business on his own account, was protracted to twenty years, only serves to strengthen the conclusion.

"But if the original Scottish domicile of the defender was lost, there are strong reasons against thinking that it was ever reacquired. It is sufficiently proved, as the Lord Ordinary thinks, that the defender's permanent residence on his return was established in London. His residence in Scotland during the summer in 1859 was merely a residence in summer quarters. He returned to his permanent domicile. Again to apply the legal test, if, after resuming his residence in 27 York Place, Portman Square, the defender had died (say on the very 17th December on which the summons was left at Badenscoth), the Lord Ordinary thinks it scarcely doubtful that his succession would have been regulated by the law of England. But if so, the defender's true domicile at that date cannot be held to have been in Scotland, so as to constitute this Court the *forum domicilii*, in the proper sense of that term.

"II. But the pursuer maintained, that, even though Scotland should not have been the true domicile of the defender, his residence at Badenscoth had at least given him a sufficient domicile for jurisdiction, and that this domicile continued till the expiry of forty days after his departure from Scotland. He mainly founded this argument on the terms of the Act of Sederunt 1805, declaring—'That where any person against whom legal diligence is meant to be executed, or who is to be cited as a party in any judicial proceeding, has left the ordinary place of his residence, which may render it doubtful whether he is within the kingdom of Scotland or not, and consequently whether the charge or citation against him ought to be executed at his dwelling-house, or at the market-cross of Edinburgh, and pier and shore of Leith, when he is not personally found, it shall in time coming be held and presumed, that the said person, after forty days' absence from his usual place of residence, but not sooner, is furth of the kingdom of Scotland; and therefore, that within the said forty days the citation or charge may be at his late dwelling-house; but, after that period, must be at the market-cross of Edinburgh, and pier and shore of Leith, unless he be personally found; or, prior to the execution, shall have taken up some other known and fixed residence within Scotland.' He also referred to the terms of the Judicature Act, 6th Geo. IV. cap. 120, sect. 53, providing—'That where a person, not having a dwelling-house in Scotland occupied by his family or servants, shall have left his usual place of residence, and have been therefrom absent during the space of forty days, without having left notice where he is to be found within Scotland, he shall be held to be absent from Scotland, and be charged or cited according to the forms herein prescribed accordingly.'

"And here the pursuer made reference to the decision of their Lordships of the Second Division in the case of Joel *v.* Gill, 10th June 1859, 21 D. 929, as an authority of great importance in his favour. He contended that in that case their Lordships placed the constructive domicile of forty days' residence in all respects on the same footing, in the matter of jurisdiction, with the true or permanent domicile; and assuming that in the case of the true domicile, jurisdiction would last for forty days after departure from the country, so as during that period to warrant citation at the last inhabited dwelling-house, the pursuer maintained that the like result must follow in the present case.

"It appeared to the Lord Ordinary that nothing could be deduced, directly or indirectly, from the case of Joel *v.* Gill with reference to the duration of jurisdiction after departure from the country. It was decided in that case that, by forty days' continuous residence in one place within Scotland, Mr. Gill was, in terms of the Bank-

the Court,—First, In respect of his domicile and *forum originis* being Scotland, and of Scotland being the *locus* of the contract founded on; and, [763] second, In respect of

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rupt Act, 'subject to the jurisdiction of the Supreme Courts of Scotland;' and this was found with regard to a person who, at the time of the application to the Court, was still continuing within Scotland. The true question in the case was, whether this sufficed to give jurisdiction to the Courts, not merely against Mr. Gill, but in his favour,—the question arising under a petition by Mr. Gill himself for sequestration of his estates. The Court held this question ruled in the affirmative by the terms of the Bankrupt Act. But they neither determined that this jurisdiction would last, or how long it would last, after Mr. Gill should leave the country; nor had they occasion to consider the question, for the simple reason, that Mr. Gill had not left the country. This being so, the question in the present case appears to the Lord Ordinary to be unaffected, one way or other, by the decision in Joel *v.* Gill.

"On the merits of the question, it seems to the Lord Ordinary to have been somewhat gratuitously assumed by the pursuer, that in the case of a true domicile within Scotland, that is, in the case of a permanent domicile, or domicile of succession, as it has sometime been termed, the domicile once constituted in Scotland is in all cases to be held as lasting for forty days after Scotland is permanently left. The Lord Ordinary had rather understood, that where a domicile had been clearly abandoned, and the country left without any intention of returning, even the lapse of a single day (sufficient in these times to transfer to the new domicile, though hundreds of miles off) might change the domicile, and also the consequences of the domicile. But if any doubt could rest on this result, where a permanent domicile had been maintained in Scotland, through the ordinary means of a permanent dwelling-house, it strongly occurred to the Lord Ordinary that the case of the constructive domicile by forty days' residence stood in a wholly different position. The jurisdiction in such a case does not rest on permanent settlement, or the possession by the individual of a house of his own. It rests exclusively on residence within the country for the appointed period. It is personal presence within the realm which forms the important element. It seems to the Lord Ordinary to follow from the principle on which the jurisdiction is in such a case founded, that the cessation of personal presence, by departure from the realm, before judicial proceedings are raised, at once puts an end to the jurisdiction.

"With regard to the Act of Sederunt 1805, and to the Judicature Act, it appeared to the Lord Ordinary that the argument of the pursuer was pervaded by an essential fallacy. The fallacy lay in conceiving that these enactments were passed for the purpose of defining jurisdiction, when in reality they were only intended to regulate citation, in cases in which jurisdiction was antecedently constituted. Had the Court, indeed, in the Act of Sederunt, intended an enactment on the subject of jurisdiction, they would therein have been exceeding their powers, and encroaching on the functions of the Legislature. Jurisdiction is assumed, in all the enactments in question. It does not tell to the contrary that edictal citation is dealt with; for though sometimes loosely spoken of, as if it were the citation proper to foreigners, there is in truth no room for edictal citation except where jurisdiction previously exists. Citation without jurisdiction is a mere nullity. Edictal citation is the form of citing Scotsmen, in the most proper sense of the appellation, if they are resident out of the country. But it might often happen, where jurisdiction against a Scotsman was perfect (as in the case of a proprietor of land within Scotland), that it was not clear whether he was out of the country or not. It is in such a case provided, that, within forty days of his departure from his usual place of residence in Scotland, the citation shall be at such place of residence, and afterwards edictally, and that thus all controversy shall be avoided. But the matter of jurisdiction is not touched. The question of jurisdiction is left exactly as before. To say that, by these enactments, there was a rule laid down, that in every case of jurisdiction *rationæ domicilii*, the jurisdiction was to endure for forty days after the individual had left the domicile, appears to the Lord Ordinary a stretch of argument wholly unwarrantable.

"It was said that the Act of Sederunt only declared a rule previously recognised by the common law. But if so, the rule recognised was still one regarding citation, not regarding jurisdiction. The argument is not thereby advanced.

"The Lord Ordinary was on this head referred to the case of Calder *v.* Wood,

domicile in Scotland, and of Scotland being the place in which the representations complained of were made to the pursuer. 2. [764] The defender is subject to the juris-

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19th Jan. 1798, Mor. 2, Execution, No. 1. In that case, a native of Scotland, John Wood, having left Scotland, and (though this is not perfectly clear) having obtained a domicile abroad, returned after five years, on a visit to his friends. During the time of this visit, which lasted more than forty days, 'he sometimes lived in a furnished lodging in Glasgow, and at other times in his father's house, within a few miles of it.' He was cited at this furnished lodging on 10th October, having left it on the 7th or 8th of the same month, on his way to England. The report, however, bears that he was still at the time within the country, being in Edinburgh. The Court sustained the citation, on the footing of the residence of forty days having given a domicile for jurisdiction, and because 'the lodging-house was his most ordinary place of residence, and must be considered his dwelling-house.' The decision is perhaps not altogether satisfactory; but it does not touch the present question, for the simple reason, that at the time of the citation the residence of the defender still continued within Scotland. The effect of the cessation of personal presence within the realm did not come into controversy, for personal presence within the realm had not ceased.

"In the present case there can be no doubt that, after forty days' residence at Badenscoth, the defender became liable to the jurisdiction of the Scottish Courts, simply as a consequence of that residence, independently of all other considerations. But the pursuer has failed to satisfy the Lord Ordinary that the jurisdiction created by this constructive domicile lasted beyond the time when the defender left the country, or continued to subsist at the date of the citation to the present process.

"III. Assuming that there was no jurisdiction on the ground of domicile, real or constructive, the pursuer endeavoured to establish jurisdiction *ratione originis*. And he referred to the opinions delivered by their Lordships of the Second Division in the recent case of Sinclair *v.* Smith, 17th July 1860, 22 D. 1475, as correcting the mistake of supposing that the decision of the House of Lords in the case of Grant *v.* Peddie abolished jurisdiction on that ground.

"The Lord Ordinary has no difficulty (and he never had) as to what the judgment in the case of Grant *v.* Peddie settled and what it left open. It established, in the most express terms, that the mere fact of birth in a particular country did not, on that ground alone, give the courts of that country jurisdiction over the individual to the day of his death, to whatever other country he might remove. In so doing it abolished the *forum originis*, in the proper sense of the term,—that is to say, a jurisdiction sustained *ratione originis* exclusively. It did not decide, but left open, whether the fact of origin in a particular country might not combine with other circumstances to create jurisdiction. In the view of the Lord Ordinary, the *forum originis*, properly so called, must now be held extinguished. But the fact of nativity, or, in other words, the domicile of origin, remains as a possible element, along with others, in any question of jurisdiction. The *forum originis*, and the *domicilium originis*, are wholly different things. The first expresses a tribunal, having jurisdiction from origin merely; the second expresses a fact, which may form or not an element of jurisdiction in any case whatever, without the judgment being ruled one way or other by the decision in Grant *v.* Peddie.

"The decision in the case of Grant *v.* Peddie admittedly prevented the pursuer from founding jurisdiction in the present case on the mere fact of the defender having been born in Scotland. But the Lord Ordinary considered himself as not in the least precluded from hearing any argument on the effect of origin, as combined with other circumstances, in conferring jurisdiction on the Scottish Courts. Assuming, however (as must be done on this branch of the case), that there was no domicile in Scotland, actual or constructive, at the date of citation, the pursuer was unsuccessful in shewing the Lord Ordinary any combination of origin with other circumstances, sufficient to found jurisdiction against the defender, a domiciled Englishman *ex hypothesi*.

"The domicile of origin will, it is well known, last till another is acquired. But after it is fairly abandoned, and another domicile established, it appears to the Lord Ordinary that the domicile of origin, like any other domicile whatever, only rises into force by reacquisition. The new domicile must be abandoned, and the domicile of origin reacquired. It will be held of easy reacquisition, and considered as reacquired

diction of this Court, in respect that the domicile and *forum originis* of the parties to the contract founded on were [765] Scotland,—that the defender agreed to account in

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on comparatively slight evidence; for the law recognises the instinct of return to the parent stream. But whatever be the amount of evidence, it appears to the Lord Ordinary that, in order to give effect to the domicile of origin once lost, there must be found enough to satisfy the Court that the domicile elsewhere was abandoned, and the domicile of origin reassumed.

"Assuming, as is the condition of the argument in this branch of it, that the defender was a domiciled Englishman at the date of citation, with what circumstances, or set of circumstances, is the fact of his birth in Scotland to be combined, in order, by the combination, to create jurisdiction to the Scottish Courts? Is it the summer residence at Badenscoth with which birth is to combine, in order to operate this effect? If that residence is of itself insufficient to constitute a Scottish domicile, the Lord Ordinary cannot perceive that the circumstance of the defender having been born in Scotland can turn that into a true domicile which otherwise is not so legally. Is it the alleged contract which is now sued on, which, considered as a Scottish contract, is to combine with birth for this purpose? Contract is undoubtedly, in certain circumstances, a ground of jurisdiction. The Lord Ordinary will immediately consider whether contract affords jurisdiction in the present case. But, supposing the contract has not itself that effect, the Lord Ordinary cannot perceive how it would vary the case, that the contract was formed by one who was born in Scotland. The nativity cannot vary the contract, or give it a higher effect than is otherwise due to it. Is it with the citation at Badenscoth that the nativity is to be combined? If the residence at Badenscoth is not sufficient to confer jurisdiction, the citation at Badenscoth clearly cannot have that effect. Citation is, in a proper sense, no element whatever of jurisdiction. Citation supposes jurisdiction constituted antecedently.

"The Lord Ordinary has searched in vain for anything, by combining which with birth in Scotland, a jurisdiction may be created to the Courts of Scotland, which the Scottish birth would not by itself confer.

"IV. Finally, the pursuer contended that jurisdiction lay against the defender in the Scottish Courts, in the matter of the present action, in respect of the contract, which forms the foundation of the action, being a contract made within Scotland.

"The contract referred to is that by which the Illinois Investment Company appointed the defender their manager, and by transgression of which the defender is said to have incurred the liabilities which the present action seeks to enforce.

"The Lord Ordinary doubts, in the first place, whether the present can be properly said to be an action laid on contract. It is not so much an action on contract, as an action on wrong or delict. The contract indeed conferred the office, and prescribed, directly or indirectly, the duties of the defender. But fraud or malversation in the discharge of those duties raises rather a claim *ex delicto*, than a claim *ex contractu*. The distinction is strongly illustrated in the opinion of the Lord Justice-Clerk, in the case of the Western Bank *v.* Douglas, 27th January 1860, D. 22, 474. The action in that case, which was laid on malversation in the office of bank directors, was held by the Court to be an action on delict, not on contract; and on that ground a preliminary defence was repelled, that all parties interested were not called. The Lord Ordinary has great difficulty in distinguishing that case from the present.

"But further, it is expressly necessary to sustain jurisdiction on the ground of contract in Scotland, that, at the time of executing the summons, the defender be found personally in Scotland. It is not that the citation gives the jurisdiction; but it is essential towards explicating the jurisdiction given. This is trite law, and was recognised as such in the recent case of Sinclair *v.* Smith, already referred to. But, at the date of executing the summons in the present case, the defender was not in Scotland, but had left the country for several weeks. It may be that, as suggested by the Lord Justice-Clerk in the case of Sinclair, personal citation is not indispensable in such a case. But, whether the citation be personal or not, personal presence within the territory at the time of the citation is absolutely requisite. For want of personal presence at the time of the citation, it appears to the Lord Ordinary that the case of the pursuer fails, so far as rested on the locality of the contract within Scotland.

Scotland for his actings,—and that the parties agreed that the Courts of Scotland should act in the matter of enforcement and execution of the contract.

A third additional plea was stated, to the effect that the defender was subject to the jurisdiction of the Court, in respect he had funds in Scotland at the date of citation to the action. This plea was disallowed, in respect there was no statement on record on which it was founded.

It was argued for the pursuer;—The defender was a Scotchman not merely by birth but by residence, till the year 1837, when this essentially Scotch company, which had its origin, and the greater part of its partners, resident in Scotland, was constituted, and entered into a contract, by which they agreed with the pursuer to go abroad and carry on their business, under the direction of a committee of management in Scotland, and to account for his intromissions to them or their cashiers and agents in Scotland; and all the parties to the contract consented to its registration for execution in Scotland. Thus both the *locus contractus* and the *locus solutionis* were Scotch. Under the civil law, jurisdiction to enforce contracts belonged to the courts of the *locus solutionis*.[1] To the conditions required by the law [766] of Rome, the conditions of citation within the territory, or possession of property within it, had been added by Erskine without authority. After the decision of the House of Lords in Grant *v.* Peddie,[2] it could not be maintained that, *ratione originis* merely, a party was subject to jurisdiction; but where the *locus originis* of the defender, the *locus contractus*, and the *locus solutionis*, were all Scotch, there was enough to found jurisdiction.[3] This action was founded on a contract made in Scotland, and though the averments of breach of contract were brought up to a case of delict, this was not less an action on the contract. A contract was averred, and also breaches of it, and it was not to save the defender from a civil action for reparation that he could plead that the breaches of contract amounted to theft. The whole case was laid on contract. The pursuer's title was his being a shareholder of the Illinois Investment Company; and the ground of his action was, that having been induced to take additional shares in the concern, by false representations made in Scotland to the shareholders by Strachan, in reports presented in terms of his obligations, he was liable in damages.

More than this, it had been proved that the defender had funds in Scotland at the date of citation. That was not, indeed, specially averred in the record made up on the question of jurisdiction, but it was sufficiently imported into the pursuer's condescendence from the condescendence appended to the summons, by the general clause making reference to holding as repeated all the statements relative to the question of jurisdiction in the principal summons.

"On this branch of the argument, the Lord Ordinary was largely referred to the case of Sinclair *v.* Smith, just cited. But it seemed to him that the argument did not derive much aid from the decision in that case. Jurisdiction was there sustained, in respect of a Scottish contract. But the case exhibits these two characteristic features,—1*st*. The action, though an action of damages, was laid on direct breach of the contract, just as much as an action of damages for non-delivery of goods sold, or any similar breach; 2*dly*. The defender was personally within Scotland at the time of citation; in fact, was personally cited. Both these features are wanting in the present case.

"It will be manifest, from the preceding observations, that the leaning of the Lord Ordinary's mind was to hold that the objection to the jurisdiction was well founded, and ought to be sustained. But, considering the great diversity of view as to the application of the recent authorities presented by the parties, the Lord Ordinary has thought it better to explain his sentiments in the present form, than to embody them in a formal judgment."

[1] Pothier ad Pand. l. v. t. i. sect. 35, folio edit. p. 180; Inst. l. i. t. 2, sect. 20—Ivory's edit.

[2] June 14, 1822, 1 Sh. & D. p. 495, revd. on appeal, July 5, 1825, 1 W. & S. p. 716; Douglas *v.* Cuningham, Feb. 1, 1642, Mor. p. 4816.

[3] Anderson *v.* Hodgson, July 1747, Mor. p. 4779; French *v.* Pilcher, 13th June 1800, Mor. *voce Forum Competens*, App. No. 1; Mackenzie *v.* Mackenzie, March 8, 1810, F.C.; Bell *v.* Bell, Feb. 22, 1812, F.C.

The general principles on which jurisdiction was founded, as given effect to in England, were in favour of the jurisdiction in this case being sustained.[1]

It was argued for the defender ;—To found jurisdiction it was necessary that there should be power to enforce the decrees that might be pronounced; thus personal presence within the judge's territory, or the existence of goods there, were grounds of jurisdiction.[2] Origin did not, *per se*, found jurisdiction, neither had the combination of the *locus originis* with the *locus contractus* ever been held to do so.[3] The *locus contractus* was only effectual in combination with personal citation ;[4] and that was not only the law of Scotland, but also the Roman law.[5] The cases cited for the pursuer were some of them cases where questions of status were involved, or where the goods which formed the subject in dispute were in Scotland; there was no case where jurisdiction was sustained on the ground that this country was the *locus solutionis*. The authority of the jurists was against the pursuer.[6]

This action was not an action on contract. Damages were claimed *ex* [767] *delicto*, not *ex contractu ;*[7] but if founded on any contract, it was on a contract under which the defenders were bound to proceed to America, and there perform certain duties. If the defender had been guilty of any delict, it was in America, and not here. Scotland could not, therefore, be said to be either the *locus contractus* or the *locus solutionis ;* neither could the reports sent to this country be a ground of jurisdiction. Every shareholder might have been tempted to purchase additional stock, and the representations might have reached the shareholders in England or Ireland as well as in Scotland; it could not reasonably be held to aid the jurisdiction of the Scotch Court that such information was received in Scotland.

The opinion of the Court was delivered by the

Lord Justice-Clerk.—Judging from the note appended to the Lord Ordinary's interlocutor, the argument addressed to his Lordship must have been of a somewhat desultory and discursive character. The record which was made up between the parties, on the question of jurisdiction, was also—particularly in the pleas in law—so vague and ambiguous, that it was very difficult to understand on what grounds the pursuer really intended to rely. We, therefore, by interlocutor of 27th February last, appointed him to amend his pleas, "so as to state precisely the grounds on which he contends that the Court has jurisdiction to entertain the present action." Under this appointment the pursuer proposed three pleas; but the third being partly founded on a special fact, which was not averred in the record, viz. that the defender had funds in Scotland at the date of raising and executing the summons, was plainly inadmissible ; and therefore the Court pronounced another interlocutor, dated 5th March last, by which they "allow the first and second amended pleas to be appended to the record, in place of the pleas originally stated on record, and disallow the third proposed amended plea."

We are to give judgment on the two amended pleas admitted by the last mentioned interlocutor, which suggest the only grounds on which the pursuer now maintains the jurisdiction of the Court, as against the defender Strachan. It is unnecessary, for the purposes of this judgment, to notice most of the questions discussed in the Lord Ordinary's interlocutor, for which, indeed, the record, as now finally adjusted, affords no foundation. The greater part of the facts averred on record are also, in the present state of the pleadings, quite immaterial, as being intended to sustain the jurisdiction of the Court, on the ground that the defender Strachan was, when the action was raised, domiciled, or at least resident, in Scotland,—a plea which is abandoned as untenable.

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[1] Deck *v.* Deck; Bond *v.* Bond, xxix. Law Journal, pp. 129, 133 (Probate and Matrimonial Cases).

[2] Ersk. Inst., l. i. t. ii. sect. 16.

[3] Sinclair *v.* Smith, 17th July 1860, *ante*, vol. xxii. p. 1475; Anderson *v.* Hodgson, July 1747, Kilkerran's Reports, and M. p. 4779.

[4] Kames' Law Tracts, p. 234 (edit. 1761); Ersk. Inst., l. i. t. ii. sect. 20.

[5] Huber, l. v. t. i. sect. 33, vol. ii. p. 222; John Voet, l. v. t. i. sect. 73; Heineccius ad Pand., l. v. t. i. sect. 33; Vinnius, l. iv. t. vi. sects. 8, 10.

[6] Voet, l. v. t. i. sect. 73; Vinnius, vol. ii., p. 858, l. iv. t. vi. sect. 10, *de Actionibus*.

[7] Western Bank *v.* Douglas, 27th Jan. 1860, *ante*, vol. xxii. p. 475.

The first of the two amended pleas rests alternatively,—1, On the combination of the two facts, that the defender's domicile of origin was in Scotland, and that the place of the contract sued on was Scotland; or, 2, On the combination of the two facts, that the domicile of origin was in Scotland, and that the false representations, which are the ground of action, were made in Scotland.

It is not disputed that the defender's domicile of origin was in Scotland; and if it were equally clear that the action is laid on a Scotch contract, or on false representations made in Scotland, there would arise for consideration the broad and general question, whether the combination of *forum originis* and *locus contractus*, or the combination of *forum originis* and *locus rei gestae* is sufficient to found jurisdiction against a defender resident and domiciled abroad, and who has no estate or effects within this country.

But it is contended for the defender that the present action is not laid on contract at all, or at all events that the contract which the pursuer relies on is not a Scotch contract, and that the false representations on which the action is laid were not made within Scotland, but in America.

These are obviously questions which must be determined in the first instance,—because, if the defender is justified in this representation of the nature and grounds of the action, no question of general application will arise; and for the purpose of solving these questions, it is only necessary to examine the summons. It appears that in the year 1837 a company was formed in Aberdeen called the "Illinois In- **[768]** -vestment Company," the main object of which, as its name partly imports, was to invest money in the purchase of property in the State of Illinois, and the other western States of North America. The company was Scottish in its origin, and may also be fairly enough represented as having its head-quarters within this country. But it is equally clear, that the only scene of its contemplated operations was the United States. By the contract of copartnery, the defender Strachan was named manager; and by a separate contract of employment, dated 8th March 1837, between him and the company, his powers, duties, and emoluments, are fixed and defined. He is appointed the "manager of the company in America," and is represented as "about to proceed to his destination as manager foresaid." He binds himself to devote his whole time to the business of the company, under the instructions of the directors in Britain, and to account to the cashiers and agents of the company in Britain for the funds and property that may pass through his hands, and pay over the property realised to them. For the performance of these duties he was to receive a salary of L.300 a-year, for five years certain, besides his travelling expenses from Aberdeen to his destination in Illinois paid in advance, and all travelling expenses incurred in transacting the business of the company in America.

The pursuer was an original shareholder of the company to the extent of 25 shares of L.20 each; but he alleges that he was subsequently induced to acquire in addition 100 shares of L.20 each, "representing a sum of L.2000 sterling of the capital stock" of the company.

Such being the origin of the company, and the nature and extent of the pursuer's connection with it, the allegations against the defender Strachan are in substance—(1) That as manager of the company he fraudulently misconducted its affairs for his own ends, embezzled its funds, and reduced it to a state of insolvency and ruin; (2) That he fraudulently misrepresented the true condition of the company's affairs in the reports, letters, and other information which he sent home from America, alleging that it was in a state of growing prosperity, while, by reason of his own fraudulent mismanagement and embezzlement, it was daily becoming more and more embarrassed and impoverished, and inevitably tending to ruin; (3) That by these fraudulent misrepresentations the pursuer was induced not only to retain his original stock, but to increase his interest in the company by the acquisition of new stock to the extent of L.2000, as above stated. On these grounds, he concludes that the defender Strachan (jointly and severally with the other defender Smith, or each severally) shall "make payment to the pursuer of the sum of L.3000 sterling, being the amount of the price paid by the pursuer for 2000 shares of the additional stock of the Illinois Investment Company, on the 1st of March 1841, with interest on said sum at the rate of 5 per cent per annum from the said date till payment, under deduction of all dividends on said 2000 shares of additional stock paid to the pursuer," &c. Or otherwise, to make

payment of L.4988, 19s. 8d., as "the amount of the loss and damage sustained by the pursuer, as holder of the said 2000 shares," &c., "by and through the illegal and fraudulent conduct of the defenders, as sole director resident in America, and manager, respectively, of the said company."

In accordance with this view of the allegations and conclusions of the summons, the pursuer's pleas appended to his summons are laid—the first and second on "the false and fraudulent representations of the defenders," inducing the pursuer's purchase of 2000 shares, and retention of all his original shares; and the third and only other plea on "the grossly culpable and fraudulent violation of duty as director and manager on the part of the defenders respectively, in misapplying the funds of the company for the benefit of themselves and their friends, and committing the other illegal, reckless, and fraudulent acts above condescended on."

Is this, then, an action on contract, in such a sense as would enable the *forum contractus* to sustain its jurisdiction against a foreigner, party to the contract, who is for the time found within the territory, according to the rule laid down by all the jurists, and recognised in Sinclair *v.* Smith?

It appears to the Court that this is not in any proper sense an action on contract, for an action on contract must be an action to enforce the contract, either by decree for specific performance, or by damages for breach of contract, as was held by the Court of Justiciary in Thomson *v.* Logan (3 Irvine, p. 323). The only contract which [769] can be said to be founded on against the defender in this action is the contract by which he was employed as manager of the company; and it matters not whether that be represented as being contained partly in the contract of copartnery, or depending on the separate contract of employment, for in any view it is a contract of employment, and nothing else. But the employer, and therefore the only party contracting with the defender in that contract of employment, is the Illinois Investment Company, to which party alone the defender is bound *ex contractu* either to perform the duties of manager, or to account as such; and therefore the company alone can sue an action on that contract, either for implement, or for damages in respect of non-implement. Had this action been truly an action for the enforcement of the contract, the pursuer, as a single shareholder of the company, would have had no title to sue. But that this is an action, not *ex contractu*, but *ex delicto*, and so inferring a joint and several liability, capable of being enforced by any party who has suffered loss from the delict, may be at once demonstrated by the application of the test suggested in the judgment of the Court in the Liquidators of the Western Bank *v.* Douglas and others. "The test of distinction will generally be found in the inquiry, whether the nature of the obligation of reparation, as disclosed in the summons, falls to be determined by the terms of the contract, or by the acts and conduct of the defenders. If the action is for breach of contract, the contract itself will by its own terms fix, whether the liability is joint, or several, or joint and several." In the present case the claim of the pursuer to redress of his individual wrong,—and that against all or any of the wrongdoers,—arises not from the terms of the contract, but from the quality of the acts of misconduct attributed to the defenders by the summons.

For these reasons we hold that this is not an action on contract, and therefore that, even if the defender had been within the territory when the summons was raised and executed against him, the jurisdiction of the Court could not have been sustained on the grounds given effect to in Sinclair *v.* Smith.

But it is further contended, that the fact of the false representations, on which the action is founded, being made in Scotland is, in this question, equivalent to the contract being made in Scotland, if the action were laid on contract. The Court have no wish to dispute that the rule which admits, as the foundation of jurisdiction, *locus contractus* and presence of the defender within the territory at the date of raising and executing the action, extends to cases not laid on contract, but where the cause of action, be it contract or delict, clearly arises and occurs within the territory; for the rule, as stated by the weightiest authorities, is sufficiently extensive to embrace the latter class of cases. Huber is distinct on this point:—"Sequitur causa fori tertia; quam rem gestam esse diximus, eamque vel é contractu vel ex delicto admisso. Rem gestam commodius de contractu delictoque prædicamus, quam alii, contractum generaliter, etiam pro delicto intelligentes, fori causam appellant, quia sic *καταχρηστικῶς* accipitur, in l. 20, ff. de Judic. Sub contractibus etiam negotia, de quibus quasi con-

trahitur, ut est negotiorum gestio, administratio tutelæ, indebiti solutio, comprehendi non est dubium,—l. 36, sect. ult h. t."—(Huber, lib. *v.* tit. 1, sect. 53).

But is it possible to say, that the *res gesta*, the delict, which furnishes the ground of action, occurred in Scotland? On the contrary, the summons distinctly alleges that the embezzlement and other acts of dishonesty complained of were committed in America; and if the false representations can be said to have a *locus* at all, they were made in America; and although they may have reached the pursuer in this country, it would not have altered their character or locality, though he, as an individual, had received them while resident in London or Paris either temporarily or permanently.

It only remains to advert, in a single sentence, to the second plea maintained by the pursuer in support of the jurisdiction of the Court. It is based on these considerations,—that the contracting parties were Scotch, that the defender agreed to account in Scotland for his actings under the contract, and that the parties further agreed that the Courts of Scotland should be appealed to for the enforcement and execution of the contract. If the assumptions of this legal proposition were sound, the inference would be irresistible.

But, apart altogether from the consideration, that the contract of employment of the defender Strachan does not contain such stipulations as are here assumed, there **[770]** recurs also the formidable difficulty already sufficiently expounded, that this is not an action to enforce the contract, and, therefore, that the plea is entirely inapplicable.

The Court must not be understood as expressing or indicating any opinion, how far jurisdiction may be sustained against a person not within the territory, and domiciled beyond the territory, on the ground that he was a Scotchman by origin, and that the cause of action arose in Scotland; for no such question is raised by the facts of the present case.

The judgment of the Court will therefore be to sustain the objection stated for the defender Strachan to the jurisdiction of the Court, and to dismiss the action, *quoad* that defender, with expenses.

The Court sustained the objection to the jurisdiction of the Court stated for the defender Strachan, and dismissed the action *quoad* him.

No. 123. **XXIII. Dunlop 772.** 20 Mar. 1861. 1st Div.—Lord Ardmillan.

GEORGE WHITEHEAD and MANDATORY, Pursuers.—*Sol.-Gen. Maitland—A. B. Shand.*

LIONEL HILL THOMPSON, Defender.—*Young—Mair.*

Process—Foreign—Evidence—Decree conform.—In an action for judgment conform to "extract or exemplification" of a judgment obtained in the Court of Queen's Bench against the defender, the "exemplification" produced bore to be attested by one of the Masters of the Court as a true copy; the seal of the Court was appended to it, and there was prefixed a notarial instrument, certifying that it was an office copy, and that it agreed with the original, and that the subscription to it was genuine. *Held* (*aff.* judgment of Lord Ardmillan, *diss.* Lord Curriehill), that the validity and regularity of the document not being formally challenged, it was good evidence for this Court to receive and to act upon, in the absence of specific allegations as to the law of England, and the points in which the proceedings there were defective. Allegations against the validity of a foreign judgment which *held* irrelevant to be remitted to probation.

Whitehead brought this action against Thompson for payment "of the sum of L.51, 18s. 6d. sterling, for which sum the pursuer, on 27th April 1854, obtained judgment against the defender in the Court of Queen's Bench in England, conform to extract or exemplification of said judgment herewith produced, with the legal interest of said sum of L.51, 18s. 6d. from the said 27th day of April 1854 till payment."

The record was as follows:—"Cond. 1. In the year 1854, the pursuer, who is a

tailor and habit-maker in London, raised an action or suit in the Court of Queen's Bench against the defender, who then resided in or near London, and was subject to the jurisdiction of that Court. In that suit, the pursuer sought to recover payment of the balance of an account due by the defender. Ans. 1. Not known and not admitted that the pursuer raised an action or suit in the Court of Queen's Bench, in the year 1854, against the defender, or that in that suit he sought to recover payment of the balance of an account due by the defender. *Quoad ultra* admitted.

"Cond. 2. The defender appeared in the suit, and did not dispute the competency of the Court in the matter at issue; and, after some procedure, a judgment was, of this date (April 27, 1854), given against the defender for **[773]** the sum of L.51, 18s. 6d. An extract or exemplification of the said judgment is produced, and specially referred to. The counter statement is denied. Ans. 2. Denied that the defender appeared in the suit. Admitted that a document purporting to be an extract or exemplification of a judgment alleged to have been given against him has been produced, but the correctness or regularity of the same is not admitted; and explained, that although the defender continued to reside in London for about two years subsequent to the date of the alleged judgment, the pursuer never once attempted to put same in force.

"Cond. 3. The said sum of L.51, 18s. 6d. was legally due to the pursuer by the defender when the said judgment was given, and still remains due; and the judgment was pronounced by a competent tribunal, and in a competent form. The counter statements are denied, except in so far as instructed by the letter referred to, to the terms of which reference is made. Ans. 3. Denied. Explained and averred that the defender long ago paid any account he was due to the pursuer, and that the account referred to in the proceedings before the Queen's Bench was for goods said to have been furnished to his son, who was at the time major, earning his own maintenance, and upon his own responsibility, and not upon that of the defender. The pursuer was repeatedly requested by the defender, and specially by letter of date August 5, 1853, to send him a separate account of the charges due by himself, which was afterwards done and the amount settled. The defender was not served with any writ or summons in reference to the proceedings in the English Courts, and he never authorised any one to appear in, and was not a party to, these proceedings.

"Cond. 4. The pursuer has frequently called upon the defender to make payment of the sum for which the said judgment was given, with interest; but the defender refuses, or at least delays, to comply with the demand. He has recently come to reside at Rosemount Cottage, near Lasswade, and the present action has become necessary for the purpose of enforcing payment. The counter statements are denied, except to this extent, that the pursuer admits that he saw the defender about the time mentioned, and asked for his address, or for payment of the account now sued for. Ans. 4. Admitted that the defender refuses to make payment of the sum concluded for, and that he is at present residing at Lasswade. *Quoad ultra* denied, and explained that in or about the month of September 1858, the pursuer, who happened to be in Edinburgh at the time, having, along with some of his friends, met the defender and his family in the neighbourhood of Dalkeith, insolently demanded payment of his alleged account, and the defender having denied the same, the pursuer committed a violent assault on the defender's person, and seriously injured him and alarmed his family,—for all which the defender is about to raise an action of damages against the pursuer. The pursuer's explanation is denied, and reference made to the correspondence which passed thereon, herewith produced."

The pursuer pleaded;—That in the circumstances, "and in respect of the judgment of the Court of Queen's Bench," he was entitled to decree.

The defender pleaded;—"1. No service of the writ or summons at the instance of the pursuer in the Queen's Bench having been made on the defender, the judgment libelled on is not an effectual decree against him, and cannot be enforced. 2. The said judgment having been pronounced in absence of the defender, and *sine causa cognita*, the pursuer is not entitled to decree of this Court, conform thereto. 3. The claim of the pursuer is, by the Statute of Limitations, extinguished by the lapse of six years from the date of the account referred to in the judgment. 4. The defender not being resting owing to the pursuer the sum concluded for, nor any sum whatever, he is entitled to absolvitor."

The pursuer consented to close on summons and defences, and the case **[774]** was sent

to the adjustment roll, when, "on the motion of the defender, and under reservation of all questions of expenses," an order for revisal was pronounced on 28th February 1860; and on 17th March the record was closed without new papers being lodged, although some additions were made to those originally put in.

A notarial copy of "Exemplification of Judgment" was produced, with the seal of the Court attached to it. Prefixed was the notary's attestation, that it was an office copy of the judgment-roll in the custody of the Masters of the Court of Queen's Bench at Westminster, that the seal thereto affixed was the official seal of the said Court, and the usual one affixed to such documents; that the signature subscribed at the foot of the said document, was the subscription and of the own proper handwriting of Henry John Hodgson, Esquire, one of the Masters of the said Court of Queen's Bench: And that the said office copy agreed with the original judgment-roll in every article and particular.[1]

On 20th July 1860 the Lord Ordinary pronounced the following interlocutor:—"Repels the defences, and decerns against the defender, conform to the conclusions of the libel: Finds the defender liable to the pursuer in expenses."[2]

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[1] After the attestation the document proceeded:—

"Pleas before our Lady the Queen at Westminster, in the term of Easter, in the 17th year of the reign of our Sovereign Lady Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, and in the year of our Lord 1854.—Witness, JOHN LORD CAMPBELL. Roll 63.

"In the Queen's Bench,

"On the 11th day of February in the year of our Lord 1854.

"Middlesex, to wit.—George Whitehead, by James Townley, his attorney, sues Lionel Hill Thompson for money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant, and for money found to be due from the defendant to the plaintiff on accounts stated between them, and the plaintiff claims L.60.

"On the 27th day of April in the year of our Lord 1854, the defendant in person says that he cannot deny the action of the plaintiff, nor but that the plaintiff is entitled to recover against him L.50, 16s. 6d., besides his costs of suit; and hereupon the plaintiff prays judgment [judgment signed the 27th day of April 1854] for the said sum so acknowledged, together with his costs of suit to be adjudged to him, &c.: Therefore it is considered that the plaintiff do recover against the defendant the said L.50, 16s. 6d., and L.1, 2s. for his costs of suit, which said monies in the whole amount to L.51, 18s. 6d.

"I certify the foregoing to be a true copy of the original judgment-roll in the custody of the Masters of the Court of Queen's Bench. (Signed) H. J. HODGSON, one of the Masters of the said Court. 21st December 1859.—Examined, J. DAVIS."

[2] "NOTE.—This is an action for payment of a debt constituted and decerned for by a judgment of the Court of Queen's Bench. That judgment, duly certified, is here. It bears that the suit at the pursuer's instance was for L.60, that the defender appeared personally and admitted the debt to the extent of L.50, 16s. 6d., and that decree was thereupon pronounced, not for the sum claimed, but for that admitted sum of L.50, 16s. 6d. only, with a small sum of costs, making the entire amount L.51, 16s. 6d. No statement of facts has been put on record by the defender, and no averments in point of fact have been made by the defender, in the manner and with the precision which the law requires, to entitle him to demand a proof thereof in the face of the judgment of the English Court, to the authenticity, authority, and validity of which judgment no intelligible objection has been stated.

"The cause or ground of action in the Court of Queen's Bench was an ordinary English debt. The pursuer was a tailor and clothier in London. The defender was resident in London. The Court of Queen's Bench was a Court of competent and appropriate jurisdiction, and a Court of the highest authority. The decree of the Court of Queen's Bench does not appear to be, and is not said to be, in its terms, defective and irregular; it is before this Court in an authentic form; and it is not challenged by the defender as false and forged—(Starkie on Evid. I., p. 300, and pages 304 and 306—Disbrow v. Mackintosh, 27th November 1852, 15 D. 123). The defender's contention is, that he is now entitled in this Court to disregard altogether

[775] The defender reclaimed. He now asked proof of the concluding part of his answer to cond. 2. He pleaded that the decree founded on was irregular. **[776]** It

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the judgment of the Court of Queen's Bench, and to have the case tried here on the merits, just as if that judgment had never been pronounced. This proposition is, in the opinion of the Lord Ordinary, not well founded. A decree of the Court of Queen's Bench is certainly, in reference to this Scottish Court, a foreign decree, and it is therefore, to some extent, examinable. But it is the decree of a Court of the highest authority in England, where the cause of action arose, and where both parties were resident. Its jurisdiction is beyond question, its regularity is not impeached, its authenticity is materially instructed, and its terms are conclusive.

"It must be assumed that this judgment is according to the law of England, and, indeed, there is no distinct and precise averment to the contrary. It is not the judgment of an inferior Court, in regard to which error may be more probable, but the judgment of a high tribunal of the greatest authority; and though when sought to be enforced here, it is examinable, it is not to be got rid of by vague, general objections, but is entitled to respect, faith, and credit. It is, in the words of Mr. Story, 'to be put in execution, unless some good exception be opposed to it, in law or equity.' It is 'to be presumed just till the contrary be proved'—(Story, p. 501, par. 600). The cause is not to be re-tried, and the judgment to be reviewed in all respects, but the justice of the judgment must be impeached on relevant grounds, clearly alleged. Story says, that, 'the present inclination of the English Courts of common law is to sustain the conclusiveness of such judgments'—(Story, p. 506, par. 606). Lord Kenyon and Lord Ellenborough, at an earlier, and Vice-Chancellor Shadwell, in Martin *v.* Nicholls (3 Sim. Rep., 458), at a more recent date, expressed a similar opinion. The Lord Ordinary, in deference to the decision in the case of Southgate *v.* Montgomery, 9th February 1837 (15 S. and D., 507), must hold this judgment of the Court of Queen's Bench to be examinable on grounds, clearly and relevantly stated, going to impeach its validity and its justice. But such grounds must always be stated with the clearness and precision which our law requires. A judgment of this high English Court cannot be lightly got rid of when produced in this Court in an authentic form, and in a competent action for recovery of the debt. If it is to be set aside, it must be on distinct and definite grounds, clearly and relevantly averred—(Becket *v.* M'Arthy, 2 B. and Adolph., 951). In strict pleading, the defender has made no averments of which he could, according to our forms of process, be allowed a proof. The course of pleading adopted by the defender deserves to be noticed. On 23d February 1860, the pursuer indorsed on the defences a consent to close on summons and defences. When the case appeared in the adjustment roll to close the record, the defender, on 28th February 1860, craved an order for revisal, and obtained it 'on the defender's motion, and under reservation of the question of expenses.' Notwithstanding of this, however, no new paper was lodged by the defender in answer to the revised condescendence for the pursuer, but the original defences, with a few verbal alterations, and bearing the pursuer's indorsation to close, were lodged as 'revised defences,' and no 'statement of facts for the defender' was made in this paper. Thus, notwithstanding that the revisal was allowed, on the defender's own motion, he advisedly abstained from putting on record any definite and specific averments in point of fact as the foundation of a counter case. This the defender ought in all cases to do. In such a case as this it was peculiarly necessary that the defender's statements, in point of fact, should be precisely and distinctly made as substantive averments—(13 and 14 Vict., cap. 36, sect. 1; Act of Sed., 11th July 1828, sect. 105).

"The Lord Ordinary has the less hesitation in applying to the defender's attempt to escape from this judgment of the Court of Queen's Bench the strict rules of pleading, because he observes that the defender, in the first letter which he seems to have addressed to the pursuer's attorney, after the date of the judgment, does not deny the debt, or dispute the judgment, but merely craves indulgence—Letter of 18th June 1854, No. 17 of process."[1]

[1] "Dear Sir,—I am much obliged to you for your favour of the 5th instant which I only received this morning. I was rather taken by surprise to learn you had signed judgment without prior intimation of the fact to me. . . . . I rely upon your indulgence to allow the matter to remain over until the dividends become payable in July," &c.

was also in absence, although bearing to be not so. A foreign decree might competently be examined, on any relevant objection being stated to it;[1] and, therefore, the only question was, whether the objections now stated were such as entitled the defender to proof? There was no evidence that any judgment had been pronounced at all. But the point of the case was, that there had been no notice of these proceedings; and, therefore, that the defender had had no opportunity of appearing and defending himself. The pursuer must instruct by evidence that the proceedings in England were regular before he could plead them in this country. There was no presumption that the proceedings were regular, especially where there was a denial of all the averments on the subject. The document produced by the pursuer as a judgment was not a probative document; neither was the certificate by Mr. Gribble. It established nothing. Possibly it might be the very thing required, but how was this Court to know that? But it was impossible to hold it sufficient, merely because the defender's answer to the pursuer's statement was defective; and that could be held where he positively averred want of service.[2]

Replied;—The authenticity of the document produced was not denied, and no case had been made against it. This judgment was not in absence.[3] If there had been a statement here that notwithstanding this *ex facie* regular proceeding there was no regular proceeding in the Court of Queen's Bench, the Court might have allowed proof. But there was no such averment.

Lord President.—A demand is now made for proof of the averment contained in the concluding part of the answer to the second article of the pursuer's condescendence. I think that the record in this case is not to be condemned for prolixity. I should rather say, that when a question is raised as to a matter of English law and practice, we would have desired a little more full statement in the record than we have on both sides. The action is brought to have judgment pronounced here in conformity to a judgment that is stated to have been pronounced in the Court of Queen's Bench, and there is produced to us an "Exemplification" of a judgment pronounced in that Court, bearing date 11th February 1854, bearing the signature of one of the Masters of the Court; and bearing a marking upon it that the judgment was signed on 27th April 1854. It bears the seal of the Court, and is certified by a notary in the usual way, and nothing is stated in this record against the regularity of that exemplification of judgment. Therefore I hold that it is to be received and read as the exemplification of a judgment that was pronounced by the Court of Queen's Bench—that in point of form it is perfectly regular as that which it professes to be. That, however, does not preclude the party from impugning the judgment of the Court of Queen's Bench on grounds properly stated, and in themselves sufficient. It is difficult to gather from the statement of the defender what it is exactly that he means to say in reference to the proceedings in the Court of Queen's Bench. The defender's answer to the pursuer's first averment admittedly cannot be reconciled with the statement in the answer to cond. 3. They are contradictory and inconsistent. Therefore it [777] is difficult to read the statements so as to understand what the defender means to aver. But, in reference to the answer to article 3, which is what the defender chiefly founds upon, I desired to know more clearly what was meant by saying that he "was not a party to these proceedings." But I find that that is an expression used by the party in some sense, which those charged with the defence are not able to interpret for him. Then the defender says further that he "was not served with any writ or summons in reference to the proceedings in the English Courts," and he now asks to be allowed proof of this averment.

Now, the object of proof, I suppose, is to establish something as to the service of writs or summonses, and something as to the appearance of parties in such proceedings. I am not very sure what is meant by the expression "not served with any writ or summons," and I am not sure what is meant by "never authorised any one to appear

[1] Southgate *v.* Montgomerie, 9th February 1837, 15 S. & D. 507; 1 Starkie on Evidence, 356; Holditch *v.* Spalding, July 1844, 2 Clarke & Fin. 470; Kames' Principles of Equity, 366, 368, 376.

[2] Brown's Commentaries, p. 167.

[3] Chitty on Forms of Practical Pleading, pp. 58, 463, 478.

in, and was not a party to these proceedings." These may be technical expressions, or they may not. If we were to allow proof of them, we would allow proof on the assumption that if the matters set forth here were established, the decree would not be a good decree—that it would not stand in its own country—that the steps taken towards obtaining it were irregular and inconsistent with practice, and that the decree was bad. I am not prepared to do that without some better knowledge of what is the English law, and what is the meaning of these expressions. Now, in order to apply this matter in evidence, I would like to know what is the law of England in regard to the steps that should be taken preparatory to taking such judgment. I cannot get at these in this case, because there is no averment as to what it means. The defender has not averred it. If we allow proof before answer, and get proof, we might then learn, by reference to England, what is the course of procedure there. But I do not think we are entitled to do so unless it is averred. I think that the statement which the defender makes here is unsatisfactory. It wants explanation. It wants the fulness which would be required in such matters. He ought to have set forth what he says are the proceedings which are necessary towards the efficacy of the judgment in the country in which it is pronounced, and then stated what is awanting in that respect in the case with which we are now dealing. Without that, I cannot see how we can give effect to this objection at all. The defender should have made a statement of facts for himself in regard to this. I think there is an objection to the place in which it is found, although, if it had been very full, it might have been got over. But, when introduced in this meagre way, in answer to the allegation that this was a judgment of a competent tribunal, and that it is in competent form—which is not now impugned—it is introduced in a place where it ought not to be. But being there, yet so inexplicit and defective an allegation as to what the law of England is, I do not think we can allow the proof which is proposed to be taken.

LORD IVORY.—I am of the same opinion, and have nothing to add.

LORD CURRIEHILL.—I have felt considerable difficulty as to this case. The only ground upon which our judgment is sought is, that a judgment, such as is now sought from us, has been given against the defender in an English Court. We have no statement as to the grounds of debt, and no offer to prove it otherwise than by the English judgment. Before we can give decree conform, without further evidence in support of the claim, we must be satisfied that the judgment is such that it would be held as *res judicata* in England. Upon one point I entirely concur,—namely, that this Exemplification is sufficient evidence that the judgment was pronounced. I have looked at it, and I see that it is signed by a Master of the Court, and that it is sealed with the seal of the Court. I cannot go into the objection stated on that ground. Assuming the decree to have been pronounced, I look to see upon what ground it was pronounced. It sets forth that "on the 27th day of April 1854, the defender in person says that he cannot deny the action of the plaintiff, nor but that the plaintiff is entitled to recover against him L.50, 16s. 6d." The only ground, therefore, of that judgment, is a statement that the defender appeared in Court and confessed the debt. If we could assume the decree as proof of that statement, it would be the best of all means of establishing the debt. But that allegation is met by a denial in the answer to the second article of the condescendence. The third article of the condescendence contains an allegation that the sum of L.51, 18s. 6d. was legally due, and that the judgment was pronounced by a competent tribunal in competent form. That is met not only by a [778] general denial, but by this counter statement upon the defender's part, that he "was not served with any writ or summons in reference to the proceedings in the English Courts, and he never authorised any one to appear therein, and was not a party to these proceedings;" and he offers to establish these allegations, and demands a proof of them. I cannot resist that demand, unless these allegations be shown to be irrelevant. I cannot give judgment in favour of the pursuer without allowing the defender a proof of the allegation that the ground upon which the judgment bears to have been pronounced was false in point of fact. In the first place, we would require to know whether, if that was established, the law of England would give redress. If it would, we could not withhold similar redress. And even if the law of England would give no redress, we would have to inquire whether, according to that comity which is the ground upon which the courts of one country give effect to the decrees of another, the law of Scotland would require us to give decree for an

alleged debt, merely because a foreign court had given decree for it in an action to which the debtor had not been summoned, in which he did not appear, and in which there had been no inquiry as to the ground of debt. I do not think that the comity shown by the courts of one nation to those of another would authorise us to give decree for a debt which could not be said to be established in any way except by a decree which, in the circumstances supposed, it would be contrary to all sound principles of law to recognise.

I am sorry I cannot concur with your Lordships, because I cannot resist an impression that the defender's statements are put forward for the mere purpose of delay. But I cannot get over the obstacle which the law creates against my giving way to such a suspicion.

LORD DEAS.—Three reasons have been urged to us why the interlocutor of the Lord Ordinary should be recalled. In the first place, that this Exemplification, without proof led in support of it, is no evidence of anything. 2d, That there is a denial on record that there ever had been an action or suit in which the judgment libelled could have been pronounced. And 3d, *Esto*, there had been such a suit or action, that there is a denial on record that there had ever been service or notice of it to or upon the defender. Mr. Young relied mainly on the first of these grounds. That ground, I think, is the weakest of the three. I have no doubt whatever that the Exemplification is good and sufficient evidence for this Court to receive, so long as it is not impugned as being false and forged. It bears to be attested by one of the Masters of the Court of Queen's Bench as a true copy of the original judgment roll in the custody of the Masters. The seal of the Court of Queen's Bench is appended to it, and then you have a notarial instrument prefixed, in which the notary certifies that it is an office copy, and agrees in all respects with the original judgment roll, and that the signature at the foot thereof is the genuine subscription of Mr. Hodgson, one of the Masters of the Court.

Now I take it that such an Exemplification, with its authenticity so attested, is evidence which would be received all over the world. At all events, I have no doubt that it is receivable in this Court as full legal evidence of that judgment, and that we must deal with it accordingly.

In the second place, however, it is said that there is a denial on the record that there was any such suit or action. And, no doubt, as your Lordship has pointed out, in the answer to the first article, the defender says vaguely—"Not known, and not admitted that the pursuer raised an action or suit in the Court of Queen's Bench in the year 1854 against the defender." But then we have also the statement, which your Lordship likewise pointed out, in answer third, where he explains and avers, "that the account referred to in the proceedings before the Queen's Bench was for goods said to have been furnished to his son," which is quite inconsistent with the supposition that no such proceedings ever existed. Again, when you come to the end of that article, he further says, he "was not served with any writ or summons in reference to the proceedings in the English courts," which is also inconsistent with the supposition that there had been no such proceedings. If anything else is necessary on this second point, it is sufficient to refer to his first and second pleas in law. These may be good or bad pleas in themselves, but they plainly go on the same assumption with his answer to article third, that there did exist a writ or summons at the instance of the pursuer in the Court of Queen's [779] Bench on which a judgment was pronounced, and accordingly there is no plea in law founded on the opposite assumption.

There remains only the third ground, being the only one in which there is any room for question at all—viz. a denial that there was any service of the writ or summons on the defender. Now the averment in regard to that is the averment already partially quoted from the end of the answer to the third article of the condescendence—"The defender was not served with any writ or summons in reference to the proceedings in the English courts, and he never authorised any one to appear in, and was not a party to these proceedings."

Now, assuming the existence of the proceedings and judgment, we must also assume that the Court of Queen's Bench had before it such evidence of service or notice as that Court deemed necessary before pronouncing that judgment. If, then, this party meant to aver that there had been some irregularity, or omission, or falsification in the service or notice, or in the evidence of service or notice, which he wished us to

inquire into, I think he was bound to have stated what it was which the law of England required in the shape of service or notice, or evidence of service or notice, and then to have stated what the defect was which he alleged to have occurred. He was not entitled to wrap himself up in generalities, which, if explained, might turn out to import no defect at all, but to be a mere sham for the purpose of delay. The effect of every decree of a foreign court might be indefinitely postponed, if a vague statement like this were enough. With reference to this point, it is by no means immaterial to notice what is mentioned in the note of the Lord Ordinary, that this party had ample opportunity of amending this record if he had thought proper. But after delaying the case, by taking an order for that purpose, he failed to avail himself of that order.

Farther, I doubt if it be necessary to our pronouncing a decree conform to this English judgment, that we should be satisfied that it is a *res judicata* in the sense of its being a judgment which could not be got over or recalled in the English courts. I am disposed to think that that is not necessary. That judgment was pronounced six years ago; and if it be true that the writ or summons was never served on the defender, and that this is a fatal objection to the judgment, it is a remarkable fact that he has never taken any step in England for setting it aside. All that we are asked to do here is to give decree conform to it, so as to enable the party who obtained it to have the same execution on it in Scotland as in England, so long as it has not been duly impugned or recalled. If execution following upon it in England would not prevent the defender getting rid of the judgment altogether, so neither will execution in Scotland. Be this as it may, however, the answers already stated to the three grounds of objection are to my mind conclusive, and I am clearly of opinion that this interlocutor should be adhered to.

The Court pronounced the following interlocutor:—"Refuse the desire of the said reclaiming note, and adhere to the interlocutor reclaimed against: Find the defender liable to the pursuer in additional expenses of process," &c.

No. 126. **XXIII. Dunlop 796.** 23 Mar. 1861. 1st Div.—Lord Jerviswoode.

WILLIAM GRANT and JOHN GRANT, Complainers.—*Sol.-Gen. Maitland—D. M. Smith.*

JOHN GEORGE TOLLEMACHE SINCLAIR, Respondent.—*Ross—Boyle.*

Landlord and Tenant—Lease—Break.—An agricultural lease for fourteen years was entered into with the landlord's factor, but no formal lease was extended. The conditions were written in duplicate, and bore to be between the tenants and the factor. The landlord's copy, which was duly signed, bore that there was to be a break at the end of seven years. The tenants' copy bore, in addition, the words "optional to the tenant." The tenants' copy also contained certain marginal additions, which were not inserted in the landlord's copy, but which, nevertheless, the landlord admitted he had authorised, although he repudiated the words "optional to the tenant," and denied the authority of the factor to insert them;—*Held* (1.) that, in construing the lease, both copies of the lease were to be looked at; (2.) That the factor having admittedly had power to grant a lease, must be presumed to have had power to modify or alter the conditions of it; (3.) (*alt.* judgment of Lord Jerviswoode) that there being no charge of fraud against the tenant, the circumstances warranted the presumption that the words "optional to the tenant," were inserted by authority of the factor; and, therefore, that the landlord was not entitled to put an end to the lease.

William Grant and John Grant, residing at Dirlet, presented a note of suspension of a threatened charge, at the instance of John George Tollemache Sinclair, upon a decree of removing pronounced by the Sheriff-substitute of Caithness upon the 8th March 1859, affirmed by the Sheriff-depute upon the 23d day of May 1859 (*infra*, p. 801). In the summons of removing the suspenders were described as "tenants under

the pursuer, in virtue of a minute of agreement between William Tait, factor on the Ulbster estate, and the defenders, dated 18th March and 16th April 1851." The final decree of the Court in the suspension contained the following findings as matter of fact: **[797]**—"1st, That, in the month of March 1851, an agreement of lease was entered into between William Tait, then factor on the estates of Ulbster, and who, as such factor, was in use, on behalf of the landlord, to enter into agreements of lease, on the one hand; and the complainer John Grant, acting for himself and the other complainer, on the other hand, whereby there was let to the complainer the farm of Dirlet for the period of fourteen years from the term of Whitsunday 1851; and that at or prior to Whitsunday 1854 the respondent further let to the complainers the lands of Acharenny, to be held by them on the same footing as the foresaid farm of Dirlet. 2d, That, in March 1854, duplicate minutes of agreement of lease of the said farm of Dirlet were prepared by the said factor and his clerks, and were signed by the parties, and that one of these minutes was retained by the landlord, and forms No. 9 of this process, and the other was delivered to the tenants, and forms No. 16 of this process. 3d, That, of the date on which the said minutes were signed by the said William Tait and John Grant, and after the minute No. 9 had been signed, and before the minute No. 16 was signed, certain alterations were agreed upon, which were added by the said William Tait, and his clerk, Andrew Tait, on the margin of the minute No. 16, being the duplicate delivered to and retained by the tenants. 4th, That each of the said minutes contains in the end of the first clause thereof the words, 'with a break, however, at the expiry of the first seven years of the lease.' 5th, That, in the minute No. 16 held by the tenants, there are added to the said words the further words, 'optional to the tenants;' which words do not occur in the minute No. 9 retained by the landlord. 6th, That the said last mentioned words were added to the said minute No. 16, by one of the clerks of the factor, then present, and by his authority, before the said minute No. 16 was delivered to the tenant. 7th, That the said minute No. 16, with the additions and alterations thereon, has ever since been retained and acted on by the tenants as their title of possession, put into their hands by the factor for the landlord. 8th, That the tenants did not avail themselves of the break stipulated in the agreement of lease, or give any notice of intention to do so; but, on the contrary, intended to continue their possession of the lands till the expiry of the stipulated period of fourteen years. 9th, That, on or about 11th November 1857, the respondent gave notice to the complainers, that he intended to put an end to the said agreement of lease at the term of Whitsunday 1858, being the term of the expiry of the first seven years thereof; and that, on the 13th of the same month of November, he raised an action of removing against the complainers, concluding against them for removing from the subjects before mentioned at the term of Whitsunday 1858, in which action of removing the decree of removing now under suspension was pronounced against the complainers."

The suspenders, in their reasons of suspension, stated that "it appears that the words 'optional to the tenants' were not inserted in the other duplicate or counterpart of the minute of agreement, being No. 3/4 of the inferior court, and No. 9 of the present process, which was retained by Mr. Tait on behalf of the respondent, although the complainer, John Grant, relied upon Mr. Tait's causing this to be done at the time. The other complainer, William Grant, was not present; but he, afterwards, on the application of the respondent's ground-officer, Robert Bremner, adhibited his mark to the same on the 16th of April 1851, without its being read over to him, and in perfect reliance and good faith that it corresponded with the other copy or duplicate in the hands of himself or his son. Farther, the said duplicate or missive held by the respondent is wanting in certain other stipulations as to meliorations and other matters which are entered by the said William Tait on the duplicate or missive held by the complainers, and which stipulations, **[798]** by admission of the respondent, form part of the contract between him and the complainers." The answer to this statement was,—"Admitted that the words in question were not inserted in the minute, No. 9 of process, and that the same does not contain certain stipulations to which the respondent has given effect. It is also admitted that the complainer, William Grant, was not present when the minute was signed. *Quoad ultra* denied as stated; and it is explained that the complainer, John Grant, signed the minute No. 9, before he signed the minute No. 16."

The additions made to the minute of agreement founded on by the suspenders, but which were not contained in the landlord's copy, were as follows:—"1st, That a lease of the said lands shall be granted for a period of fourteen years, from and after the term of Whitsy. 1851, with a break, however, at the expiry of the first seven years of the lease, optional to the tenants. 4th, That meliorations shall be allowed for timber on the roofs of such additional approved of office-houses, with slated roofs or shed covers, at the termination of this lease. 13th, That the proprietor agrees to put the dwelling-house in a proper and tenantable state of repair at his own expense."

The testing clause of the landlord's copy bore, that "this minute of tack, written upon this and the preceding eight pages, by Andrew Tait, residing at Ormelie, at Ormelie the 18th day of March 1851 years, in presence of these witness, the said Andrew Tait and William Dickinson, residing at Thurso, at Dunbeath, the 16th day of April 1851, in presence of these witnesses, Alexander Sinclair and William Sinclair, residing there.

(Signed) "WILLM. TAIT.
his
"WILLIAM × GRANT.
mark
"JOHN GRANT.

(Signed) "Andrew Tait, witness; William C. Dickinson, witness; Alex. Sinclair, witness;—and William Sinclair, witness to Wm. Grant mark, at Dunbeath, this 16th April 1851."

It did not appear whether the lease of the lands of Acharenny, which were admittedly leased at Whitsunday 1854 on the same footing as the other lands were held and occupied, was verbal or written.

On the 11th day of November 1857 the landlord gave notice of his intention to put an end to the lease at Whitsunday 1858, and on 13th November he brought an action of removing in the Sheriff-court of Caithness. Proof having been allowed, the defender, William Grant, deponed,—"Aged 70. I and my son John entered to the farms of Dirlet, and others, at Whitsunday 1851. My son John arranged with Mr. Sinclair, pursuer, or Mr. Tait, his factor, about the lease before we entered. I had no conversation with Mr. Sinclair or Mr. Tait about the lease, and I left it entirely with John to arrange the terms with them. John told me the lease was to be for fourteen years, and that we were to have a break at the end of seven years. I cannot read or write. The lease was read over to me by John. Being shown No. 3/4 of process, I identify my mark, which was affixed at Dunbeath in presence of William and Alexander Sinclair. Before putting my cross to it, I was informed as to how long we were to have the farms by Robert Bremner, ground-officer for the pursuer. He said it was for fourteen years. He said nothing about a break, as far as I mind. The paper was not carefully read over to me before I put my mark, nor read over to me at all at Dunbeath, as far as I mind. I did not put in the words 'optional to the tenant,' on page first of No. 10/1, nor got any one else to insert them. I wish to remain in possession for the remaining seven years. I do not recollect the date when I put my mark to the paper **[799]** at Dunbeath; it was a few weeks after we had made the agreement with the landlord. The parties present at my putting my mark were the said William Sinclair, Alexander Sinclair, and Robert Bremner. I know John Dunbar, farmer, Dunbeath. I do not recollect whether he was present. I cannot recollect whether, before I put my mark, the said Alexander or William Sinclair did or did not read it over to me."

Evidence was also led as to the handwriting of the words "optional to the tenants." Several witnesses who were familiar with the handwriting of the parties were of opinion that they were written by William Tait, the factor. Andrew Tait, the writer of both minutes, was abroad. William Tait, the factor, was in New Zealand at the date of leading the proof, and had since died. In 1852 the landlord, Sinclair, dismissed him for habitual drunkenness. The other witness, Dickinson, who had also been a clerk in Tait's office at the date of signing the minutes, was not examined in the action of removing; but having been examined in the suspension, "and being shown the minute of agreement, No. 16 of process, and being asked to state whether the same, or any part thereof, is in his handwriting, depones, With the exception of the marginal additions on pages 2 and 5, the said minute is in my handwriting, down to the end of

the 14th clause thereof on page 5. And being particularly asked whether the words 'optional to the tenants,' at the end of the clause No. 1 on page first of said agreement are in his handwriting, depones, I really cannot say at present whether these words are in my handwriting or not; but they appear very like my handwriting. Interrogated, depones, These words—'optional to the tenants'—appear to me as if they had not been written at the same time as the context. All the writing in the agreement which is in my handwriting was inserted in the minute under instructions from Mr. Tait, so far as I know. I would not have put in the words 'optional to the tenants' without Mr. Tait's instructions, nor would I have inserted them after I left Mr. Tait's office. I neither have, nor ever had, any personal acquaintance with the tenants, John and William Grant. I should not know them if I saw them. And being cross-examined for the respondent, depones, I have no special recollection of having written said minute of agreement, I wrote so many similar documents. I have no special recollection of inserting the words in question, supposing I did insert them. Interrogated, depones, There appears to have been some interval of time between the insertion of the words 'optional to the tenants,' and the writing of the context of the deed."

John Grant, the other defender, deponed,—"I am 33 years of age. I knew the late William Tait, factor for the pursuer. In 1851 I made an agreement with him to take the farms of Dirlet and others. Being shown No. 3/4, I identify my own signature and Mr. Tait's attached thereto. I saw him sign it. There was another copy of that agreement which was not signed at the same time as No. 3/4. Immediately after signing No. 3/4, Mr. Tait and I had some discussion about buildings and improvements. He agreed to put the dwelling-house into repair at his own expense. I do not know if he inserted the clause or note at top of page 5, No. 10/1, in his own hand, but I heard him order it to be put on. I had also some discussion with him about the building of houses. He agreed to allow me meliorations, and I saw him insert the lower marginal note on page 2d on No. 10/1. We have erected barn, byre, cart-shed, gig-shed, and stable. I complained that the lease was of too short duration to admit of my being at the expense of the buildings which we were obliged to put up; and Mr. Tait then ordered some person, who was in the room at the time, to insert the words 'optional to the tenants,' on page first of No. 10/1, and all the marginal additions, and these words were inserted in No. 10/1, before I and Mr. Tait signed that paper; and, on the same day, and immediately after we had signed No. 3/4, I desired Mr. Tait to get these additions inserted in No. 3/4, but he [800] told me to take No. 10/1, and he would get the alterations and additions inserted in No. 3/4. These words 'optional to the tenant,' were not inserted by me, or by any person authorised by me. I wish to retain possession for the remaining seven years of the lease. I did not know Mr. Tait's clerks. I had only seen himself once, besides that occasion, and it was at the parochial board of Latheron. I transacted the matter with Mr. Tait for myself and my father. My father did not transact personally with either. It was in virtue of No. 10/1 that I entered into possession, and have retained the farms."

Alexander Sinclair, tenant, Dalemore, aged 58, being shown the document, No. 3/4,—"My name, and that of my brother William, are attached as witnesses thereto. The words to William Grant's mark were filled in by me. William Grant put his mark at the time therein mentioned in my house, the post-office. I read a portion of it to him, beginning with the beginning. I cannot say if I read it all; but I did mention to him that there was a break in seven years. I distinctly recollect of this, but whether I made it as a statement, or read it from the paper, I do not recollect. My own lease was signed the same day, being the lease No. 12. For defenders.—My belief is, that William Grant understood what I said about the break. I cannot swear as to the fact, but I think the negotiation about the lease took up part of two days."

Mr. Sinclair, the pursuer, "being shewn No. 10/1 of process, depones, I recognise the handwriting of Mr. Tait in the second marginal note on page 2 thereof. The other marginal notes are in the handwriting of Andrew Tait, his brother, who was a clerk in my office, and the body of the document is in the handwriting of a clerk of the name of Coghill, as I believe, excepting from the middle of page 5 to the end, which is in the handwriting of Andrew Tait; and also, with the exception of the following words on page 1st, 'optional to the tenants.' Having compared the signature to No. 13/1 with the words 'optional to the tenants,' depones, I think they are exceedingly like the same handwriting. I do not recognise the handwriting of the words, 'optional to the tenants,'

as that of any clerk in the factor's office, with all of which I am familiar. I took an active charge of the management of the estates during the years 1851 and 1852. I was present in the factor's office when the particular lease, which is the subject in dispute, was negotiated. The lands let to the defenders were only a portion of lands which had been let to a previous tenant, and which were divided between the Sinclairs of Dalemore and the defenders. Both these leases were negotiated at the same time, and the tenants of both farms wished to have a break optional only to themselves, and that proposed break was the subject of conversation to which I allude. I refused to allow a break within their own option, but I offered to agree to a mutual break, or, as an alternative, that there should be no break at all. The former proposition—viz. a mutual break, was adopted by the tenants of both farms. To the best of my recollection, the defenders never, on any subsequent occasion, proposed to me that they should have a break in the lease optional to themselves; and had that proposition been made to me, I should certainly have rejected it. I never heard of any such proposition having been made to Mr. Tait subsequently to the negotiation, nor was I made aware of any words to that effect in the defenders' copy of the lease, till a short time before the present process was instituted. When Mr. Tait was sober, I considered him a very accurate and pains-taking man of business, and more likely to err through over cautiousness than over confidence. On three occasions I found him in his office the worse of drink, and then he did not transact any business, being unfit to do so. Re-examined—Depones, The negotiation to which I have alluded to-day took place in the end of April or about the 1st of May 1851, but I am not certain as to dates. It may have been as early as March of that year. **[801]** I think the negotiation was begun and ended in one day. The Sinclairs of Dalemore came along with the defenders, and gave them advice during the negotiation. The negotiation took place in the factor's business-room. There were two clerks in the office, moving in and out, but I do not believe they paid any attention to what was going on. My attention being called to the marginal note on page 2d of production No. 10/1 of process, which note I have already stated to be in the handwriting of Mr. William Tait, depones, That, from my knowledge of Mr. Tait's practice in such matters, I am satisfied he must have got my sanction to make a stipulation in the terms contained in the said marginal note. I also sanctioned the stipulation contained in the marginal addition on page 5 of said document."

The Sheriffs-substitute and depute both refused the defenders' motion for a commission to take the evidence of Andrew Tait, in New Zealand.

In these circumstances the Sheriff-substitute (Hamilton Russell), on 8th March 1859, pronounced the following interlocutor, which, on 23d May 1859, the Sheriff-depute (Dingwall Fordyce) adhered to on appeal:—"The Sheriff-substitute having resumed consideration of the closed record, with the writings produced, proof adduced, heard parties' procurators, and advised the cause, finds, as matter of fact, that by probative minute of agreement between the pursuer and the defenders (No. 3-4 of process), the pursuer let to them the farms of Dirlet, Cattag, Smerery, and Snitout, for the period of fourteen years from Whitsunday 1851, at the rent therein specified, 'with a break, however, at the expiry of the first seven years of the lease:' Finds that the said minute was signed by the said John Grant, but not by his father William Grant, in respect the latter could not write, and did not have his signature attached notarially, but that it is admitted by the pursuer that he followed the faith of the said John Grant in the signing of the said minute, and that it is admitted by the defenders that the said John Grant acted in the transaction for his father and himself, with the consent and approval of the former: Finds that the pursuer, at some time thereafter, but the date of which has not been specified, let to the defenders, by an agreement, whether verbal or written has not been explained, the farm of Acharenny, for the same period, and on the same terms as regards the endurance and break, as the lands of Dirlot and others were let to them: Finds that the defenders entered into and have continued in possession of these several farms: Finds it admitted that, on the 11th of November 1857, the pursuer gave written notice to the defenders that he meant to avail himself of the foresaid break, and to put an end to the lease of the whole of the foresaid lands at Whitsunday 1858: Finds that the defenders have resisted removal, on the ground that, by an alleged minute of lease between the parties, of the same date as that founded on by the pursuer, the latter agreed to limit the option in regard to the break

to themselves; and that the deceased William Tait, then factor for, and acting in the whole transaction as representing the pursuer, inserted, or directed the insertion of the words, 'optional to the tenants:' Finds that any agreement to that effect is denied by the pursuer; that the defenders have failed to establish that those words, 'optional to the tenants,' were inserted by the said William Tait, or by any party with his authority, and that the document founded on by the defenders is not signed, is improbative, and can bear no faith in judgment: Finds, as matter of law, that the minute of agreement founded on by the pursuer is a valid agreement, containing a right to either party to a break at the period mentioned; that the pursuer gave competent notice that he availed himself thereof, and therefore sustains the action, repels the defences, and decerns in the removing, in terms of the conclusions of the libel: Appoints the case to be enrolled, that parties may be heard with reference to the conclusions for violent profits: Reserves all questions of expenses, and decerns."

[802] It was of the threatened charge upon this decree that the present suspension was brought by the Grants, who stated that they had now ascertained that the addition founded on had been made by a clerk in Mr. Tait's office, named Dickenson, who was resident in England, and craved a diligence for his examination, which, on their renouncing probation *quoad ultra*, was granted. They pleaded;—That the missive or minute held by them being the contract, or an essential part of the contract betwixt them and the respondent, and not being founded on by him, the action is incompetent. That they had been improperly prevented from leading competent and relevant evidence as to the preparation and execution of the missive held by them. The option of a break at the expiry of the first seven years of the lease being expressly limited to the complainers in the missive held by them, the respondent is not entitled to found on the same. Even exclusive of the words, "optional to the tenants," the provision as to the alleged break falls to be construed against the landlord, and is presumed to be for the benefit of the tenants. At all events, that provision forming a condition subsequent to the constitution of the contract of lease, and being imperfect and inoperative in the shape contended for by the respondent, he cannot, without the consent of the complainers, irritate the contract at his own option. Even supposing the respondent to be entitled to act upon the break, no period of notice being stipulated, the respondent has no right to fix the term of such notice at his own hand, and it is *ultra vires* of the Court to fix the same on his behalf. Farther, supposing the said break to be operative at the instance of the respondent, the conclusions of the action of removing, and judgments following thereon, not being in accordance with the terms thereof, the said action is incompetent, and the said judgments are wrongous and unjust, and ought to be recalled, with expenses.

The respondent pleaded, *inter alia*;—The copy of the minute of lease on which the suspender founded can bear no faith in judgment, in respect it is deficient in the solemnities required by law, and has not been acted upon by the parties thereto. The insertion of the words, "optional to the tenants," in said minute, not having been made with the consent or knowledge of the respondent, or any one acting on his behalf, or, at all events, by any one duly authorised by him, and for whose actings in the matter he is responsible, the same are not binding upon him.

On 20th July 1860 the Lord Ordinary pronounced the following interlocutor:—"Finds, as matter of fact, 1st, That an agreement of lease was entered into, in the month of March 1851, between William Tait, then factor on the estates of Ulbster, on the one hand, and the complainer John Grant, acting for himself and the other complainer, on the other hand, whereby there was let to the complainers the farms of Dirlot and others, for the period of fourteen years from the term of Whitsunday 1851; and that, at or prior to Whitsunday 1854, the respondent farther let to the complainers the lands of Acharenny, to be held by them on the same footing as the foresaid lands; 2d, That duplicate minutes of agreement of lease were signed by the parties in March 1851, as aforesaid, and that one of these duplicates was retained by the landlord, and forms No. 9 of process, and that the other was delivered to the complainers, the tenants, and forms No. 16 of the present process; 3d, That on or about the date at which these duplicate minutes were signed by the complainer John Grant and by Mr. Tait, a communication took place between them in regard to certain buildings and improvements on the farm, and that thereafter the factor made two marginal additions on the said duplicate minute, No. 16 of process, bearing reference to these

matters; 4th, That each of the said minutes, in the first clause thereof, contains a provision for a break at the expiry of the first seven years of the lease; 5th, That in the duplicate minute held by the [803] tenants, there is further contained, in the said first clause, the words 'optional to the tenants,' which words do not occur in the first clause, or in any part of the duplicate minute retained by the landlord; 6th, That by minute, No. 45 of process, the complainers renounced further probation, excepting as regarded the examination of William Charles Dickenson, mentioned in the 12th reason of suspension, and that the said William Charles Dickenson has since been examined, under the interlocutor of 29th June last, his deposition being contained in the report, No. 46 of process; 7th, That the complainers have failed to prove that the said words 'optional to the tenants' were inserted in the said minute, No. 16 of process, by the hand of the said William Charles Dickenson, or that these words were inserted in the said minute by the authority of the said factor, as stated in the 2d and 12th reasons of suspension; And 8th, That on the 11th November 1857, the respondent gave notice in writing to the complainers, that he intended to avail himself of the break stipulated in the minute of agreement; and that, on the 13th of November following, he raised the action of removing against the complainers, concluding for removing against them from the subjects before mentioned, at and against the term of Whitsunday, or 15th day of May 1858, in which process the decree of removing now under suspension was pronounced: Finds, as matter of law, and with reference to the foregoing findings, that the break stipulated in the said agreement of lease was mutual, and available to either of the parties thereto, and not to the complainers only; that the respondent had sufficient right and title to give notice that he intended to avail himself thereof, and to insist in the summons of removing subsequently raised by him against the complainers; and that the conclusions for removing therein contained were competent and relevant, with reference to the terms of the foresaid minute of agreement of lease: Therefore, repels the reasons of suspension, refuses the note, and decerns: Finds the complainers liable to the respondent in the expenses incurred by him in this Court: Appoints an account thereof to be lodged, and remits the same to the Auditor to tax and to report: Farther, remits the cause to the Sheriff to proceed therein as to him shall seem just."[1]

[804] The suspenders reclaimed.

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[1] "NOTE.—This case presents features of considerable difficulty, and the question which has first to be determined is, what are truly the terms of the agreement of lease between the parties? It is set forth on the part of the complainers themselves, in the second reason of suspension, that the minute or missive of agreement was made out and signed in duplicate—one duplicate being delivered to the complainers, and the other retained by the respondent. In the answer to this reason, it is stated that it is believed to be true that the minute No. 16 of process was originally prepared by the orders of the factor, to be executed as a duplicate of the minute No. 9; but the other statements made regarding it are denied. The truth of the case appears to the Lord Ordinary to be, that these minutes were really intended as duplicates for the use of the respective parties, but that, in consequence of some communication between the complainer John Grant and Mr. Tait, as spoken to by the said complainer in his evidence in the inferior Court, Mr. Tait had agreed, subsequent to the adjustment of the substantive terms of the lease, to allow certain meliorations and buildings to the tenants, a memorandum as to which was then placed by him on the duplicate minute which was intended for the use of the tenants. It farther appears from the said complainers' evidence, that Mr. Tait undertook to insert additions to the same effect in the copy retained for the landlord. This he never did.

"In these circumstances, the Lord Ordinary is of opinion that the complainers cannot relevantly object to the summons of removing, that it is founded solely upon the minute of agreement in the possession of the landlord. The Lord Ordinary understands, that where a deed has been executed in duplicate, each duplicate is a principal deed, and may be founded on as such. If so, it follows that the action of removing was competently laid on that writ which was in the hands of the landlord; although, in the particular circumstances of this case, a defence may arise on the merits, in consequence of the variations which are found now to exist in the terms of the two minutes as produced.

"Laying aside, then, the objection urged for the complainers, that both minutes

LORD PRESIDENT.—This case is in about as unsatisfactory a position as any case I have seen. There is room for considerable difference of opinion in regard to it,

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are not, or that the tenants' duplicate alone is not, libelled on as the warrant for the action, the Lord Ordinary shall pass to the next question raised at the debate, which had reference to the particular terms of the summons of removing. It was strenuously maintained, on the part of the complainers, that that summons was altogether inept, in respect that it concluded for removing at the term of Whitsunday 1858 only, and not as at that term from the houses and grass, and from the lands in tillage at the separation of the crop. But it appears to the Lord Ordinary that as by both the duplicate minutes the lease was granted only for a period of fourteen years from and after the term of Whitsunday 1851, the summons was in apt and corresponding terms, although it does not by any means follow, as the complainers pleaded, that, on decree being pronounced in terms thereof, they would at once be deprived of the privilege, to which they are unquestionably entitled, of reaping the crop then sown by them on the lands, or of any reasonable access to the lands in connection with their right to such crop. On the contrary, they would, in the Lord Ordinary's opinion, be entitled to such crop, and proper access thereto, as in the ordinary case of an away-going crop.

"The leading question, however, as to which the parties have been directly at issue in this and in the inferior Court, has relation to the words 'optional to the tenants,' contained in the first clause of the duplicate minute held by the tenants, and which are not to be found in the landlord's duplicate. Evidence was led in the inferior Court in regard to this matter, and it did appear to the Lord Ordinary that the Sheriff had refused to allow certain evidence bearing on that matter which ought, in law, to have been admitted. But although the complainers originally founded on such refusal, they subsequently lodged the minute, No. 45 of process, whereby they renounced probation, except as regarded the evidence of Mr. Dickenson, as mentioned above, and consequently, as the Lord Ordinary understands, rest their case on the evidence as now adduced. The Lord Ordinary, anxious to ascertain the truth in regard to the facts of this important branch of the case with least expense to the parties, granted commission for the examination of the witness Dickenson, and his deposition has since been reported. His evidence, which cannot be considered of a satisfactory character, fails, in the Lord Ordinary's opinion, to establish that the words in question were written by him, or that they were written with the authority of the factor, Mr. Tait. If this be so, the only evidence in regard to this point is reduced to that of the complainer John Grant himself, and the Lord Ordinary concurs in the views of the Sheriff and Sheriff-substitute as to the necessity of receiving with reserve the testimony of one so directly interested in the suit.

"Holding, then, the alleged express option to the tenants not to be proved, a question still remains, which was pressed with much force before the Lord Ordinary, to the effect that, independent altogether of any express option, the terms of the minutes, as admitted by both parties, suffice to confer the privilege of enforcing the break at the expiry of seven years solely on the tenant, to the exclusion of the landlord. But whatever weight might, in other circumstances, have been due to this argument, the Lord Ordinary cannot think that he would do justice between the parties here were he to shut his eyes to all that has hitherto been urged, and now to consider the view adverted to as an abstract question.

"Even in this aspect, however, the Lord Ordinary would be inclined to hold that, on a fair construction of this informal, but strictly mutual contract, the privilege of the break must be held to have been intended to be mutual, and that it would require stronger evidence than can here be drawn from the terms of the writing to prove that the tenants were alone entitled to exercise that privilege.

"But, taking the case as it is truly presented to the Court in all its features, it appears to the Lord Ordinary to be evident that the complainers have been all along conscious that, under the original agreement, as contained in the duplicate minutes, before the words 'optional to the tenants' were inserted at all, it was intended that the break should be available to both parties. Accordingly, in whatever way the words in question were added to the minute held by the complainers, they were avowedly so added for the express purpose of effecting a change in the original terms of the agreement in regard to this matter, and to provide, contrary thereto, that the break should

[805] and I confess that my own opinion rather goes against the opinion of the Lord Ordinary. There is a farm let for fourteen years, with a break at the end of seven years. There is a document drawn up as a lease, and signed by the parties,—this is in the landlord's possession,—and, on the same day, there is what is called a duplicate prepared, which is given into the possession of the tenant. That duplicate appears to have been written before the other, for there is a clause in it that is struck out, and is not included in that other, in which the enumeration of the clauses is continuous, and there are some words struck out that impose a greater burden upon the landlord. But that document, which is called here the tenant's copy, is put into the tenant's hands as his title; and there is possession for seven years upon it, and then a removing is brought by the landlord, founded on the duplicate in his own possession.

In the first place, as to the question whether that break, as contained in the landlord's copy, was a break optional to the landlord or tenant, or both? I think it is a break optional to either party. The strict grammatical construction of it would rather lead me to consider it a break in favour of the landlord, than in favour of the tenant. The words by which it is constituted might, I think, bear that grammatical construction. It is a grant, but with a break, which is a limitation or restriction of the grant. It is a limitation attached to the grant. In the case of Johnstone, which was referred to, the clause was otherwise expressed. I hold the sounder construction of the document to be, that it left the break open to either party. If it could be held to be a break only to the tenant, even as expressed in the document in the possession of the landlord, that would be conclusive in this case. But if this document which is in the possession of the landlord had been the same in all respects with the document in the possession of the tenant, with the exception of the words, "optional to the tenant," I should have doubted the sufficiency of the evidence to have supported these words. But the copy retained by the landlord, and the copy given to the tenant on the same day, are not the same. The copy retained by the landlord does not show the true conditions of the lease as they stood when the tenant took his copy away with him, and as he has been possessing for several years. I think the lease has in its clauses conditions of importance, which are not in the landlord's copy. Therefore I cannot hold his copy as containing the conditions of the lease; on the contrary, it is admittedly a defective copy. Therefore [806] we must apply to the tenant's copy, and the circumstances connected with the lease, in order to ascertain what the conditions really are.

It is sufficiently established, that after the copy retained by the landlord had been signed, and with a view to the interest of the parties, various alterations were made. The alterations were made before the tenant carried away the copy which was prepared by the landlord, and was given to him as the voucher of his right of possession. Now this discrepancy as to the break is but one of various discrepancies, and the

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be available to the tenants only. The third statement of facts for the complainers in the inferior Court bears, that the complainer John Grant, after having signed one copy of the agreement, had a discussion with Mr. Tait, *inter alia*, as to the endurance of the lease, and, as he states, then obtained the insertion of the words in question; and, if it be competent at all to refer to parole evidence on this point, that of the same complainer, as given in the inferior Court, would seem conclusive. He there states that he complained to Mr. Tait that the lease was of too short a duration to admit of his being at the expense of the buildings which the tenants were obliged to put up, and that Mr. Tait then ordered some person to insert the words 'optional to the tenants.' These words were thus, according to the evidence of this complainer, inserted for the purpose of enabling the tenants to hold for a longer period than seven years, and when the said complainer objected that the lease was of too short a duration, he was, according to his own statement, treating it as a lease which the landlord might bring to an end contrary to the desire of the tenants, at the expiry of the first seven years.

"On the whole, the Lord Ordinary is of opinion that, under the agreement of lease as it truly subsisted, the landlord could competently avail himself of the break, and that the complainers have been unable to show sufficient grounds on which the decree of removing should now be suspended."

question comes to be, whether, looking to all the circumstances, there is ground for holding that this variation is in a different position from the rest? Now I do not think it is established clearly who wrote these words, "optional to the tenant." One person has sworn distinctly, that Dickenson was the man who wrote these words. Dickenson himself will not deny it; but he does not say, in express terms, that he wrote them. If I were to judge from comparison, I would say that there is a strong presumption that he wrote them. I think that the handwriting of these words is very like the handwriting of the rest of the document. But the more important thing is this, that it has the distinctive character of the writing of the several parties in that office, viz. the two Taits, as well as Dickenson; and although I see a material variation in his handwriting in a subsequent document which has been founded on in argument, I think it may be accounted for by the man being only sixteen when he wrote the one, and twenty-four when he wrote the other, being engaged in mercantile business in the meanwhile. But I do not think that that disproves that it was Dickenson who wrote the document, or the reverse. Nor do I think that the recent letter of Dickenson helps the case either way. I throw that document out of view altogether; and taking the rest of the writing in this article of the lease, and the marginal note in the duplicate lease, and the various marginal notes in the other document, and the strong similarity of the writing, the only difficulty would be, whether that was the writing of Dickenson, or one of the Taits. They were all in the same office. There is a strong presumption that it was written by Dickenson.

Then it is stated that there were two clerks going out and in while these documents were being signed; and we see from the signature of the witnesses to one of the copies that Dickenson was one of them, and William Tait was the other.

Farther, Grant says that the addition was made by some one in the room, by Tait's authority, and there is nobody to contradict that. While, then, we have the statement of one witness positive to the fact, we have the similarity of the handwriting, and especially Dickenson's handwriting. He will not swear that it was not his handwriting; and he says that if he did insert these words, he did so by authority. These circumstances, coupled with the fact that the lease was materially altered, and that these alterations were made on the document given to the tenant to carry away with him as his title of possession, lead me to the conclusion that this was one of those alterations so made; and it is impossible to escape from that conclusion, except on the footing that there was a forgery, which we see no ground for supposing there was.

But there is another point which has given me some trouble in the circumstances. It is said that the factor Tait had no authority to make such a stipulation. Sinclair says that he was against granting such a stipulation, and that if Tait had asked for leave to grant it, he would have refused it. We cannot give effect to that view of the matter. Tait did make other alterations; and there is this peculiarity in the case, that the minute of agreement which is given to the party as his title of possession, and the minute of agreement which he is made to sign by the landlord, is not a minute of agreement beween him and the landlord, but is a minute of agreement between him and Tait, as factor for the landlord. Therefore Tait is held out by the landlord as a party entitled to make the terms of the agreement. Consequently, if Tait sanctioned this alteration at that meeting, I do not think it is incumbent on the tenant to establish that there was also the landlord's sanction to it. Now, we have not Tait's evidence here. It is said that he was a person of dissipated habits, and was dismissed soon after the transaction. It may be so. But he was not of such dissipated habits as not to be held to be a factor authorised to make the terms of the agreement. These dissipated habits may have made him more pliable, and have accounted for his not transferring this alteration to the landlord's copy, or stated to the landlord afterwards that he had come under these [807] conditions; but that did not destroy the tenant's right, founded on what was done by the man whom the landlord held out as his representative in this matter. It may be that in the outset, on comparing two documents of this kind, with additions on one of them, there is an *onus* on the tenant, who had signed the one in the possession of the landlord, to show that the others were additions made by authority. But that is an *onus* which it is not difficult to shift; and I think that the tenant has shifted it in this case, for he has shown that various alterations were made which were essential to

the lease, but neither of which were copied into the minute which the landlord founds upon, but which he, nevertheless, acknowledges to be binding. Therefore the tenant has satisfied the *onus* of showing that the landlord's copy was departed from, which is the main thing to be looked to; and thus he has raised a presumption—raised from the handwriting of Dickenson, and positive testimony on the subject, which, in the circumstances, has led me to the conclusion—that the landlord here has not made out his case, and that the tenant has made out a case to sustain his possession under this missive, as showing that the meaning of the clause was that the break was to be optional to the tenant.

It is said the tenant must have had a different view of the clause originally, else he would not have insisted on inserting these words. It may be that he was doubtful whether it was a break at all, or whether he understood the meaning of the clause. In either view, it was right that he should have had that stipulation added—more easily acceded to, certainly, by the factor, if it was matter of doubtful interpretation before; but the words *are* added, and the addition is made in a handwriting which shows that the words were part of the transaction; and, upon the whole, I have come to the conclusion that the interlocutor of the Lord Ordinary must be altered.

LORD IVORY.—I have had great difficulty in this case, but I have come also, as the safest conclusion, to a result in favour of the tenant. The two documents which constitute the lease are in a very peculiar situation. They are not copies; but they are so far concurrent, and one of them is unquestionably supplementary to the other. Now a supplementary document—where there are two—which contains stipulations within it that are to form part of the contract, must be the later copy, and it must be the more binding document,—that on which the parties mean to rest, because it is impossible to hold that the imperfect document is the legal instrument, out of which you can derive the whole contract of the parties. Here I think the later copy bears to be signed on 18th March 1851. It was delivered then to the tenant, as a title of possession; and looking to it in that light, it is most important that there are three or four marginal notes, containing additional and material stipulations, which would not be in the lease at all, if you throw that document out of view. But it is impossible to do so, for unless it is imported into the transaction, there is no completed contract between the parties. The other document does not contain all the stipulations that are admitted; therefore I look upon this document, with all its modifications, as constituting a binding contract between the parties.

As to the authority of the factor to make these alterations, I have no doubt. The lease is by him, and he is set forth as the party who was to grant it. If he was not the party to do so, there is no lease; and it is new to me to be told that a party shall have authority to grant a lease, and not authority to make such modifications on it as are necessary to complete it. But in the summons of removing the lands are set forth as held by the tenant "in virtue of a minute between William Tait, factor on the Ulbster estate, and the defenders," so that there is authority to the factor to do this. The question is, what is the completed document which forms this contract? If you say it is the contract without the alterations, that is one thing. If you say it is a contract with the alterations, then this is the contract set forth as the lease. So far the landlord is concurring in these alterations; but this particular alteration is also made by the factor, and it will not do for the landlord to adopt one part of the document and reject the other. There is the same authority for the additional alterations and stipulations as for the contract itself. It is very true that the particular alteration which is the subject of dispute here, and arising on the insertion of the words "optional to the tenant," is not authenticated in any particular way. It is not signed; it is not noticed in the testing clause; and though evidently on the face of the document, it is a superinduced addition. That creates the puzzle—when it was done, and by whom. But, **[808]** having done the best I can to satisfy my mind as to whether it was written by Dickenson or not, or whether it was done by any clerk in the office of the factor—for I think that would be the same thing—I think that the preponderance of the evidence, and the most natural result of it, leads to the conclusion that this was in the handwriting of Dickenson. That being so, I have no difficulty in coming further to the conclusion that it was made about the time that the lease was in course of construction; and I lean very much to the truth of the statement by John Grant, that it was made upon the day on which the copy was made. Thereafter the tenant possessed

upon it. You cannot throw that out of view, and therefore I take these words as part of the contract ultimately modified between the tenant and Tait, who, as I have already said, must be held to have had authority to insert them. And in casting the balance of the evidence, it is a powerful influence with me that I cannot come to any other conclusion without holding the tenant to be guilty of forgery, and there is no reason whatever for coming to that conclusion. The alteration must have been made by the tenant as a wrongful proceeding, if done by him at all; and if done in his own hand, he must be held guilty of forgery, which I hold him incapable of; and in a doubtful case of evidence that is of importance, for the result I arrive at is consistent with the innocence of all concerned, while the other is not, and there is not a suggestion in the record to charge the tenant with any such guilt.

LORD CURRIEHILL.—This is a very embarrassing case. The only safe course is to endeavour to place the case upon the legal principles by which the decision of it should be regulated. The question is, whether the landlord who is pursuing this action had the privilege of bringing the lease in question to a termination at the end of seven years, although it was granted for a period of fourteen years? The landlord in support of his right produces a contract of lease, which was signed by the parties, and placed in his hands. In that contract a break is agreed to at the end of seven years, and that privilege is not thereby limited to either party. Unless that stipulation was departed from, it confers upon the landlord the right to avail himself of the break. But what competent evidence is there of that privilege having been departed from by the landlord? The onus of proving this lies upon the tenants, and in their proof they are limited according to the principles laid down by Erskine (3, 2, 20). Erskine, speaking of written contracts, a duplicate of which is in the hands of each of the parties, and one of which contains a clause not found in the other, says—"In mutual contracts, a marginal note upon one of the duplicates is probative against the party who is possessed of and founds on that duplicate, though there should be no such note upon the other duplicate; but if the note shall contain anything in favour of that party, it is not binding on the adverse party, unless it be supported either by his oath, or by posterior relative writings, or in special cases by the testimony of the instrumentary witnesses." I hold the doctrine laid down by Erskine in these clear and unambiguous terms to be sound law. And I ask, is there legal evidence here, such as Erskine says is necessary, to show that the privilege of a break to the landlord as well as to the tenant, in the document delivered to the former, has been departed from? That evidence consists of the duplicate which is in the hands of the tenants, and in which there has been added words importing that the break is optional to the tenants. But according to the rule as stated by Erskine, the duplicate by which the tenants are bound is that which they placed in the hands of the landlord, and not that kept in their own hands, unless they prove that the landlord agreed to the addition. But have they done so? The duplicate which they retained in their own hands is not a probative writing; and although there was *rei interventus*, that merely obviates the objection which the document would otherwise lie under, for want of the statutory solemnities. It does not obviate the necessity of proving by legal evidence that the clause itself had been signed by the landlord, or had been authorised by him. But I see no satisfactory evidence of this kind. It is said that there are other alterations upon the margin of the tenants' duplicate, and that these are admittedly binding, though they are not contained in the landlord's copy; and hence, that the latter ceased to be considered a binding document, and that the tenants' duplicate formed the title on which possession has followed. That is not a sound inference. It is not the case that the landlord's copy ceased to be viewed as a binding document. There is no evidence to show that it was. [809] On the contrary, after the alterations are alleged to have been made on the tenants' duplicate, the landlord's duplicate not only was left in his hands by the tenants in its original state, but it was taken in that state to the elder tenant, and signed by him, and again left with the landlord. I do not found upon that signature as being of itself of much importance, because Grant senior was not able to write. But this occurrence is conclusive evidence that that document had not been abandoned by the landlord, and that the tenants then knew that this was the case. The landlord, therefore, cannot be held to have then relinquished the privilege which was stipulated in his favour in the document which was so left in his hands. It was, no doubt, still competent for the tenants to prove that the landlord, having the right to make use of the break

subsequently agreed to, departed from it. But what is the evidence of his having done so? It is said that he authorised the words "optional to the tenant," to be added to the tenants' duplicate. But I see no sufficient evidence of that. The object of the greater part of the parole evidence is to endeavour to identify the person who wrote these words on the tenants' duplicate. But the question is not, who was the writer of these words, but whether the words were there at the time when it was signed on behalf of the landlord, or are an *ex post facto* addition. Where is the evidence that these words were written by anybody before the document had been left with the tenants? I am not now going over the proof in detail, but I can find no evidence to that effect. The contract was originally prepared upon the footing that the landlord was to have power to use the break. It is incumbent upon the tenant to show that the landlord departed from that right, and, in my opinion, he has failed to prove it.

Lord Deas.—There can be no doubt, as your Lordship has observed, that the evidence in this case is not very satisfactory either way. But such as it is, the case must be decided on it; and the question is, how does the evidence preponderate? I am of opinion that it preponderates in favour of the tenant. There are two principles, with which your Lordships are quite familiar, in our law, which it is necessary to keep in view at the outset. In the first place, when between landlord and tenant there are improbative missives or memoranda entered into with a view to a lease, these improbative and irregular documents do not, properly speaking, form the lease, but form the materials upon which an extended and formal lease may be framed. Consequently, if either of the parties here had called upon the other, *debito tempore*, to execute a formal lease, the two documents which we have here would have been taken as the materials, or part of the materials, from which the terms of that formal lease were to be ascertained and fixed,—not taken by themselves, but along with any other letters or correspondence which had passed between the parties, and which tended to throw light upon their intention and meaning as regards the details which were to be embodied in that formal lease. In the second place, there is a principle which your Lordships are also familiar with, that if neither party insists on a formal lease being executed, the documents, however irregular and improbative, which passed between them at the time, if they enable us to know the rent and the endurance of the lease, will be held equivalent to a lease. The consequence of that second principle is, that no formal lease having been here insisted on by either party, or executed between them, we are to look for the terms of the lease to the documents which do exist, however irregular and informal they may be, but which are to be held equivalent to a lease, as possession has followed on them for a period of years on the part of the tenant, and rent has been received by the landlord. We must start, therefore, with this, that if both these documents be improbative—which unquestionably they are—neither the one nor the other singly is to be regarded as the lease, but we are to look to both together, in order to find the terms of the lease between these parties. The Sheriff-substitute seems to have been under a misapprehension that the document which was found in the hands of the landlord is a probative document, and that the other is an improbative document; and therefore, he says, that the document in the hands of the landlord is the regulating lease, and the tenant must prove that it was departed from. The Sheriff was, to a considerable extent, under the same misapprehension. This was starting with a total mistake. The document which was found in the hands of the landlord is not regularly tested more than the document found in the hands of the tenant. Your Lordships know quite well that a regular testing clause sets forth the writer's name and designation, [810] the date and place of subscription, and the names and designations of the witnesses in whose presence the document was subscribed; and of these requisites, the first and the last are statutory solemnities. Now, the testing-clause of the document found in the hands of the landlord bears that "the minute of tack, written upon this and the preceding eight pages, by Andrew Tait, residing at Ormelie, at Ormelie, the 18th day of March 1851 years" (that is right enough so far as the writer's name is concerned), "in presence of these witnesses, the said Andrew Tait and William Dickenson, residing at Thurso, at Dunbeath, the 16th day of April 1851, in presence of these witnesses, Alexander Sinclair and William Sinclair, residing there." That testing-clause, as it stands, is nothing else than nonsense. It bears that the document was written of certain dates, in presence of certain parties. But it does not say it was subscribed of these dates, and, what is more material, it does not say it was subscribed

in presence of the witnesses named. This may be what was meant, but it is not what is said; and the result is, that the clause is so blundered as not to be such a testing-clause as to make this a probative document. Then, when you come to the tenant's duplicate, no doubt it is defective, even to a greater extent, in the testing-clause; but the result of that is nothing more than to make it also improbative—just as the landlord's document is improbative. Both documents are signed by the tenant on the one hand, and by the landlord's factor, who admittedly had authority to enter into the lease, on the other hand, and, being both signed, it does not matter much to the present question whether they are signed on every page, or whether all the marginal notes are signed. It only comes to this, that both documents are irregular and improbative, and this is the state of the case at starting. But, even if the one were assumed to be probative and the other not, it is equally clear to my mind that you cannot say that the landlord's document is or was intended to be the lease, any more than the tenant's document. It is plain that neither was intended to be the final and concluded lease. They were only, when taken together, to be the groundwork of a formal lease. It was intended from the first that the lease should be executed in duplicate, and the tenant's duplicate was to be just as much the contract as the landlord's duplicate. Accordingly, both were signed on the same day, the 18th March, by John Grant, who is looked upon as the leading tenant, and by the old man by his mark. If the two documents had agreed, it would have been impossible to say that you were to look to one more than to the other. They were just intended to form together the memoranda or materials for the formal contract. The one was to be evidence in the hands of the landlord, the other in the hands of the tenant. But the documents do not agree. And then comes this material observation, that it is rather the tenant's duplicate which is to be looked to than the landlord's, because there are two marginal notes upon the tenant's duplicate, one signed, and the other not signed, but both of them acknowledged by the landlord to be binding upon him. The one which is signed is very material, because it relates to ameliorations upon the office-houses; and it was candidly admitted by the landlord's counsel, upon a question put by me, that there is plainly a clerical omission here,—the meaning being that ameliorations were to be allowed for the timber of such additional houses as should be erected by the tenant with the approbation of the landlord;—a clause which might very naturally lead the tenant to insist more strongly than before, on the lease being for a period of fourteen years. We know that many things are understood in these informal leases which are not expressed on the face of them; and if it was necessary or understood that the tenant should erect office-houses at his own expense, and that, at the end of the lease, he was merely to get an allowance for the timber, it was natural for him to say, "It is very hard for me to do that upon a lease for seven years, and therefore the option of a break should be with me, and not with the landlord." It is plain that there are many reasons why the option should be given to the tenant rather than to the landlord. The tenant goes on laying out money, and it is hard for him not to know whether, when the lease is half run, he is to be allowed to continue or not. The more money he spends, the more likely it is that the landlord will come in and turn him out. It was very natural, therefore, for the tenant to insist that he should know what was the endurance of his lease, and that the option of a break should lie solely with him, and that this should be made clear if it was not so already. This, accordingly, is the tenant's story; and it has been consistent from the beginning, which is something, [811] when the question is, whether he has been guilty of gross fraud and forgery, which is the only alternative. That is not to be presumed, and the circumstances I am now mentioning are favourable to the supposition that it is not the fact.

Then we have a variety of other circumstances which tend in the same direction. It is quite true that, when you look at the tenant's duplicate, the presumption is—and I have no doubt of the fact—that the words in question were inserted after the rest of the document had been written; and indeed this is not denied. But the question is, whether that was fraudulently done by the tenant behind the back of the landlord and his factor, or whether it was done with the sanction of the factor. For I agree in thinking that the factor, having power to grant the lease, had also power to sanction what is there inserted; and if he so sanctioned it, it is as binding as if done by the landlord himself, or by his son who acted for him, and neither of whom, it is to be observed, came latterly into direct contact with the tenants at all. It is not pretended that the

son was present when these two marginal notes were added, which he nevertheless acknowledges to be binding upon him as his father's successor. He was present only on one day, which we must hold to have been the 17th March. He may have thought the negotiation was concluded on that day, but the tenant thought not, and it is plain that it was not so, otherwise these two clauses, that are admitted to be binding, could not have been authoritatively added. Therefore, there is no contradiction between the testimony of the son (now the proprietor) and the tenant. All that the one says may be correct, and so may all that is said by the other. There is nothing to contradict the testimony of John Grant as to what took place between him and the factor, and nothing to throw suspicion upon it, which there generally is when a man is committing a fraud. The testimony of the old man confirms the evidence of John Grant; for the old man says that John read over to him his copy, and explained that it was a break in favour of the tenant. It is a mistake to say that the other document, the landlord's copy, was read over to the old man. Part of it is said to have been read to him, but it does not appear how much; and nobody says it was explained to him that the break was a break in favour of the landlord. Therefore, the old man's testimony is corroborative of the testimony of John, and so is the handwriting of the words in dispute. I agree in thinking that the question is not, by whom or when were the words written, but by whose authority were they written; and I think there is no doubt that it was by authority of the factor, because these words, so far as it is possible to judge, are written in what your Lordship has appropriately called the office-hand—the hand-writing common in the factor's office at the time—for clerks naturally imitate one another; and there is no reasonable doubt that the words were written by one or other of them, and, if so, that they were written by authority of the factor. That, again, is exactly what John Grant says. He says they were written by some one in the office. Is there any reason to doubt that? I see none. It might look odd to say that one thing in a document was written by one clerk, and another by another, if we did not see that that was unquestionably what occurred, for one of the marginal notes, admittedly written by authority, was written by one clerk, and the other by another; and so again, there is here nothing to throw suspicion upon the document. Then, when you come to the Acharenny lease, you find nothing there to raise such suspicion, but rather the reverse. We do not know whether and when that lease was put in writing, or whether it was verbal; and here, as upon some other parts of the case, I think it was fully as much incumbent on the landlord to supply information as on the tenant, and that there is fully more responsibility upon him than upon the tenant for all the irregularity in this case from beginning to end. He was a large proprietor, with assistance at command, while no man of business was employed by this tenant. As regarded this Acharenny lease, we would have expected the landlord to tell us, whether it was in writing, and if so, to have produced it, to show whether it bore a break at the option of either party, or in favour of the tenant. But one circumstance here is, that the lease was not granted till shortly before Whitsunday 1854, within three years of the time when the break was to occur. It is a strange thing for a man to take an agricultural lease in Scotland, with a break at the end of three years, before he has time to make a rotation of crops. The lease was to subsist for eleven years from Whitsunday 1854; and the theory that it was to be terminable at the end of three years [812] is very unlikely. And then I should like to have been told what passed on the occasion when the extended lease was proposed to be executed. The grounds assigned for refusing to sign it might have been very important. If the tenant did not then say that it differed from his own duplicate, that would be against him, and if he did, that should have rather led the landlord at once to bring an action for setting aside that duplicate than to wait till the end of the seven years, and then bring an action of removing. On the back of the extended lease I find "1856;" and it bears to be signed by the landlord before witnesses, and it is usual to keep a note for filling up the testing-clause, which ought to have been produced to show what the date was. All this vagueness is very unsatisfactory. Again, we have not the evidence of the man who went to New Zealand, which it was no doubt very inconvenient to wait for in an action of removing. But the action has lasted long enough to have allowed the evidence to have been got of the only man there is reason to suppose could have thrown any material light upon the case. Here, again, I think the blame is fully more to be attributed to the landlord than to the tenant, looking to the landlord's delay in bringing this to a

point after the extended lease was prepared and refused to be signed. Taking it upon the whole matter, and on as strictly legal principles as you please, it appears to me that the evidence preponderates in favour of the tenant. It is not a case that can be determined one way or other upon regular or probative documents. The scraps of writing which exist are to be taken along with all the facts and circumstances of real evidence bearing upon them. There is, to say the least of it, no greater burden lying on the tenant than on the landlord. The landlord cannot put his case so high as to say that it shall turn exclusively upon the document in his possession. The terms of the lease must turn admittedly to some extent on the document in the hands of the tenant; and the question is, whether there are grounds sufficient for rejecting the words in dispute, any more than the other additions? I agree with the majority of your Lordships in thinking that there are not, and this whether we look to the justice or the law of the case.

The Court pronounced the following interlocutor:—(After the findings in fact above quoted)—"Find, as matter of law, that the break stipulated in the agreement of lease, and on which the complainers were entitled to rely, was a break optional to the tenants only, and that the landlord was not, in respect of said break, entitled to put an end to the agreement of lease, and to remove the tenants at Whitsunday 1858, or at the expiry of the first seven years: Therefore sustain the reasons of suspension, suspend the letters of charge *simpliciter*, and decern: Find the charger (respondent) liable to the suspenders in expenses of process, both in this Court and in the inferior Court; allow an account thereof to be given in, and remit," &c.

No. 127. **XXIII. Dunlop 812.** 23 Mar. 1861. 2nd Div.—Lord Benholme.

Mrs. CORNELIA LOUISA INTVELD or PURVIS and Others (PURVIS' Trustees), Pursuers.—*G. Graham Bell—Moir—Duncan.*

ROBERT RAAF PURVIS and Others (PURVIS' Executors), Defenders.—*Millar—Thoms.*

ROBERT RAAF PURVIS, Defender.—*Millar—Thoms.*

Domicile—Foreign Testamentary Writings—Lex loci actus—Scotch Trust-Disposition—Revocation.—A native of Scotland went to sea while a boy; he served an apprenticeship in the British West India service; he then for some years commanded a Dutch East India ship, and afterwards for some years resided in the Netherlands India, where he held a Government appointment, carried on trade, and acquired landed property, and married. In 1833 he came to Scotland with his wife and family. Between 1834 and 1846 he made four trading voyages to the Netherlands India, where his business was carried on in his absence. He finally left that country, and came to Scotland in 1849, where he resided uninterruptedly till his death in 1854, when he intended returning with his wife and family to Netherlands India. He died possessed of considerable heritable and moveable **[813]** property in both countries, and left several testamentary writings, some executed in the Netherlands India, and some, but not the last in date, in Scotland;—*Held* (1.) (*aff.* judgment of Lord Benholme), that the testator died a domiciled Scotsman; and (2.) that the testamentary writings executed in India, were, if valid by the *lex loci actus*, effectual testamentary writings to convey moveable property in Scotland.

Question, Whether they were an effectual revocation of a settlement conveying heritage in Scotland?

This action of multiplepoinding and exoneration was raised by the trustees of the late William Purvis, for the purpose of ascertaining the distribution to be made of his estates, which consisted both of heritage and moveables, one portion of which was situated in the Island of Sumatra, in the Netherlands India; and the other portion in Scotland. Parties differed as to where Mr. Purvis was domiciled at the time of his death, although they were agreed as to the facts on which that question turned.

Mr. Purvis was born of Scottish parents, in the parish of Saline, and county of Fife, in the year 1797. He entered the Royal Navy of Great Britain when a boy, in which service he continued for three months; and on quitting it entered the West India merchant service of Great Britain, and served therein as an apprentice for four years. On finishing this apprenticeship, Mr. Purvis, in the year 1817, entered the Dutch East India service, and continued therein for upwards of four years. On leaving that service, Mr. Purvis married the daughter of an officer in the Dutch civil service. Thereafter Mr. Purvis commenced trading in the Dutch East Indies, and was subsequently appointed to a government office at Padang, in the Island of Sumatra. Here he remained until 1833, when he returned to Scotland with his wife and six children who had been born to him of this marriage. On their arrival in this country, the whole family took up their residence with Mr. Purvis' mother at Inverkeithing. In 1834 Mr. Purvis made a voyage in a ship purchased by him, belonging to London, to the Netherlands India, and returned to Scotland in 1836. Here he remained till 1838, when he made a second voyage to the Netherlands India, in another ship belonging to him, and returned to Scotland in 1841. After residing here two years, he again made a voyage to the Netherlands India, whence he returned to Scotland in 1845. His last voyage thither was in 1846, and he finally left the Netherlands India and returned to Scotland in December 1849, where he continued uninterruptedly to reside till his death, which occurred at Edinburgh on the 3d December 1854. Prior to this event he had expressed an intention to return with his wife and family to the Netherlands India.

He left the following testamentary writings:—(1.) A joint-testament executed by Mr. and Mrs. Purvis mutually, on 11th January 1823, before a notary public residing at Batavia. It commenced with a clause of revocation of all previous testaments. Its purport was to constitute the surviving spouse the heir of the predeceaser in all the property belonging to such predeceaser, subject only to such claims as were competent by the Dutch law to the parents of a deceased child dying without issue, or to the child or children of a deceasing parent; to burden the surviving parent with the guardianship and education of the issue of the marriage; and, in the event of Mr. Purvis dying before his wife, to constitute, along with Mrs. Purvis, two gentlemen named Stahl and Kempae, as the co-executors, to the exclusion of the College of the Orphan Chamber, of the estate left by him. This joint-testament reserved power to the spouses to make, with respect to its provisions, "all such alterations as they will think proper, either together or one of them, and such by private arrangement, except in what has been said of the inheritance,"—*i.e.*, except in regard to the disposition made of the property of the predeceaser.

(2.) A joint codicil executed by Mr. and Mrs. Purvis mutually at Padang, **[814]** in presence of two witnesses, and dated 4th October 1831. This codicil bears expressly to have been made in virtue of the "reserve clause of this testament," and was annexed to the last mentioned deed. The codicil appointed four executors in room of Messrs. Stahl and Kempae, both deceased, and requested them, in the event of any accident occurring to Mr. or Mrs. Purvis, to send their children to Scotland, to the joint care of Mr. Purvis' mother, sister, and brother, who, along with Mrs. Purvis' sister, were asked to act as the guardians of their children. On 18th March 1833 Mr. Purvis appeared before a notary public at Padang, and presented to him the said joint testament, along with the codicil annexed, and required him to make a copy thereof, which was done.

(3.) A trust-disposition and settlement, executed in Scotland on 4th September 1834. Under this deed Mr. Purvis appointed certain trustees, all resident in Scotland, to whom he conveyed all lands and heritages then belonging, or that should belong to him at his death, with the writs and evidents thereof; as also, all debts and sums of money then due or owing, or that might be owing, to him at his death, by bond, bill, or in any other manner of way, with the vouchers thereof; and all his means, goods, gear, and effects, rents, and interests of his heritable and moveable estate, for the purpose generally, of distribution of the same among his children. By said deed, the trust was burdened with annuities to his wife, mother, and sister; in the event of their surviving him, he directed that after a sufficient sum was set aside to provide for payment of these legacies, his trustees should convert his whole estate into cash, and divide the same equally among his children then in life, subject to this qualification

or condition, that the shares payable to his daughters should not exceed the sum of L.3000. The trustees were appointed executors, and all former "dispositions, assignations, and settlements made by" the truster were recalled. To this deed an alteration or codicil is added, holograph of Mr. Purvis, and bearing to have been executed at Inverkeithing on 10th March 1836. By this codicil he directed his trustees to allow to his wife, after his death, L.1500 for the purchase and furnishing of a house in "any part of this country she may judge prudent and convenient." The trust-deed and codicil were both recorded in the books of Council and Session on 19th December 1854.

(4.) A deed, of which an official translation was produced, in which it was called an "alteration or codicil to joint testament." This deed was executed by Mr. Purvis alone, before a notary public at Padang, on the 21st March 1845. It bears to have been executed "in consequence of the reserve clause appearing in the mutual testament, with the annexed codicil." It nominated Mr. Robert Raaf Purvis, the testator's eldest son, co-executor in the testator's estate, in room of a gentleman deceased.

(5.) A deed, called in the official translation "an alteration or codicil to mutual testament." It was executed by Mr. Purvis alone, before a notary public at Padang, on the 19th of June 1848, and bears to have been made, "in consequence of the reserve clause appearing in the mutual testament and annexed codicil," and after presentment to the notary of that document. By this codicil Mr. Purvis appointed as co-executor in his estate and inheritance, his son William, in the room of an executor deceased.

Neither of the two last mentioned deeds made any special redisposition, or rebequeathment of property.

The parties interested in the provisions of these deeds were the executors and administrators under the joint testament of 1823, executed in Batavia; the pursuers, the trustees under the Scotch deed of 1834; the widow; the eldest son as heir-at-law of the truster; and his younger children as his heirs *in mobilibus*. Claims were put in for the pursuers, the trustees; for the executors; and for Robert Raaf Purvis.

The trustees claimed, for the purpose of distribution under the trust-deed, **[815]** the whole heritable and moveable effects of the deceased, wherever situated; or alternatively, the whole heritable and moveable property of the truster situated in Scotland; or, in any view, the heritable property belonging to the truster situated in Scotland,—Pleading, (1.) The testament of 11th January 1823, and codicil of 4th October 1831, were effectually revoked by the Scotch trust-settlement of 4th September 1834. (2.) The subsequent codicils executed at Padang in 1845 and 1848, assuming them and the testament of 1823 to be valid, did not revoke, and were not intended to revoke the Scotch trust-disposition and settlement to any extent, and in any view could not revoke, and were not intended to revoke the trust-disposition, in so far as regarded the heritable property situated in Scotland.

The executors under the testament and codicils executed at Padang, averred that Mr. Purvis' domicile, at the date of death, was in Sumatra. They claimed to be preferred to the fund *in medio* so far as it consisted of personal estate, in order that it might be administered by them under the testament and codicils, and according to the law of the Netherlands India, where Mr. Purvis had his domicile at the time of his death. And (2.) In case it should be found that the property of the deceased situated both in Scotland, and in Netherlands India formed a part of the fund *in medio*, they claimed to be preferred to the whole personality, wherever situated, and to the real estate in India,—Pleading, (1.) The testament and codicils being formal and complete according to the law of the country where they were made, and having been unrevoked and operative at the time of Mr. Purvis' death, constituted his last will, and were entitled to effect as such. (2.) The trust-deed and codicil executed in Scotland, having been revoked by the testamentary writings made in Padang, neither the trustees nor the beneficiaries under the trust-deed had right to the fund *in medio*. (3.) The testament and codicils made in Netherlands India being valid and effectual, and Mr. Purvis having his true domicile there at the time of his death, the claimants were thereby entitled to the personal estate of the deceased, wherever situated, and to the real estate situated in Netherlands India. (4.) The fund *in medio* in this action consisting only of the property of Mr. Purvis situated in Scotland at the time of his death, the rights of parties to his estate in Netherlands India could not be made the subject of competition, or of judgment in the action.

Robert Raaf Purvis, the heir-at-law, claimed as intestate succession the fund *in medio*, in so far as that consisted of heritable estate in Scotland,—Pleading—The trust-deed and relative codicil executed in Scotland by the claimant's father, were revoked by the testament made at Padang, and these testamentary writings not being sufficient as a conveyance of heritage in Scotland, that part of the succession was subject to the rules of intestacy, and fell to the claimant as the heir-at-law.

A tutor *ad litem* was appointed to the younger children, who reported to the Court, that the question whether, or to what extent, the Scotch settlement was operative, would be fairly and satisfactorily tried between the parties who had raised it. And until that question was settled, it appeared to be unnecessary that separate appearance should be entered for the minor defenders, it being reserved to them to make such appearance afterwards as might be necessary.

A number of letters from Mr. Purvis relative to his business during the period subsequent to his return to Scotland for the last time were produced. The import of them is stated in the note of the Lord Ordinary, in so far as they bore on the question of domicile. Parties, by joint minute, renounced further probation.

On 30th June 1857 the Lord Ordinary pronounced this interlocutor:—"Finds that the late William Purvis, Esq., a native of this country, died, domiciled in Scotland, in the year 1854: Finds that the said William Purvis **[816]** left a trust-deed of settlement in favour of the pursuers, embracing, *inter alia*, all lands and heritages that might belong to him at the time of his death: Finds that this settlement remained effectual and unrevoked *quoad* all the heritable property belonging to the testator at the time of his death, situated in Scotland: Finds that the disposal of the testator's real property in the Netherlands India depends upon the validity of the testamentary writings which he executed in that country to carry real property there: Finds that, by the law of Scotland, in which country the testator died domiciled, the succession to his moveable property will depend upon the formality, according to the law of the country in which they were executed, of the testamentary writings executed by the testator in the Netherlands India, as constituting a last will and testament of moveable property; and, with these findings, appoints the case to be enrolled, that the proper steps may be taken for ascertaining the effect and validity of these writings by the foreign law."[1]

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[1] "NOTE.—The question of domicile, in reference to which further probation has been renounced, does not appear to be involved in much doubt. The testator was a native of, and lived the earlier years of his life in, Scotland. He then went abroad, and after living for many years, and after marrying abroad, he returned to this country with his wife and family in 1833, more than twenty years before his death. He himself repeatedly went abroad after that period, leaving his family in this country, and returning to them from time to time. The last five years of his life were spent exclusively in Scotland, where he died, and where he had property both real and personal. His letters during this last period indicate an intention of ultimately returning to the Netherlands India, for the special purpose of greater intercourse with relations in that country. But that plan was, at best, contingent, and it would rather appear, that had he found an estate in this country to suit him at a moderate price, he would have bought it, and given up the plan of settling abroad. His later intention appears to have been to reside some years longer in this country, at all events, for the education of his younger children. And as the climate of this country suited him better than that of the foreign country, it appears that he would have preferred that the intercourse of their families should have been attained by his relations returning to this country, rather than by his going out to them.

"2. The second and third findings do not require much notice. The Lord Ordinary cannot consider any of the later testamentary writings, even if they revived to every effect the testament of 1823, as sufficient to revoke the conveyance of his Scotch heritable property contained in the trust-deed of 1834. And upon the authority of the case of Thomson's Trustees, 18th December 1851, and other cases, the Lord Ordinary thinks himself entitled to act upon this opinion, without requiring the opinion of foreign counsel.

"3. The last finding involves a question of international law, in regard to which

The Court, on 19th January 1858, of consent, recalled the joint minute [817] of parties renouncing further probation on the question of domicile, and granted diligence against havers for the recovery of all letters and documents relative to the question of domicile to be found in this country, without prejudice to the parties offering other evidence in regard to that question; and on considering the farther evidence,—

On 16th December 1859 the Court, after hearing parties, pronounced this interlocutor:—"Adhere to the Lord Ordinary's interlocutor, in so far as he finds that the said William Purvis died domiciled in Scotland in the year 1854, and that the said William Purvis left a trust-deed of settlement in favour of the pursuers, embracing, *inter alia*, all lands and heritages that might belong to him at the time of his death, and to these extents, refuse the prayer of the reclaiming notes for the executors of the said William Purvis and Robert Raaf Purvis; before farther answer as to the other findings of said interlocutor, appoint parties to lodge cases arguing the questions, (1st.) Whether the validity, in respect of formality of execution, of the writings alleged to have been executed by the deceased William Purvis, in the Island of Sumatra, in the years 1823, 1831, 1845, and 1848, in so far as they purport to be a testamentary disposal of his moveable estate, is to be determined by the rules of the law of Scotland, or those of the law of Sumatra, prescribing the mode of executing and authenticating such writings? (2d.) Whether the said writings can receive effect as a revocation of the testator's prior trust-deed and settlement in whole or in part?"

It was argued for the trustees;—It had been decided by the Court that Mr. Purvis died a domiciled Scotsman, and his domicile of origin was admittedly Scotch; it must, therefore, be held that the whole deeds had been executed by him as a domiciled Scotchman, though resident in Sumatra. The succession to his whole moveable estate, had he died intestate, would have been regulated by the law of Scotland,[1] and equally was the validity of deeds executed abroad, relative to his succession, to be regulated by the law of Scotland. It was not necessary to contend that the heritable property in Sumatra, or any property, was affected by the trust-deed, except the whole moveable property and the heritable property in Scotland.

I. In support of the proposition that the validity in point of form of execution of the joint testament and codicils executed by Mr. Purvis in Sumatra, was to be determined by the law of his domicile at his death, it was submitted,

1. Having regard to the circumstances of the present case, law must assume that Mr. Purvis intended the deeds executed in Sumatra to take effect only in the event of his dying domiciled there. The possession of a domicile in any country implied the adoption of its laws, and as no one can (at least, as regards the question of succession) be possessed of two domiciles at the same time, the possession of one domicile implied the rejection or non-adoption of any other. Every one was assumed to know the laws of his domicile. The testator must be assumed to have been aware of the mode in which his property would be distributed by the law of his domicile if he died intestate, and also the form in which, by the law of Scotland, an effectual will required to be

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there may be a conflict between the law of Scotland and of other countries, especially of England. The Lord Ordinary humbly adopts what he considers the Scotch view of the international question; and holds that a testament is good and effectual to settle personal property, if drawn up conformably to the laws of the country in which it was executed, even although the testator should die domiciled in a country in which other formalities would be required. He thinks that this view of the international question is supported by the authorities referred to, and by the opinions of the Judges in the case of Leith *v.* Leith, 6th June 1848. With reference to this last case, it is to be observed that the testator, Sir George Leith, died domiciled in Scotland. The English will, upon the effect of which the question turned, was executed by him during a temporary residence in England. None of the Judges seem to have doubted that such will was effectual as a settlement of moveables. The real difficulty was as to its effect in revoking a settlement of Scotch real property; and had the intention to revoke been clear, a majority of the Judges would have given effect to it, even as a revocation of the Scotch trust-settlement."

[1] Somerville, 5 Vesey, p. 750.

executed. The inference from the fact that a party leaves a will that is not effectual by the law of his domicile is, that he intentionally dies intestate.[1] Looking to the testator's migratory life, it might very well be assumed that he intended his property to be distributed, as directed by the deeds executed in Scotland or in Sumatra, according as he might be domiciled at his death in either country.

2. The validity, in point of formality of execution, of the deeds executed **[818]** in Sumatra was to be determined by the law of Scotland, because that law, rightly understood, required that the *lex loci domicilii*, at the death of the testator, should be applied, and not the *lex loci actus*. Jurists were divided in opinion between three theories, viz., (1) That a will, valid according to the *lex loci actus*, was valid everywhere, both as to moveables and immoveables; (2) That a will so executed was valid, both as to moveables and immoveables, within the territory of the law of execution; and (3) That a will, executed according to the formalities either of the *lex loci actus* or of the *lex rei sitæ*, was valid.—Those jurists who adopted the first theory[2] carried it beyond the principle contended for by the executors, and held also that a will, not valid by the *lex loci actus*, was not valid *quoad* moveables situated in a territory by the law of which it would be valid. The jurists who held the more modified theory[3] proceeded on views which did not recognise the rule *mobilia sequuntur personam*, and other principles now conclusively settled in the law of Scotland, or they proceeded on principles of fancied convenience or expediency. The whole reasons for maintaining the *lex loci actus* were swept away by the introduction of the doctrines that the domicile at death was the *situs* of moveable property *quoad* succession, and that, for the purposes of succession, one could possess but one domicile at death. The personal moveable estate of the testator being at his death subject to the law of Scotland, by that law was to be decided whether there were deeds left effectual to interfere with the rules of succession it recognised. A settlement was presumed to be made at the moment of death, when only it became effectual,[4] death being held to be equivalent to delivery, without which an unilateral deed was ineffectual.[5]

From the principles that the courts of every state had effectual jurisdiction within its own territory, and that its laws were not to be disturbed by allowing operation to the laws of other countries, it followed that the validity of the testamentary writings in this case was to be determined by the law of Scotland. *Quoad* immoveable property, the law of Scotland adopted the *lex rei sitæ*, and the course of intestate succession was only to be overcome by deeds valid by the law of Scotland; *quoad* moveable property, the rules of succession, by the law of Scotland, were those of the law of domicile at death.[6] Prior to 1788, the rule of the actual situation of moveables was applied to testate moveable succession.[7] Afterwards, however, the rule of the actual *situs* was abandoned, and the constructive *situs* of the owner's domicile at death was substituted. But the *lex loci actus* was never adopted by the law of Scotland; and agreeably to the principles of this law, **[819]** and agreeably to the law of England,

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[1] Sir Herbert Jenner Fust's opinion in Craigie *v.* Lewin, 1843, 3 Curt. p. 435.

[2] Vinnius, Comm. Instit., lib. ii. tit. 10, sec. 5; John Voet, Comm. Pand., lib. i. tit. 4, pt. 2, sec. 13; Paul Voet, De Statutis, sec. 9, cap. 2, sec. 3 and sec. 4, cap. 2, sec. 4; Huber, Prælect. Juris Civilis, vol. ii., lib. i., tit. 3, sec. 4.

[3] Burgundus, Tract. 6, sec. 1; Rodenburg, De Jure Conjug., tit. ii., cap. 3, sec. 1.

[4] Bell's Pr., 4 edit. sec. 1863; Ersk. Inst., b. 3, tit. 8, sec. 1.

[5] M'Nair *v.* Woodrop, 31st May 1827, 5 Sh. & D. p. 735; Miller *v.* Dickson, 11th July 1826, 4 Sh. & D. p. 822; Stair, b. 3, tit. 8, sec. 28; Houston *v.* Houston, 13th Jan. 1631, Mor. p. 8049; Miller *v.* Milne's Trustees, 3d Feb. 1859, *ante*, vol. xxi. p. 377; Faber, de Error Pragmat, Decade 36, Error 2; Habergham *v.* Vincent, 2 Vesey junior, p. 229.

[6] Bruce *v.* Bruce, H.L. 1790, Mor. p. 4617; Hog *v.* Lashley, 1792, 3 Paton's Apps. p. 247; Ommaney *v.* Bingham, 1796, 3 Paton's Apps. p. 448; Somerville *v.* Somerville, 1801, 5 Vesey, p. 750.

[7] Purves *v.* Chisholme, 1611, Mor. p. 4494; Melvil *v.* Drummond, 1634, Mor. p. 4483, and Durie, p. 723; Shaw *v.* Lewis, 1665, Mor. p. 4494; 1 More's Stair, Notes, p. 9; Brown *v.* Bizet, 1666, Mor. p. 4498; Davidson *v.* Elcherson, 1778, Mor. p. 4613; Morris *v.* Wright, 1785, 2 Hailes, p. 963, and Mor. p. 4616.

the validity of testamentary writings must be determined by the law of the testator's domicile at death.[1]

3. The power or faculty of testing not being a natural right, but a civil privilege, the rule of the *lex loci actus*, as applied to deeds of obligation generally, executed abroad, was inapplicable to the case of wills, and the Court was not bound, either *ex comitate gentium* or *ex debito justitiæ*, to apply that rule to the ascertainment of the validity of testamentary writings. The executors cited no decision in support of their argument that, because deeds of obligation, valid by the *lex loci actus*, received effect, therefore testamentary deeds, so valid, should have effect. There was a difference recognised by law between the two classes of deeds, and such a difference as precluded the inference drawn by the executors. Contracts or obligations bound the person, and were granted in virtue of the exercise of the natural rights of ownership. Wills, on the other hand, were deeds which did not bind the person, but only affected and interrupted the established laws of succession, and were executed not in virtue of a natural right, but of municipal privilege.[2] To apply the rule of the *lex loci actus* in this case would be to ignore the law of the domicile at death, and to decide this case on principles at variance with those of the law of Scotland.

4. To hold that, if the testamentary writings executed in Sumatra were valid by that law, they were therefore to be received and given effect to as valid by the law of Scotland, although not executed with the formalities prescribed by the law of that country,—which was the testator's domicile at death,—was to accept, in proof of testacy, evidence which was incompetent, and therefore inadmissible by the law of this domicile. The validity of a will in point of execution, or in other words, in point of form, ultimately resolves into a question of competency of evidence to prove the testacy as opposed to the intestacy of the deceased. In the present case the *forum domicilii* of Mr. Purvis was the Court of Session; and in determining how far the foreign testamentary writings executed by him established testacy on his part, this Court was not entitled to accept as evidence to this effect writings which, in point of solemnity and formality of execution, were not in conformity with the provisions of the Scotch law.[3]

5. The law of Scotland was the only law by which, consistently with sound legal principles, the validity of the testamentary writings left by the testator could be decided, that law being the *lex domicilii* at his death. No case had arisen in Scotland where the point raised in this action had been decided, but the contention of the trustees was supported by the authority both of the jurists and of the decisions of the courts of other countries.[4] The rule of law now recognised as the *lex domicilii* was but a **[820]** modification of the *lex rei sitæ*,—a principle always applied to immoveable property by Scotch law, making the "situation" the main element in the law applic-

[1] Bremer *v.* Freeman, 10 Moore's P.C. Reports, p. 306; Craigie *v.* Craigie, 1843, 3 Curt. p. 435.

[2] Puffendorf, de Jure Naturæ, l. 4, c. 10, sect. 2; Faber, de Error Pragmat, Decade 36, Err. 2; Argentræus, Comment. de Donat., p. 188; Miller *v.* Dickson, 11th July 1826, 4 Sh. & D., p. 822; Bouhier, Œuvres de Jurisprudence, vol. i., cap. 25, n. 59, and cap. 28, n. 23; Boullenois, vol. i., pp. 706, 713, and 718; Pothier, Post. Works, vol. ii., p. 438; Yates *v.* Thomson, 3 Clark & Fin., p. 544; Warrender *v.* Warrender, 2 Clark & Fin., p. 488; Cuninghame *v.* Semple, Mor. p. 4462; Stair Inst., l. iii., tit. viii., sect. 28; Miller *v.* Milne's Trustees, 3d Feb. 1859, *ante*, vol. xxi., p. 377; Brown *v.* Thornton, 6 Ad. & Ell., p. 185; Clark *v.* Mullick, 3 Moore, P.C., p. 252.

[3] Per Mons. Target in the Duchess of Kingston's Case, Coll. Jurid., vol. i., p. 324; per Lord Justice-Clerk Hope in Leith's Trustees *v.* Leith, 6th June 1848, *ante*, vol. x., p. 1137; Traité de la Preuve, par Mons. Dantry, p. 202; Greenleaf on Evidence, vol. ii., p. 669; Don *v.* Lipman, in H.L., 26th May 1837, 2 Sh. & M'L., p. 682; Bain *v.* Whitehaven and Furness Junction Railway Co., 7 Bell's Apps., p. 79.

[4] Cujacius' Observations, lib. 14, cap. 12; Story's Conflict of Laws, sect. 473; John Voet, ad Pand., l. i., tit. 4, pt. 2, sects. 7, 13; Stanley *v.* Bernes, 3 Hagg., p. 373; Curling *v.* Thornton, 2 Add. 6; De Bonneval, 1 Curt., 856; Craigie *v.* Lewin, *ut sup.*; Croker *v.* Marquis of Hertford, 3 Curt., 468, and 4 Moore, P.C., p. 339; Bremer *v.* Freeman, 10 Moore, P.C., 306; Robins *v.* Dolphin, 27 Law Journ. (N.S.), Prob. and Mat. Cases, p. 24; Crookenden *v.* Fuller, 8 Weekly Rep., p. 49.

able to the transmission of property, and was clearly a sound principle in international jurisprudence, at once vindicating and recognising the independent jurisdiction of different states, and at the same time applying to questions arising for decision in its own courts the rules of judicial procedure observed by these courts. To hold that the validity of the joint settlement and codicil was to be judged of by the law of Sumatra was to hold that Mr. Purvis executed these writings in reference to a law to which, as regulating his succession, neither his person nor his property were ever subject.

The Court, in judging of the validity of wills, were bound to construe and apply the Act 1681, just as the English Courts applied the Act 1 Vict., c. 36.

II. The second question stated in the interlocutor involved two inquiries—

1. Can these writings, or any of them, be held to amount to an effectual revocation, on the part of the testator, of the trust-deed, in whole or in part? To solve this question, the dates and terms of the deeds executed, subsequent to the trust-deed, required to be kept in view. The Scotch settlement clearly recalled the joint will previously executed. But possibly Mr. Purvis' view may have been that the deeds executed in Sumatra and in Scotland had each an independent existence in the countries where they were executed, and that the recal of previous settlements in the trust-deed did not affect the testament previously executed in Sumatra. He had friends and relations and funds in both countries, and it may have been his desire that in whichever country he died, a deed, operative by the law of that country, might be in existence for the regulation of his succession. This view derived support from the terms of the codicils, seeing they did not make any redisposition or rebequest of his property. It was improbable that Mr. Purvis intended to make any rebequeathment of his property, which he may have considered to be unnecessary. It was clear that if it was the testator's intention to make a new bequest, and so practically revoke his trust-deed, that he had not done so by any expressions contained in the codicils. There was no authority in the law of Scotland, which was the rule in this case, for holding that, by the reference in the codicil to the previous deeds executed in Sumatra, they were renewed, and their revocation recalled. Even if it was to be held that the execution of the codicils revived the previous joint testament, it was not to be held that the revocation of previous settlements in the deeds so revived, operated to recal the trust-deed, so far as it dealt with heritage in Scotland.[1]

2. The next question was, whether, assuming these writings to contain or amount to an expressed intention on the part of Mr. Purvis, so to revoke his trust-deed, these writings have been so executed in regard to their form, *qua* legal instruments, as to entitle the Court to give effect to them as a valid revocation of the trust-deed? When a right was constituted by writing, and could be constituted only by certain special formalities, it was required by the law of Scotland that a deed to revoke it should be equally formal in its character. There were two sets of cases in which the decisions required to be distinguished, viz. those where an invalid deed executed in virtue of a reserved power or faculty was held to control or affect the disposition made **[821]** by a previous deed.[2] In these cases it was to be assumed that the principal deed was in itself incomplete, and was more or less dependent for its completion on the importation into it of the informal deed. The assumption in the case of a deed revoking a previous deed was entirely the opposite; the two deeds were entirely antagonistic in their nature and results, and the one required to be as formal and validly executed as the other.[3] When the principle on which the validity of any postmortuary deed affecting succession to property was to be decided was considered, it ultimately came to depend on, and to be regulated by, the law of the country in which the property was actually, or was

[1] Fordyce *v.* Cockburn, 5th July 1827, 5 Sh. & D. p. 897.

[2] Brock *v.* Hogg, H.L., 25th Feb. 1831, 5 W. & S. p. 61; Inglis *v.* Harper, H.L., 18th Oct. 1831, 5 W. & S. p. 785; Ker *v.* Lady Ker's Trustees, 24th Feb. 1829, 7 Sh. & D. p. 454; Cameron *v.* Mackie, in H.L., 29th August 1833, 7 W. & S. p. 106.

[3] Simpson *v.* Barclay, 10th Jan. 1752; Elchies, *voce* Testament, vol. i. No. 12; Dundas *v.* Dundas, 25th Feb., and H.L. 21st May 1783, Mor. p. 15,585, and 2 Paton's Apps. p. 618; Henderson *v.* Wilson, 31st Jan. 1797, in H.L. 29th March 1802, Mor. p. 15,444, and 4 Paton's Apps. p. 316; Lang *v.* Whitelaw, 16th Nov. 1809, 2 Sh. Apps. p. 13, and 5 W. & S. p. 66; Leith's Trustees *v.* Leith, 6th June 1848, *ante*, vol. x. p. 1137.

constructively held to be situated. Erskine so far recognised this principle, when, in contrasting between deeds of obligation and of disposition, he says:—"In the conveyance of an immoveable subject, or of any right affecting heritage, the granter must follow the solemnities established by the law, not of the country where he signs the deed, but of the state in which the heritage lies, and from which it is impossible to remove it. For though he be subject, with respect to his person, to the *lex domicilii*, that law can have no authority over property which hath its fixed seat in another territory, and which cannot be tried but before the Courts, and according to the laws of that state where it is situated." Making allowance for and giving effect to the modification in the law effected by the decision in the case of Bruce after Mr. Erskine's time, the trustees would adopt the principle enunciated by him, and apply it to the case of post-mortuary deeds affecting moveable property, whether these purport to be deeds of bequeathment or of revocation.

The Court, after considering the cases, pronounced an interlocutor, on 8th June 1860, ordering them to be laid before the Judges of the First Division and the Lords Ordinary, that their Lordships might state their opinions in writing on the two points ordered to be argued by the interlocutor of 16th November 1859.

The consulted Judges returned the following opinions:—

LORD PRESIDENT, LORDS IVORY, CURRIEHILL, DEAS, NEAVES, ARDMILLAN, MACKENZIE, and JERVISWOODE.—1. We are of opinion that the validity, in respect of formality of execution, of the writings alleged to have been executed by the deceased William Purvis, in the Island of Sumatra, in the years 1823, 1831, 1845, and 1848, in so far as they purport to be a testamentary disposal of his moveable estate, is to be determined by the law of Sumatra,—prescribing the mode of executing and authenticating such writings; to this effect, that if those writings are formally executed according to the law of Sumatra, they are to be held valid in this country as expressions of the testamentary intentions of the deceased.

There is no statute in Scotland which specially regulates the execution or authentication of wills and testaments. The only rule is, that a nomination of executors must be in writing, and that nuncupative legacies are not valid except to the extent of L.100 Scots.

The authentication or formal execution of wills depends in Scotland upon the same rules as the authentication or execution of other writings affecting moveables, with certain modifications favourable to wills, which have not been extended to other writings.

[822] A testament is a "written declaration of what a person wills to be done with his moveable estate after his death;" Ersk. Prin. b. 3, t. 9, sec. 2. Where sought to be acted on or enforced in a Scotch Court, it is only necessary that the Court should have a writing produced which can be received as showing the declared will of the deceased.

Where the testament has been executed in Scotland, the most formal mode of authenticating its execution is that which has been prescribed by the Scotch statutes applicable to the execution of writs, of which one of the latest and most important is the Act 1681, c. 5. But these statutes have always been construed as not affecting the validity of holograph writings, or of other informal writings in use in certain cases. In particular, a writing authenticated in terms of the statutes is not the only kind of writing which will be effectual to prove a declaration of will by a deceased:—"Testamentary deeds," Mr. Erskine says, "are so much favoured, that if the testator's intention appear sufficiently, they are sustained, though not quite formal, especially if they be executed where men of skill in business cannot be had."—"And let the subject of a testament be ever so valuable, one notary signing for the testator, with two witnesses, is sufficient, though two notaries are required by statute to all deeds of importance;" Ersk. b. 3, t. 2, sec. 23. Holograph writings, though not authenticated in terms of the statutes, are undoubtedly admissible as declarations of will, even when disfigured by deletions and alterations, and defective in some particulars which a formal deed would naturally contain.

In considering the question as to wills or testaments executed in a foreign country, it is to be remembered that this matter has no reference to heritable estate. Besides, the general rule that writings as to heritage must be executed and authenticated

according to the *lex rei sitæ*, it is the law of Scotland that heritage cannot be the subject of a will or testament wherever it may be executed, or with whatever formalities it may be executed. Scotch heritage cannot be bequeathed by any deed, however probative. It can only be disposed of by a deed of conveyance or disposition, which must in words express an immediate and *inter vivos* disposition of the subjects, although it may be qualified by reservations or conditions that shall modify its practical effect. No expression of will as to the disposal of heritage *mortis causa* is of any avail by the law of Scotland. A deed disposing of heritage, *mortis causa*, would need to be framed and authenticated in the same manner as an ordinary deed disposing of it *de præsenti*.

The question under consideration, then, is narrowed in its application to the class of deeds or writings disposing *mortis causa* of moveable or personal estate, or, as already said, declaring the will or wish of the party as to the disposal of such estate.

We hold it to be the settled law of Scotland that the Scotch statutes in question are not imperative as to writings of this nature, executed in a foreign country, but that such writings are receivable here as valid or authentic expressions of testamentary will, if executed according to the formalities which would make them valid as wills or testaments in the country of execution; and that, in this respect, there is no distinction between such writings and any writings of the nature of contracts or obligations executed abroad, unless it be that from the peculiar favour shown to wills, they may be treated with more indulgence than a writing *inter vivos*.

We find the law on this subject laid down by our institutional writers in clear and unequivocal terms.

Thus Lord Stair, in treating of foreign wills, b. i. t. 1, sec. 16, while stating that nuncupative wills made abroad are not valid here, yet says:—"But as to the manner of probation or subscription, the law of the place regulates." And again, where he speaks of the inefficacy of an English testament to affect an heritable bond, he says:—"For albeit the custom of the place may supply the solemnity of any writs or evidents, for instructing a right, as writs made abroad by notaries or tabellions, are valid, though not done according to the law of Scotland, which requires two notaries and four witnesses in writs of importance; yet the custom of those places cannot constitute any right of succession not allowed by the law of Scotland."—Stair, b. iii. t. 8, sec. 35.

Sir George Mackenzie, in whose time the Act 1681, c. 5, was passed, thus states the law:—"No heritable right can be left in testaments, though the testator was **[823]** *in leidge poustie*, or perfect health; and though the testament be made in other nations, where heritage may be disponed by testament; yet it will not transmit a right to heritage lying in Scotland; and yet a testament made according to the solemnities of these nations will be valid in Scotland; for though they may regulate as to solemnities, yet they cannot alter the nature, and so not the transmission of our rights."—Mack. Inst., b. iii. t. 8, p. 326.

Bankton states the law thus:—"Each country is only governed by its own laws—*i.e.*, the laws of its own institution, or these received and authorised among them, though common to other nations. But, for expediency, it is everywhere received as the law of nations, and particularly obtains with us, that deeds granted abroad, conform to the laws of the place where they are dated, are sustained, though defective in the solemnities or formalities required by the law of the place where they are sued on, because the obligation, being once effectual, must remain so; and it were absurd that the debtor's changing his residence should free him of his obligation. Nor is it presumed, that men learned in other laws than these of the place where the parties are for the time can be found to advise with in executing deeds. The same rule holds as to testaments in writing."—Bankton, b. i. t. 1, sec. 76.

Mr. Erskine's statement of the law is to the same effect, and is to be found in four sections of book iii. t. 2, being sections 39 to 42 inclusive, to which reference is made. It may be thought that the language used by Mr. Erskine in some parts of these passages is not so precise as might have been desired, and that there is some confusion in his different descriptions of the place where the foreign writing is supposed to have been executed. But it is clear from the whole context, on the one hand, that Mr. Erskine drew no distinction, in point of formality of execution, between wills executed abroad and written contracts executed abroad; and, on the other hand, that where he speaks of the *lex loci contractus* or *lex domicilii*, he uses these terms as illustrations or

examples of the more general rule of law as to that "territory where the deed is signed," and by which effect is given to the foreign deed "perfected according to the law of the place where it was made out."

It is necessary here to attend to the distinction between the operation of the law of the place of execution as authenticating the writing, and its influence in giving practical effect to the deed upon the property or succession of the deceased. The law of Scotland receives a foreign instrument as a good expression of a testator's will, if the writing be authenticated according to the custom of the place of execution. But when the writing has been so received as a good expression of will, it is another question, depending on different considerations, how far it will prove effectual for its purpose. It is not every expression of will that receives effect in law. It has been already stated that no mere expression of will is available to affect heritage; and, in the same way, if the party is a domiciled Scotchman, his wife or children may have claims against him of *jus relictæ*, *legitim*, or otherwise, which the most formal testament cannot defeat. The admission, therefore, as to authenticity, of a will signed abroad, according to the place of execution, is not inconsistent with such a limitation of its effect as would have taken place if it had been well executed in Scotland according to the Scotch law. This is the import of the passage in Mr. Erskine, that no effect is due "to a foreign deed perfected according to the law of the place where it was made out, which would not be effectual here, though it had been perfected with all the solemnities required by our own law."—Ersk., b. iii. t. 2, sect. 41. Bankton has well expressed the same principle when he says,—"All the respect that, by the law of nations, is due to deeds executed abroad, conform to the laws of the place, is, that they shall be regarded as if they had been executed here, according to the formalities of our own law."—Bankton, b. i. t. 1, sec. 82.

Numerous cases have been referred to in the pleadings, which show that the doctrine we have above stated has all along been recognised as the law of Scotland. The questions that have arisen have frequently had reference to the effect of the foreign writing on Scotch heritage, as to which it has been held inoperative. But the decisions in those cases assume that, except for the peculiar character of heritage, the writings would have been effectual. In some of them the doctrine we have expressly stated is laid down by eminent Judges. Thus, in the case of **[824]** Crawford, 1 Hailes, 550, Lord Hailes says,—"I gave my opinion to the parties that the deed was a valid deed, as being executed in the form required by the law of the place." But "I considered it as ineffectual to convey heritable subjects in Scotland," which was accordingly found. In that case the deed was executed in Holland by a Dutch notary. In the case of Dundas, mentioned in the pleadings, Lord Thurlow, in the notes of his speech preserved by Sir Islay Campbell, is reported to have said,—"An instrument respecting moveable or personal property is good, if executed according to the law of the place where executed. On the other hand, if it respects immoveable property, the *lex loci rei sitæ* is the rule." In none of the cases is the domicile of the party, whether at the date of execution or at the date of death, regarded as affecting the authentication of the deed. The same observation may be made as to another class of cases regarding the revocation of deeds affecting heritage, where the revocation has been held to have been validly made by foreign wills.

More lately, in the case of Leith, 10 D. 1137, all the Judges who expressed an opinion on the subject, stated the law to be as it has been above explained; and the Judges who so touched on the point, formed a majority of the whole Court. No dissentient opinion on that point was given by any of the Court; and if those Judges who formed the minority had differed in that respect from the rest of their brethren, such a view would have been decisive of the case upon much simpler grounds than those advanced by them. It is, in point of fact, certain that there was no diversity of opinion on the bench as to the effect of a writing duly executed according to the technical formalities required by the *lex loci actus*, and to this fact Lord Ivory then alluded, when he said:—"Indeed, had there been no Scots heritage in the case, I do not understand that upon this point there would have been any difference in the Court. We are all agreed that a Scots testament of mere moveables might have been so revoked. Nay, Sir George Leith, being in England, might, without any express revocation, have executed a new testament in the English form, which, by mere implication, would have been sufficient to supersede and cut down all previous Scots settlements affecting only

his moveable succession;" 10 D. p. 1201. The technical formalities of execution there in question, would have supported a new will equally as a mere revocation.

It may be observed that, in the case of Leith, the testator, though he died in London, was domiciled in Scotland. But this circumstance, though most material as affecting the rights of parties interested in his succession, was not considered, and, as already said, has never been considered, by the law of Scotland, as affecting the validity of the deed as a mere instrument, if executed according to the *lex loci actus*.

In this state of the authorities, we conceive it unnecessary to support, by any reasons, the rule which we consider to be the established law of Scotland, as to the formalities required for the authentication of wills executed abroad. Yet we may add, that there seem to be the strongest grounds for having originally adopted, and for now adhering, to that rule, instead of holding that wills are only good, if executed according to the law of the party's immediate or ultimate domicile, without reference to the place of execution.

It is the privilege of every party to make his will at the time most convenient for him; or, in other words, to record in writing, at any time, and in any place, what he wills to be done with his moveable estate after his death. It may often be even his duty to do so when he is at a distance from his domicile, and consequently destitute of legal assistance or advice for the due execution of such declaration of will according to the law of that domicile. He may be seized with severe illness when abroad, or he may anticipate the near approach of such an illness as would incapacitate him from making his will afterwards with a clear purpose or sound disposing mind. If he then, in a foreign country, records the declaration of his will in a form valid by the law of the land where he does so, it seems contrary to reason, and an undue limitation of his powers, that such an instrument should not be received as an authentic expression of his will as to his moveable estate.

Supposing a testator domiciled in a foreign country at the time when he makes his will, according to the forms there required, it seems unreasonable to say that his change of domicile to a country where a different form of authentication is required by local statutes, is *eo ipso* to operate as a revocation of that will which **[825]** was validly made at the time when it was made. Change of domicile may change the rights of third parties and the powers of the testator, but it cannot alter the fact that he has expressed his intentions as to his succession, and has preserved that writing without alteration or visible revocation. Such a result would certainly seem to be incompatible with the principles of a system of law, such as prevails in Scotland, where wills, in consequence, perhaps, of their limited operation as not affecting land, or from other considerations, are not regulated by special statute, and where the only object of the law is to find a writing forming an authentic record of the wishes of the deceased. It seems, in like manner, unreasonable to say that a man domiciled in Scotland, but going suddenly abroad, and being there seized with a mortal disease, should not be able to avail himself of the forms of authentication in use in the foreign country, where he may wish to make his will when on deathbed, and when he is incapable of either returning home or communicating with the lawyers of his domicile. Nor do we see any reason why such a will should be invalid though he should die on his way home, or survive for some time in his native country, if he all along preserves the will so made, and does not make another.

Wills, as to their practical operation, only come into effect at death, but, in reference to their validity, and often as to their meaning, it may be necessary to inquire into the capacity or condition of the testator at the time of execution; and there seems no reason why consideration should not be had of the testator's locality at the same date in reference to the form of authentication. Wills are revocable during life; but when not revoked, they are good at the death if they were originally well made. A will, whenever made, is said to be a last will, if there is no later will; and it has reference to the time of death in this sense, that in such a case the testator is held to have retained till his death the intentions he before expressed. But a will once well made ought to remain so, if not afterwards altered. A change of mental capacity will not destroy it. A change of place ought as little to do so, so far as regards the admissibility of the writing as a declaration of intention.

Take the case that a Scotchman in a foreign country, from defect of education or from disease, is unable to write his name when he wishes to make his will, it is his

been laid down by authority of very great weight, that a revocation of a deed conveying Scottish heritage may be accomplished by a deed executed abroad with the formalities of the place of execution; at all events, where the conveyance has remained an undelivered deed. The diversity of opinion entertained on this question is illustrated in the case of Leith *v.* Leith, in which seven Judges of the Court of Session expressed an opinion in the affirmative, and the six others affirmed the negative of the position.

I am not prepared to decide that, in the case of an undelivered deed, the deed may not be effectually cancelled by a mandate, or authority to a friend or agent, instructing its physical destruction, executed agreeably to the law of the place in which the mandate is written. As the granter could himself destroy the undelivered deed by putting it into the fire with his own hands, it may possibly be, that he can effect the same object by the hands of another, by means of a simple letter, or any other writing authentically expressive of his will. I desire, however, to be understood as expressing no opinion on this question, because no such question arises in the present case. The question at present is not of cancellation by physical destruction, but by posterior deed. I am of opinion that, in such a case, the deed of revocation must be executed with the same statutory solemnities as the deed which it revokes. I perceive no just ground for distinguishing betwixt the cases. If the revocation was effected by a deed of contrary disposition, the statutory solemnities would admittedly be required. But I view a deed of revocation as in substance just a counter-conveyance, and the same principle to apply. Nor do I consider it to create any difference that the deed revoked has been undelivered; more especially where, as here, it contains a dispensation with delivery. If the deed remain undestroyed, it is, when produced from the repositories of the granter, an operative deed, unless another deed be shown to have revoked it. The [828] revoking deed must, I think, be equally authentic with the deed which it is alleged to revoke.

I do not enlarge on these topics, because, after the ample discussion of the point in the case of Leith *v.* Leith, it is sufficient to say that I concur in the opinion of the six Judges, who held the view I have now expressed. I would refer more particularly to the opinion of Lord Mackenzie, as accurately embodying my sentiments. And I feel myself free, in the present case, to act judicially on the view entertained by me, because the case of Leith *v.* Leith, whilst comprising an ample exposition of contrary opinion, yet, from the turn taken by it, does not involve any adverse decision. The state of the vote, as I gather from the report, was the following:—Six Judges, being the Lord President, and Lords Mackenzie, Medwyn, Moncreiff, Murray, and Cuninghame, were of opinion that the revocation was ineffectual, from the deed wanting the statutory solemnities. Two others, Lords Fullerton and Ivory, were of opinion that the deed was sufficiently authentic, but that its terms did not import an effectual recal. The combination of these eight Judges, although on different grounds, led to the judgment, "that the trust-settlement of Sir George Leith, dated 11th December 1835, was not sufficiently revoked by the deed dated 2d December 1841." The remaining five Judges, being the Lord Justice-Clerk, and Lords Jeffrey, Cockburn, Wood, and Robertson, were of opinion that the deed was authentic, and the revocation sufficiently expressed. It was these five Judges who truly formed the minority. The judgment was against the revocation. And, whatever deference I may feel for individual opinions, I conceive the judgment to leave it open to me to arrive at a similar conclusion in the present case, on the ground sanctioned by six out of the eight Judges constituting the majority in the case of Leith.

If the preceding views be well founded, they are conclusive of the present case, so far as concerns the heritable property within Scotland; for they necessarily imply that, as regards Scottish heritage, the Sumatra deed, relied on for the expression of revocation, cannot be read by the Court from defect of authenticity. But even if the deed were considered fully probative, both as to moveables and heritage, the case would not be thereby concluded. It would be still necessary, as I conceive, to consider whether the deed is, in its terms, such as, according to Scottish law, competently to express a revocation of a prior conveyance of Scottish real estate. For, in the words of Mr. Erskine (3, 2, 41), "it would be absurd to give the smallest effect to a foreign deed, perfected according to the place where it was made out, which would not be effectual here, though it had been perfected

with all the solemnities required by our own law." Or, in the words of Lord Bankton (1, 1, 82), "all the respect that, by the law of nations, is due to deeds executed abroad, conform to the laws of the place, is that they shall be regarded as if they had been executed here, according to the formalities of our own law.

Suppose, then, that the Sumatra deed had been executed with all the solemnities of the Scottish statutes, or was now to be held equally probative as if it had, there would in that case be presented to the Court a fully probative deed, by which Mr. Purvis and his wife declare "that they intended to make their testament, annihilating thereby all testaments they might have made before this day; and doing so, they declared that the first deceasing appointed and constituted the longest liver to be his or her heir, or heiress, and that of everything the first deceasing will leave, nothing excepted." It would be difficult to say that such a deed would be held, in Scotland to touch or affect heritable property, or to form an effectual revocation of any prior conveyance of such property. The deed would be held a simple testament, applicable, at the utmost, to moveable estate, and to this exclusively. Nor would the so-called clause of revocation be probably regarded as in any way changing its character, or extending its scope; because the clause would be held, according to its own terms, to be simply applicable to other testaments, and only operative to support the testamentary disposition of the deed itself. Indeed, the clause is perhaps improperly denominated a clause of revocation, for it simply declares that the testament now made supersedes all previous testaments. It is, at all events, only introduced into the deed to support the disposition to which it is preparatory; and if that disposition is either not of Scottish heritage at all, or a disposition which, according to Scottish law, is inoperative, **[829]** the revocation will be fitly held to fail of all effect, for it only has place in the deed to aid the disposition, and has no independent existence.

I might enter at greater length into this subject. But I am given to understand, that the questions sent to us are only intended to apply to formalities of execution, and not to the construction and effect of the terms of the deeds, whether construed by one law or other. I have only, therefore, to express the further opinion, that the question, whether the Sumatra deed is to be held to revoke the disposal of Scottish heritage in the Scottish trust-disposition, is a question to be determined by the Court, without any reference to foreign lawyers. I think the Court is entitled and bound, as the tribunal of the country in which the real estate is situated, to decide on the right to it, and so to decide by exclusive application of the *lex rei sitæ*—the law universally applicable in the case of real estate. It is true that it is sometimes necessary to consult foreign lawyers as to the meaning of a foreign deed, not merely with reference to the disposal of personal property, but where the right to Scottish real estate is indirectly concerned —as where it is necessary to discover what is the condition on which the personal estate is bestowed by a foreign will—so as to determine whether the claim to the Scottish heritage be not excluded, by application of the principle of approbate and reprobate. But the question in the present case is simply, whether a foreign deed, produced to the Court, be sufficient directly to revoke the right unquestionably given by a previous valid conveyance of Scottish heritage? And this question, I think, must be determined, independently of the matter of authentication, by inquiring whether the deed contain words or clauses, apt and sufficient according to Scottish law, to effect this purpose. The question, as I view it, is not, in any proper sense, a question of intention, but of legal requirement; at least, of intention only in so far as it is matter of formal expression, not as matter of fact. To use a well-known phrase in our Courts, the question is, whether the Sumatra testament be a *habile* deed, according to Scottish law, to express an effectual revocation of the Scottish trust-deed, so far as applicable to heritable property in Scotland. If it be not a *habile* deed for that purpose, I am of opinion that the Court should at once, and of its own authority, pronounce a judgment to that effect.

I have in these latter observations dealt with the Sumatra deeds with exclusive reference to the heritable property in Scotland. With regard to the question, whether, and to what extent, the Sumatra writings have revoked the disposition of moveables contained in the Scottish trust-deed, I am of opinion that before decision, a remit should be made to lawyers acquainted with the law of that island, in order to obtain information—1st, Whether the writings have been executed with the formalities

been laid down by authority of very great weight, that a revocation of a deed conveying Scottish heritage may be accomplished by a deed executed abroad with the formalities of the place of execution; at all events, where the conveyance has remained an undelivered deed. The diversity of opinion entertained on this question is illustrated in the case of Leith *v.* Leith, in which seven Judges of the Court of Session expressed an opinion in the affirmative, and the six others affirmed the negative of the position.

I am not prepared to decide that, in the case of an undelivered deed, the deed may not be effectually cancelled by a mandate, or authority to a friend or agent, instructing its physical destruction, executed agreeably to the law of the place in which the mandate is written. As the granter could himself destroy the undelivered deed by putting it into the fire with his own hands, it may possibly be, that he can effect the same object by the hands of another, by means of a simple letter, or any other writing authentically expressive of his will. I desire, however, to be understood as expressing no opinion on this question, because no such question arises in the present case. The question at present is not of cancellation by physical destruction, but by posterior deed. I am of opinion that, in such a case, the deed of revocation must be executed with the same statutory solemnities as the deed which it revokes. I perceive no just ground for distinguishing betwixt the cases. If the revocation was effected by a deed of contrary disposition, the statutory solemnities would admittedly be required. But I view a deed of revocation as in substance just a counter-conveyance, and the same principle to apply. Nor do I consider it to create any difference that the deed revoked has been undelivered; more especially where, as here, it contains a dispensation with delivery. If the deed remain undestroyed, it is, when produced from the repositories of the granter, an operative deed, unless another deed be shown to have revoked it. The **[828]** revoking deed must, I think, be equally authentic with the deed which it is alleged to revoke.

I do not enlarge on these topics, because, after the ample discussion of the point in the case of Leith *v.* Leith, it is sufficient to say that I concur in the opinion of the six Judges, who held the view I have now expressed. I would refer more particularly to the opinion of Lord Mackenzie, as accurately embodying my sentiments. And I feel myself free, in the present case, to act judicially on the view entertained by me, because the case of Leith *v.* Leith, whilst comprising an ample exposition of contrary opinion, yet, from the turn taken by it, does not involve any adverse decision. The state of the vote, as I gather from the report, was the following:—Six Judges, being the Lord President, and Lords Mackenzie, Medwyn, Moncreiff, Murray, and Cuninghame, were of opinion that the revocation was ineffectual, from the deed wanting the statutory solemnities. Two others, Lords Fullerton and Ivory, were of opinion that the deed was sufficiently authentic, but that its terms did not import an effectual recal. The combination of these eight Judges, although on different grounds, led to the judgment, "that the trust-settlement of Sir George Leith, dated 11th December 1835, was not sufficiently revoked by the deed dated 2d December 1841." The remaining five Judges, being the Lord Justice-Clerk, and Lords Jeffrey, Cockburn, Wood, and Robertson, were of opinion that the deed was authentic, and the revocation sufficiently expressed. It was these five Judges who truly formed the minority. The judgment was against the revocation. And, whatever deference I may feel for individual opinions, I conceive the judgment to leave it open to me to arrive at a similar conclusion in the present case, on the ground sanctioned by six out of the eight Judges constituting the majority in the case of Leith.

If the preceding views be well founded, they are conclusive of the present case, so far as concerns the heritable property within Scotland; for they necessarily imply that, as regards Scottish heritage, the Sumatra deed, relied on for the expression of revocation, cannot be read by the Court from defect of authenticity. But even if the deed were considered fully probative, both as to moveables and heritage, the case would not be thereby concluded. It would be still necessary, as I conceive, to consider whether the deed is, in its terms, such as, according to Scottish law, competently to express a revocation of a prior conveyance of Scottish real estate. For, in the words of Mr. Erskine (3, 2, 41), "it would be absurd to give the smallest effect to a foreign deed, perfected according to the place where it was made out, which would not be effectual here, though it had been perfected

with all the solemnities required by our own law." Or, in the words of Lord Bankton (1, 1, 82), "all the respect that, by the law of nations, is due to deeds executed abroad, conform to the laws of the place, is that they shall be regarded as if they had been executed here, according to the formalities of our own law.

Suppose, then, that the Sumatra deed had been executed with all the solemnities of the Scottish statutes, or was now to be held equally probative as if it had, there would in that case be presented to the Court a fully probative deed, by which Mr. Purvis and his wife declare "that they intended to make their testament, annihilating thereby all testaments they might have made before this day; and doing so, they declared that the first deceasing appointed and constituted the longest liver to be his or her heir, or heiress, and that of everything the first deceasing will leave, nothing excepted." It would be difficult to say that such a deed would be held, in Scotland to touch or affect heritable property, or to form an effectual revocation of any prior conveyance of such property. The deed would be held a simple testament, applicable, at the utmost, to moveable estate, and to this exclusively. Nor would the so-called clause of revocation be probably regarded as in any way changing its character, or extending its scope; because the clause would be held, according to its own terms, to be simply applicable to other testaments, and only operative to support the testamentary disposition of the deed itself. Indeed, the clause is perhaps improperly denominated a clause of revocation, for it simply declares that the testament now made supersedes all previous testaments. It is, at all events, only introduced into the deed to support the disposition to which it is preparatory; and if that disposition is either not of Scottish heritage at all, or a disposition which, according to Scottish law, is inoperative, **[829]** the revocation will be fitly held to fail of all effect, for it only has place in the deed to aid the disposition, and has no independent existence.

I might enter at greater length into this subject. But I am given to understand, that the questions sent to us are only intended to apply to formalities of execution, and not to the construction and effect of the terms of the deeds, whether construed by one law or other. I have only, therefore, to express the further opinion, that the question, whether the Sumatra deed is to be held to revoke the disposal of Scottish heritage in the Scottish trust-disposition, is a question to be determined by the Court, without any reference to foreign lawyers. I think the Court is entitled and bound, as the tribunal of the country in which the real estate is situated, to decide on the right to it, and so to decide by exclusive application of the *lex rei sitæ*—the law universally applicable in the case of real estate. It is true that it is sometimes necessary to consult foreign lawyers as to the meaning of a foreign deed, not merely with reference to the disposal of personal property, but where the right to Scottish real estate is indirectly concerned —as where it is necessary to discover what is the condition on which the personal estate is bestowed by a foreign will—so as to determine whether the claim to the Scottish heritage be not excluded, by application of the principle of approbate and reprobate. But the question in the present case is simply, whether a foreign deed, produced to the Court, be sufficient directly to revoke the right unquestionably given by a previous valid conveyance of Scottish heritage? And this question, I think, must be determined, independently of the matter of authentication, by inquiring whether the deed contain words or clauses, apt and sufficient according to Scottish law, to effect this purpose. The question, as I view it, is not, in any proper sense, a question of intention, but of legal requirement; at least, of intention only in so far as it is matter of formal expression, not as matter of fact. To use a well-known phrase in our Courts, the question is, whether the Sumatra testament be a *habile* deed, according to Scottish law, to express an effectual revocation of the Scottish trust-deed, so far as applicable to heritable property in Scotland. If it be not a *habile* deed for that purpose, I am of opinion that the Court should at once, and of its own authority, pronounce a judgment to that effect.

I have in these latter observations dealt with the Sumatra deeds with exclusive reference to the heritable property in Scotland. With regard to the question, whether, and to what extent, the Sumatra writings have revoked the disposition of moveables contained in the Scottish trust-deed, I am of opinion that before decision, a remit should be made to lawyers acquainted with the law of that island, in order to obtain information—1st, Whether the writings have been executed with the formalities

required by the law prevalent in Sumatra, and are authentic instruments according to that law? 2dly, What is their construction and effect, according to the same law? The result will be for after consideration. But, in consulting the foreign lawyers as to the effect of these writings, I think that they should be informed, that they are invalid, according to the law of Scotland, to revoke the Scottish trust-disposition, so far as comprehending Scottish heritage. It is, amongst other reasons, in order that this may be established as a fixed point in the case, that I think the Court should settle it by judgment, antecedently to any remit to foreign lawyers.

At advising,—

LORD JUSTICE-CLERK.—This is a process of multiplepoinding, brought for the purpose of distributing the estate, heritable and moveable, of the late William Purvis, among the parties interested in his succession, according to what shall be found to be their legal rights and interests.

Mr. Purvis was a Scotsman by birth, and died at Edinburgh in December 1854. But it appears that a considerable part of his life had been spent in the Netherlands India; and while he left a trust-disposition and deed of settlement in the Scotch form, purporting to settle his whole means and estate, there are other testamentary papers, alleged to have been executed by him in the Netherlands India, of various dates, both before and after the date of the Scotch settlement. It is averred that these testamentary papers are duly attested according to the law of the place of execution, and are valid according to that law, in so far as the solemnities of execution are concerned, whatever may be their import and effect. **[830]** On the other hand, it is not disputed that the trust-disposition and settlement executed by the deceased in Scotland is valid according to the forms of the law of Scotland.

In these circumstances, it obviously became necessary, in the first place, to ascertain where the testator was domiciled at the time of his death, and this fact was settled by an interlocutor pronounced by Lord Benholme (Ordinary) on 30th June 1857, adhered to, as regards this finding by this Division of the Court on 16th December 1859. By these interlocutors it is determined, that the testator was domiciled in Scotland at the time of his death.

The important question then arose, what are to be considered and recognised as the testamentary papers of Mr. Purvis? And having ordered written argument on this question, we requested, and have now obtained, the opinions of the whole Judges in answer to the following queries;—

"1. Whether the validity in respect of formality of execution of the writings alleged to have been executed by the deceased William Purvis in the Island of Sumatra, in the years 1823, 1831, 1845, and 1848, in so far as they purport to be a testamentary disposal of his moveable estate, is to be determined by the rules of the law of Scotland, or by those of the law of Sumatra prescribing the mode of executing and authenticating such writings? 2. Whether the said writings can receive effect as a revocation of the testator's prior trust-deed and settlement, in whole or in part?"

In answer to the first of these queries, the consulted Judges are unanimously of opinion:—"That the validity, in respect of formality of execution of the writings alleged to have been executed by the deceased William Purvis in the Island of Sumatra, in the years 1823, 1831, 1845, and 1848, in so far as they purport to be a testamentary disposal of his moveable estate, is to be determined by the law of Sumatra,—prescribing the mode of executing and authenticating such writings: to this effect, that if those writings are formally executed according to the law of Sumatra, they are to be held valid in this country as expressions of the testamentary intentions of the deceased."

In expressing my concurrence, I think it necessary to offer a short explanation, for the purpose of avoiding any misconception as to the reasons which lead me, and I believe all my brethren, to the same conclusion.

The estate, or a considerable portion of the estate, both heritable and moveable, of the testator, being locally within Scotland, this Court is *forum competens* to ascertain and determine any questions which may arise as to his succession. But the *forum competens* may, in many cases, require to resort to foreign law, for the purpose of determining such questions. For the law of the domicile of the deceased, at the date of his death, must determine not only what is the true meaning and construction and effect of any will or deed of settlement he may have left disposing of his moveable estate, but

also, as regards his moveable estate, whether he died testate or intestate; and if he died testate, the law of the domicile must further determine what paper or papers constitute the will of the deceased.

The tribunal, then, in which the estate is to be administered and distributed, in every case in which it is not itself the *forum* of the domicile, must defer absolutely on these questions to the law of the domicile, and must receive, without hesitation or question, the rule of the law of the domicile as its only guide.

In the present case, the law of the *forum* and the law of the domicile, are the same; and, therefore, we are not driven to resort to any foreign law to ascertain what constitutes the will of the deceased. But it is of the utmost importance to keep in view what is the function of the *forum* of distribution, acting as a mere medium of granting administration, or dividing the estate, and the function of the law of the domicile, as fixing what is the will.

That the law of the domicile can alone settle what is the will, is a principle of international law, of extensive, if not universal, acceptation. And the *forum* of distribution bends to that law, and receives its instruction with unquestioning faith, in deference to this international principle.

But the function of the law of the domicile is quite different. It determines what is to be received as the will of the deceased, not on any principles of international law or views of general jurisprudence, but according to the rules of its own municipal system. It is dealing with its own subject (*subditus*), and his [831] estate and succession, and in that matter its authority is sole and supreme, just because of that principle of international law which leaves the question to its determination; and the law of the domicile would be declining to exercise the authority which the law of nations has conferred upon it, and refusing to discharge its peculiar duty, if it allowed itself to be influenced in the decision by anything but the rules of its own municipal code or system. It would be an entire perversion of international law, if the law of the domicile consulted or listened to foreign law international principles, in derogation of its own fixed rules.

When the question under consideration comes to be thus reduced to its true dimensions, and its precise character comes to be ascertained, all difficulty appears to me to be at an end. In deference to the international principle, we first ascertained where the testator was domiciled at the period of his death, and having ascertained that he was domiciled in Scotland, we must, in order fully to satisfy the international principle, proceed to inquire what the municipal law of Scotland holds to be his testamentary papers. The questions, therefore, which we put to the consulted Judges, and the answers we have received, are questions and answers in the municipal law of Scotland, and nothing else.

This question in the law of Scotland may be important, because of the monstrous consequences which would follow from its being decided in a sense opposite to that indicated by the opinions of the consulted Judges. But as far as authority is concerned, there seems to me really no room for doubt.

We have not in Scotland any statute of wills, the law regarding the authentication of such instruments being exactly the same as that which regulates the authentication of written instruments passing *inter vivos*.

Neither are we at all encumbered in this question with any of the peculiarities of the law regarding the authentication of writings operating as conveyances of heritable estate.

All instruments of importance, including wills, are, by the statute 1681, required to be authenticated in a particular form; and, according to a literal interpretation of this statute, no contract made abroad, according to the formalities of the place of execution, and equally (but just equally, and no more), no will made abroad, according to the formalities of the place of execution, could receive effect in this country. But the statute never was intended or understood to enact anything so mischievously stringent. Accordingly, the interpretation of the statute, coeval with the statute itself (as proved by Lord Stair and Sir George Mackenzie, who are both cotemporary writers), has fixed that all instruments (without distinction, except in the case of conveyance of land) executed abroad according to the solemnities of the place of execution, must receive effect in Scotland, exactly in the same way as if they were executed within Scotland, according to the solemnities of the Act 1681.

Any one may be entitled to question the expediency of this law, or its consistency with sound legal principle, as applied either to wills or to other instruments. I humbly but very decidedly think, that it is not only highly expedient, but in principle receives the support both of reason and of all the authorities of highest weight among writers on the theory of jurisprudence. But that is altogether beside the present question; for, be it right or wrong in principle or expediency, it is the law of Scotland, and by that law alone this question must be decided.

The case of Croker *v.* the Marquis of Hertford, so often cited in the arguments, is a clear authority on this point. There the Judicial Committee of the Privy Council held that certain codicils to the will of a domiciled Englishman, executed at Milan, according to the forms of the Austrian law, could not be admitted to probate, because an English statute has enacted that no will of any Englishman shall receive effect unless it be attested by three witnesses. But had the municipal law of England been otherwise, and had the statute of wills provided that wills of domiciled Englishmen, executed abroad, should be good, if made according to the formalities of the law of the place of execution, the same principle would have necessarily led the learned members of the Judicial Committee to the opposite conclusion from that at which they arrived.

Can it make any difference that the rule of the law of the domicile depends not on statute but on consuetude, or on a practice relaxing or explaining the statute? On the contrary, common law is of greater force than statute (at least modern **[832]** statute), insomuch as it is the inveterate representative and expression of the habits, feelings, and wants of the people, in a matter of vital concern to them, while recent statute may be only the embodiment of a crude experiment, destined to be repealed after a short experience of its evils. And the consuetudinary practice growing up alongside of, and constantly accompanying the statute 1681, must surely be of equal force with the statute itself; for it is fairly presumable that, but for that equitable relaxation, which the courts administering the common law had authority to sanction, the Legislature would have interposed to effect the same end.

I should consider it a mere waste of time to examine again the authorities that have been brought together by the consulted Judges in their opinions. It may, at first sight, occasion some surprise, that there should be no decided case directly in point throughout the whole history of our jurisprudence, if we except the case of Leith's Trustees *v.* Leith. But this fact is in reality the strongest confirmation of the authority of the institutional writers, as shewing that the legal profession and the public have, for nearly two centuries, without question, acted on the law stated by these writers as being beyond all question. I can say, with the utmost confidence, that, in the course of my own professional experience, I have met with many wills of domiciled Scotsmen, executed in England and elsewhere abroad, according to the law of the place of execution, but without the formalities of the Scots law; and even between parties engaged in the most obstinate litigation respecting the construction and effect of these wills, no suggestion was ever made that they were bad in point of execution, because not made in compliance with the statute 1681.

It is said that Scotsmen have for some centuries, and especially since the union of the two crowns of Scotland and England, been very much given to push their fortunes in all parts of the world beyond the Tweed. I believe this to be true; but it is equally true, that in most cases they retain, throughout their adventures, whether among their southern neighbours or foreigners, a very determined *animus revertendi;* and most commonly end their days in their native country, with their domicile of origin either retained or reacquired. The number of such men who have made their wills in England and elsewhere, according to the legal forms of the place of execution, and whose wills have been received here as valid without objection, is notoriously so great, that were the present question really attended with any doubt at all, it would be not merely as a legal but as a social question of almost unexampled importance.

As to the subject of the second query addressed by us to the consulted Judges, I think it unnecessary to say more than that I entirely concur in their Lordships' opinion, for the reasons which they assign.

By interlocutor of 16th December 1859, we adhered to the interlocutor of the Lord Ordinary, in so far as his Lordship found that the testator died domiciled in Scotland, and left a trust-deed of settlement, embracing, *inter alia*, his heritable estate. I now

propose that we should adhere to the last finding in the Lord Ordinary's interlocutor, which is in these terms:—"Finds that, by the law of Scotland, in which country the testator died domiciled, the succession to his moveable property will depend upon the formality, according to the law of the country in which they were executed, of the testamentary writings executed by the testator in the Netherlands India, as constituting a last will and testament of moveable property." This finding suitably expresses the ground on which we now give judgment, that the question is to be determined by the law of Scotland only, as the law of the testator's domicile.

I further propose that the remaining findings in the interlocutor should be recalled *in hoc statu*, and the cause remitted to the Lord Ordinary to proceed further as shall be just and consistent with the interlocutor formerly pronounced, and now to be pronounced by the Court.

I have only to add, that I am authorised by Lord Wood, who has paid great attention to this case, to say that he concurs in this judgment.

LORD COWAN.—I concur in opinion with the consulted Judges, that the writings purporting to be executed by the deceased William Purvis in the Island of Sumatra are, by the law of Scotland, where the deceased was domiciled at the time of his death, entitled to effect as testamentary writings, provided they are established to have been formally executed according to the law of Sumatra. The domicile of [833] the deceased at his death being Scotland, it is by the law of this country that his succession must be regulated, in so far as regards his moveable estate. The *power* of making a testament, as well as the extent to which moveable estate can be effectually tested on and disposed of, must be determined by the law of the domicile. And, in like manner, when the question is, whether a particular writing is to be received as testamentary, the answer is to be obtained by reference to the municipal law of the country of domicile.

Now, it is a principle well established in the law of this country, that writings relative to personal contracts and dispositions of personal estate are entitled to effect, when executed in accordance with the *lex loci actus*. Assuming *power* in the granter of the deed, what the law requires is *evidence* that the written contract or other writing is truly indicative of the mind of the party undertaking the obligation or disposing of his property. The best possible evidence of this is afforded by his adoption, in giving expression to his mind and will, of the form recognised by the law of the place where he is at the time of his act. Nor has any distinction ever been held to exist in this respect between contracts and testamentary writings. There is none in principle. To the latter class of deeds, indeed, the doctrine or rule is peculiarly applicable, and of great practical importance. In many cases, a party absent from his domicile may find it necessary or prudent to execute such writings without delay, and may be unable to obtain the necessary professional assistance, except from parties acquainted only with the forms of their own law. To reject the formal declaration of the granter's intention as to his succession merely because of these forms being different from those which would have been adopted had the deed been executed at his proper domicile, does not appear to be called for, either by the nature of the act in itself, or by the object of the deed executed. And so, accordingly, it has been held and recognised in the law and practice of this country. The authorities referred to in the opinion of the consulted Judges appear to me to put this beyond reasonable doubt.

As regards the case of Leith, referred to by them, I cannot read the opinions delivered, when the case was before the whole Court in 1848, without the conviction that the validity of the English will was taken as not open to objection. For it seems, at that stage of the case, to have been assumed as undoubted that a writing, duly executed according to the formalities required by the *lex loci actus*, was to be treated as a valid deed by the law of this country in any question affecting the succession of a domiciled Scotsman. But the point was certainly not decided by the judgment then pronounced. For the cause having been remitted to the Lord Ordinary, a supplementary written argument was ordered upon that point, and upon other questions that remained for decision. These pleadings came again before the whole Court, and were followed by a hearing in presence, after which, and before judgment was pronounced, the case was compromised by the parties.

The point, as to the validity of the English will executed by Sir George Leith, thus

never became the subject of express judgment. But as one of the Judges when these later pleadings came to be considered by the Court, I concur in the statement made in the joint opinion, in so far as my recollection serves me, that there was in fact no diversity of opinion on the bench as to the validity of the English testament. And for myself I find, on examination of my papers, that, after the hearing in presence, I had framed an opinion to that effect, and which I believed to have been in accordance with the views of my brother judges at that time, without any exception, and from the notes of that opinion, I find that this question, although argued in the supplementary case, and requiring to be disposed of, had not been pressed at the hearing. The note, which I have preserved, bears that the question was not made the subject of discussion at the hearing, but not having been passed from, it nevertheless required to be decided before disposing of the other questions in the cause.

I forbear entering more at large into the case, as I concur generally in the views of the consulted Judges, and in those which have been so fully given in the opinion now delivered by your Lordship in the chair. I shall only add, in a single sentence, that it does not appear to me at all inconsistent, that the municipal law of the domicile may recognise a settlement made *aliunde* according to its own forms, although at variance with the formalities *legis loci actus*. As observed by Mr. Burge (vol. iv. p. 590), by whom this matter is fully treated in its more general **[834]** bearings, "in giving effect to a testament made with the solemnities prescribed by the *lex loci actus*, jurists do not deny effect to a testament made according to the forms required by the *lex loci rei sitæ*, if it be immoveable, or the *lex loci domicilii*, if it be personal property, which is the subject of the disposition. This observation does, as I think, apply to, and correctly represent the rule of the law of Scotland in this matter, and the constant and invariable practice of our Courts. In common with your Lordship, I would view with considerable apprehension the recognition of any contrary rule.

As regards the second question on which the consulted Judges have returned an opinion, while I concur generally in the views expressed in so far as regards the effect to which a deed of revocation is entitled in the court of the granter's domicile, when executed according to the formalities of the law *loci actus*, I do not think it necessary to give any opinion upon the effect of such a deed of revocation when its purpose is to recal, either impliedly or expressly, a conveyance of heritage executed according to the formalities *legis rei sitæ*. It appears to me premature to dispose of that matter till the terms of the testamentary writings are before the Court for consideration. For even if shown to have been executed according to the law of Sumatra, these deeds may not be found, *de facto*, to contain any clause or provision which, either expressly or impliedly, can be held to operate revocation of a prior destination of heritage.

Lord Benholme.—These are questions that have very long occupied my mind, both at the bar and since I sat here. They are very interesting in the discussion, and I think have now arrived at a maturity of consideration, and I hope of judgment, which they have never previously attained. We have the opinion of the great majority of the consulted Judges unanimous in its result. In that opinion I perfectly coincide. I have read it over with extreme attention, and I do not think that I can except to any part of it. I think there is no tangible objection that can be stated, even to the details of that opinion. I think we are very much indebted to your Lordship for the very clear and lucid explanation, if I may say so, of the law that is to be applied in solving this question. It is undoubtedly the law of Scotland; it is undoubtedly the law of the domicile. It stands upon clear international principles; and the law of Scotland, very clearly on the authorities, has adopted this principle, that, where a testament carrying moveables is executed according to the formalities of the place where the testator was living at the time, that is in the courts of this country a good testament. Whilst I say, and whilst I agree with your Lordship, that we are now deciding a question of Scotch law, which ought to be decided upon the authorities of the Scotch law, let me not be misunderstood to say that it has nothing to do with international law. I think it has. I think to state the question, the law of what country shall prevail in regard to the formalities of a testament?—raises the question of international law. But then I agree with your Lordship that this country, Scotland, has adopted a particular view of that international principle, in which

principle it may not agree with the law of other countries. They may take a different view of the international principle; but I think it is still a Scotch view of an international principle. That is the view I take of it. It is clearly a point of Scotch law, but I think it touches upon the international principle that I have before mentioned. I only make that observation in order that I may be clearly understood not to remove this discussion altogether from a matter of international law; because I think it may be said, and said with justice, that there is international law concerned. It may be stated as an international principle, but I think it is very clear that a particular view of that international principle constitutes the municipal law of Scotland.

LORD WOOD was absent.

The Court pronounced this interlocutor:—"Adhere to the interlocutor reclaimed against, in so far as it finds 'that, by the law of Scotland, in which country the testator died domiciled, the succession to his moveable property will depend upon the formality, according to the law of the country in which they were executed, of the testamentary writings executed by the testator in the Netherlands India, as constituting a last will and testament of moveable property:' *Quoad ultra*, in so **[835]** far as the findings in the said interlocutor have not been adhered to by the present interlocutor, or by the interlocutor of 16th December 1859, recal the same *in hoc statu*, and remit to Lord Jerviswoode, Ordinary, in place of Lord Benholme, to proceed farther in the cause as shall be just and consistent with the findings in this interlocutor, and the previous interlocutor of 16th December 1859, reserving in the meantime all questions of expenses."

[Cf. *Richmond's Trs.* v. *Winton*, 3 M. 100.]

No. 130. **XXIII. Dunlop 846.** 30 Mar. 1861.[1] 1st Div.—Sheriff Court of Lanark.

A. and J. M'KEAND, Appellants.—*Sol.-Gen. Maitland—Fraser.*

JOHN C. REID (LAIRD'S Trustee), Respondent.—*Young.*

Bankruptcy—Sequestration—Ranking—Partnership.—A trader assumed two of his shopmen as partners, and entered into a contract of copartnery with them, whereby it was provided that he should put L.600 into the concern, and that for any larger amount he should be a creditor of the company. On a valuation of his assets and liabilities, the balance in his favour was estimated at L.600, and this balance was accepted by the partners as fulfilment of the condition in the contract. They traded with this stock, and eventually became bankrupt. Neither of the two assumed partners had put anything into the concern, and the contract contained no provision for taking over the trader's liabilities. In the sequestration, *held* (three Judges of the Second Division having been called in, *diff.* Lord President and Lord Curriehill), that a personal debt of the trader, which was included among his liabilities at the date of entering into the copartnery (the formation of which was made known to him [the creditor]), had been all along dealt with by the bankrupts as a debt of the firm, and that the creditor was entitled to rank upon the company estate.

"Robert Laird, as an individual, carried on business in his own name as a draper in Paisley from 1842 or 43 till 1850. He had previously carried on business with James Mackay, under the firm of Mackay and Laird. That firm purchased from a concern,—to whose right the appellants (A. and J. M'Keand) afterwards succeeded,—their business, at the price of upwards of L.4000, but the price remained unpaid. On the dissolution of Mackay and Laird in 1842 or 43, Robert Laird took over their

[1] Decided 17th March 1860.

liabilities, including that debt, and was admittedly recognised by the appellants as their sole debtor up to 1850. The debt amounted, with interest, in January 1850, to L.4981, 12s. 5d. On the 5th April 1850, a contract of copartnery was executed, under which Robert Laird assumed, as from the 1st February preceding, William Thomson and William Smith, two of his then shopmen, partners in his business, but only to the extent of one-eighth part or share each. The contract provides that the business shall be carried on for the space of six years under the firm of 'Robert Laird,' and that the capital stock of the concern shall consist of L.600, to be put in by Robert Laird individually, 'which shall form a debt against the company, and bear interest at the legal rate of five per cent until the same is repaid; and if the said Robert Laird shall put into the stock cash or goods to an amount exceeding his said proportion, or if the said William Thomson or William Smith shall advance cash or goods, he or they shall be deemed a creditor or creditors of the company for the amount of such advance, and shall be entitled to legal interest on the same.' The contract further provides—'That all bills, contracts, accounts, and other writings relating to said trade and business shall be taken and given under the foresaid firm, and no partner shall use the company's firm, or draw money, except for the company's business, on any account or pretence whatever, and neither of the copartners shall, either as a company or as individuals, become cautioner for any person during the existence of this contract.' There was no stipulation in the con- **[847]** -tract that the firm should take over the individual liabilities of any of the partners, or that it should have the benefit of any of their individual assets beyond the said L.600. But at the date of entering into the copartnery, Robert Laird valued his stock, conform to jotting at the end of the stock-book, No. 9/11, at L.2130, and his other assets, consisting mainly of outstanding debts, at L.6945, making together L.9125. Deducting from this sum the liabilities, which, including his debt to the appellants, amounted to L.8438, a clear balance remained of L.687. It was this balance, to the extent at least of L.600, that Laird was to put into the new concern."

The new firm of "Robert Laird" was sequestrated in November 1857. The statement of the company's liabilities given up to the trustee in the sequestration, contained under "Liabilities," which amounted to L.16,473, 17s. 9d., this entry:—

A. and J. M'Keand, as per claim, ...		L.6313	11 0
Deduct value of policies, ...		350	0 0
		L.5963	11 0

Under "Assets,"—

Stock in trade in Glasgow shop, per inventory, .	L.4903	13	3½		
Less for value, say	245	3	3½		
				L.4658	10 0
Furniture and fittings in Glasgow shop, say . . .				100	0 0
Stock in trade and furniture in Paisley shop, per inventory and valuation, ...				1266	6 11
Outstanding debts in Glasgow considered good, . . .				326	2 3
Do. Paisley, do. do. . . .				701	8 6

making in all L.7880, 3s. 5d.

The rent of the Glasgow shop was L.345; of the Paisley shop L.52.

The following was an excerpt from the stock and balance book of the bankrupts, dated 31st January 1850:—

Brought over,			L.1698	4	2	L.2130	10	2½	
2 Slips @ 6/6, 1 @ 3/, 1 @ 2/6,						6995	6	9½	
1 @ 5/, 1 @ 5/11, . .			1	9	5				
1 Shl. 6/6, oil-cloths 103/6,			5	10	0	L.9125	17	0	
Remts.			5	18	6				
28 Frieze, . . . 3/6,			4	18	0				
		L.1716	0	1					
Sold off stock, .		50	6	8	A. and J. . . .			L.5454	1	5
		L.1665	13	5	E. S.			445	0	0
Cash in bank, L.45 0 0					Bills, ...			598	9	6
„ on hand, 1 12 7								L.6497	10	11
		46	12	7	Sundries, . . .			1940	16	1
		L.1712	6	0				L.8438	7	0
Shop furniture, including safes, meter, mirrors, closet, clock, gas-fittings, &c. .		37	14	2½						
Valuation of shop-fittings, &c., original cost, L.460;					L.9125	17	0			
—off, L.80, . . .		380	0	0	8438	7	0			
		L.2130	0	2½	L.687	10	0			
Add stock, L.9, and 30/, . L.10 10 0			10	0						
Deduct, . 10 0 0										
		L.2130	10	2½						

[848] Upon their sequestrated estate a claim for L.6001, 16s. 9d. was made by A. and J. M'Keand, who, in their affidavit, stated that, in security thereof, "the bankrupts granted to the said A. and J. M'Keand various acceptances herewith produced, which acceptances were retired by the said A. and J. M'Keand, and are now founded upon, no part of which is paid or compensated, nor do the said A. and J. M'Keand hold any security for the same, or any part thereof, nor any one liable to them for said debt, except the said company of Robert Laird, and the individual partners of that company, and excepting five insurance policies, conform to list hereto annexed, all of which are valued at L.300."

The deliverance of the trustee was as follows:—"The trustee rejects this claim *in toto*, for the following reasons:—(1.) With a small exception, it appears, from the bankrupt's examination, and other sources, that the amount claimed is a debt of Robert Laird, as an individual, contracted by him prior to the formation of the company under sequestration. The contract of copartnery (which was formed and carried on within the claimant's knowledge) does not refer to this debt, neither does it bind the company by any general expression to pay or take over the debts owing by Laird as an individual; on the contrary, its provisions are quite inconsistent with such an idea. It seems, however, that Laird docqueted accounts for the claimants, in which his own debt was mixed up with some transactions of the bankrupt company; and it appears, also, that Laird did the same thing himself, in a small private ledger. But all the partners concur in saying that this ledger was accessible to none but Laird, and that the docquets were struck and signed by him, without the authority, sanction, or knowledge of his copartners.

"The claimants found upon one of these docquets for nearly the whole of their claim. In these circumstances, the debt claimed, with the exception of the few cash advances in the account, is not a debt of the company under sequestration.

"(2.) No vouchers nor accounts are produced to support the first item of the claim.

"(3.) The items of cash advances (supposing them to have been due by the company), are more than compensated by the cash credited.

"The items of interest, of course, follow the disposal of the items of principal."

A. and J. M'Keand appealed to the Sheriff, and pleaded that there were no *termini*

habiles for making any distinction between debts contracted by Robert Laird before and after the date of Smith and Thomson having acquired an interest in the business. If it could be held that the company of Robert Laird ever commenced business, the books kept by the company establish that the company took possession of the whole assets of the individual Robert Laird, and assumed his whole liabilities, and that the transactions with the appellants subsequent to the date of the contract of copartnery were with the company Robert Laird, and not with the individual. The books kept by the company Robert Laird contained evidence that the appellants' debt was assumed by the company, and no partner could be allowed to plead that he did not know the contents of the company's books.

Replied.—Laird could not make the company liable for his individual debts without the consent of his copartners, especially to the appellants, who knew of the existence of the company. There was no balance due to the appellants upon the transactions by the company.

On 3d December 1858 the Sheriff-Substitute (Glassford Bell) pronounced the following interlocutor:—"Finds that the debt for which the appellants claim to rank on the sequestrated estates of the company of 'Robert Laird' is a debt originally contracted to said appellants by Robert Laird as an individual, before the formation of said company, of which Robert Laird individually was only one of three partners: Finds that the appellants have **[849]** failed to prove that the said debt was ever assumed, taken over, or admitted as a debt due by the said company of 'Robert Laird:' Therefore, and under reference to the annexed note, sustains the defences, adheres to the deliverance appealed against, and dismisses the appeal: Finds the appellants liable in expenses," &c.[1]

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[1] NOTE.—After narrating the facts as above:—"It was this balance, to the extent at least of L.600, that Laird was to put into the new concern. Accordingly his partner Thomson, examined as a witness by the respondent, has deponed—'I understood when the contract was entered into that Laird was worth about L.600.' The contention of the appellants now is, that after the formation of the copartnery the debt due to them by Robert Laird as an individual became a debt of the company, and that they are consequently entitled to rank for its amount on the company's sequestrated estates. If this view be correct, it follows that, as Laird only put L.600 into the concern as its whole capital, and as his liabilities amounted to upwards of L.8000, the firm, instead of possessing any capital, commenced business with a very large amount of debt—a supposition altogether unsanctioned by the terms of the contract of copartnery, and inferring a strange degree of imprudence in the assumed partners Thomson and Smith. It is true that the stock belonging to Laird, in April 1850, seems to have passed, at least nominally, into the possession of the company, and to have been traded upon by them; but then it is to be remembered not only that Laird's interest in the concern was three-fourths of the whole, but that under the express conditions of article 1st of the contract he was a creditor to the company for all the cash or goods put in exceeding his proportion. The real position of parties seems to have been simply this, that the appellants looked annually to the value of Laird's stock and assets as affording them a security for their debt, and, knowing that he had transferred only the free balance of said stock and assets to the company, were not alarmed at his giving a small interest in his business to his partners. Although the stock on hand came to be disposed of through the medium of the company, it was always replaced by fresh stock, and the profit and loss of the concern fell to be calculated only on the input capital of L.600, and not on the L.6945 worth of outstanding debts which belonged to Laird when the copartnery was gone into. That property continued his, to meet his own liabilities; and if, afterwards, it became to any extent so mixed up with the assets of the firm as to be no longer distinguishable, the creditors of Laird, as an individual, have themselves to blame for letting it so slip from between their fingers. Even although the firm had had the benefit of the whole of Laird's assets, this will not infer a liability for a debt for which the said assets were never hypothecated, and which remained the unassumed debt of an individual partner. But then it is said that the firm so transacted with the appellants, notwithstanding the provisions of the contract, as to take over their debt and include it as a company obligation. The Sheriff-substitute does not know whether it is meant to be maintained that upon the principle of delegation

[850] A. and J. M'Keand appealed to the First Division, who, after hearing parties, pronounced an interlocutor on 20th July 1859, "in respect they are equally

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Robert Laird, the individual, ceased to be the appellant's debtor, and 'Robert Laird,' the firm, came to be substituted in his place; but he is of opinion that Robert Laird's individual liability was never parted with, and that there is nothing in the books or transactions of the firm to infer liability against it. In the first place, the books were kept exclusively by Laird himself, and he has admitted that he does not know whether his partners ever saw them, while they have both deponed that they had no access to them, and did not see them; and further, that they did not even know the amount of Laird's debt to the appellants, and were never made aware or suspected that it had been taken over by their firm. No doubt this ignorance might not have been in the circumstances a sufficient excuse, had the fact of assumption been clearly proved by the books or otherwise; but it is not so. For, in the second place, in none of the books, which are all in process, is there an entry of the appellants' claim as a debt of the firm. There is a series of inventories or stock-books, Nos. 9/11 to 9/18 inclusive, for the years from 1850 to 1857, and in these there are jottings at the end, or on loose slips of paper, in which an annual balance is brought out, not of the company affairs, but of Laird's as an individual. These abstracts or jottings of balances are not transferred as regular entries into any of the company books, but seem to have been made up solely with the view of enabling Laird to furnish the appellants with the duplicate or similar abstracts which they have produced, No. 6/X. His partners never saw these abstracts; and they were rendered to the appellants plainly with the view of satisfying them that Laird's individual assets continued to afford sufficient security for their debt, whatever trifling interest his partners might have in the concern of 'Robert Laird.' Then, as to the entries which occur in the private ledger, No. 7/1, which was substantially Laird's own book, and was always kept under lock and key by him, and in the bills-payable book, No. 9/1, and cash-book, No. 14/1, all they show is, that, as admitted by the respondent, the appellants continued to deal to a limited extent with Laird after the formation of the new company, supplying him with a few goods, and giving him occasional loans; but these transactions, and relative entries, can in no way affect the present case, seeing that upon them there is, *ex concessu*, nothing due by Laird individually, or by the bankrupt company, to the appellants. There are next the excerpts from the appellants' own books, and certain other productions made by them; but these appear to be all clearly in favour of the deliverance appealed against. The excerpts, No. 6/xii., show, that during the whole currency of the copartnery, Laird's account stood in the appellants' books as the individual account of 'Mr Robert Laird,' not of the firm of 'Robert Laird.' The excerpts, No. 14/4, show the same thing, and also that the annual docquets taken from Laird by the appellants, and of which his partners knew nothing, were not given by him in name of the firm but as an individual, and bear,—'I have this day examined the above account betwixt me and Messrs. A. and J. M'Keand, and have found the same correct, the balance at my debit being,' &c. In like manner, the letters of guarantee, No. 9/19 to 9/23, by the appellants to the Bank of Scotland, for drafts by Laird's agents, are not for the firm, but for the individual, 'Mr. Robert Laird.' In like manner, also, the assignations of policies of insurance to the appellants, in security, Nos. 6/II. and 6/V., are granted, not in name of we, Robert Laird, but of 'I, Robert Laird.' Finally, the bills referred to, and produced with the affidavit, are drawn upon 'Mr. Robert Laird,' and must therefore be held to be his individual acceptance. He has himself deponed,—'The bills granted to the appellants, and referred to in their affidavit, were never entered in the company's books, because it was understood that the appellants were to retire them, and to get renewals.' It will also be observed that these bills are not stated in the affidavit to be vouchers of the debt claimed, but only to have been received 'in security' of a portion of the claim. The claim is, in the first place, for a balance of L.5801 due at January 31, 1856, which is the old debt existing prior to the formation of the company in 1850, with interest during the intermediate period. The claim is next composed of certain additional sums of interest; and lastly, of three sums of cash advanced in the year 1857, consisting respectively of L.40, L.190, and L.166, amounting in all to L.396; but these advances are extinguished by credits, amounting in the year 1857 to L.525. The debt, therefore, for which the appellants wish to be ranked

divided in this cause," directing the cause to be judged by the Judges of this Division, with the addition of three Judges of the other Division.

On 17th March 1860 the case was advised.

LORD JUSTICE-CLERK.—This case regards a claim made in the sequestration of the estates of Robert Laird, who carried on business in Glasgow and Paisley as a draper, and was sequestrated in October 1857. The trustee has rejected the claim, because he holds that the debt was not a company debt, and the Sheriff-substitute has confirmed that deliverance of the trustee, and the present appeal is brought against the judgment of the Sheriff-substitute. Now the case is sur- **[851]** -rounded with so many details that it is not easy to extract from them the principle on which our judgment is to rest. But, after a full examination of the whole of these details, I have come to a conclusion quite satisfactory to my own mind, and that is, that the claim ought to have been sustained, and not rejected. Of course we have nothing to do with the details of the claim, nor with the proof of the debt, in the ordinary sense, with the examination of the vouchers, or with anything of that kind. The only question before us is, whether this is a debt which can rank on the company estate as a company debt?

Now the company, as a company, was sequestrated in the month of October 1857, and a state of the company's affairs was given up in common form, and the three partners, Robert Laird, William Thomson, and William Smith, all made oath to the accuracy of that state of affairs. I begin with that, because it shews that a considerable amount of the assets consisted of the stock in trade, and, on the other hand, among the debts the largest is that of the appellants. It is thus set out by all the three partners on oath as a company debt. This state of affairs farther shews that, at the time of the sequestration, the company was carrying on business both in Glasgow and Paisley; and it is not immaterial to observe that the rent of the Glasgow shop is stated to be L.345. I suppose that means one year's rent, and, if so, the business done in the Glasgow department had been a very extensive one, and the Paisley shop, although rented at only L.52, probably represented also a considerable business for that town.

Besides the state of the company affairs given up on oath by the partners, we have the inventory of the books and papers of the sequestrated estate of the company, which is made up by the trustee, and forwarded in terms of the statute to the Accountant in Bankruptcy on 27th January 1858, and in that inventory of the books and papers we have the whole books which are founded on by the appellants as the books of this company, including, among others, your Lordships will observe, a small private ledger with a lock, which has been represented to us very perseveringly by the respondent as not being a company book at all, although he himself includes it in the list of company books.

Prima facie, therefore, in this sequestration, M'Keand is a creditor of the company; but the trustee holds that he is not a creditor of the company, but that he is a private creditor only of one of the partners of the company, and his reasons for arriving at that result are shewn in his deliverance. He rejects the claim, he says, for this reason, among others, that it appears from the bankrupt's examination and other sources of information, "that the amount claimed is a debt of Robert Laird, as an individual, contracted by him prior to the formation of the company under sequestration. The contract of copartnery (which was formed and carried on within the claimant's knowledge) does not refer to this debt, neither does it bind the company, by any general expression, to pay or take over the debts owing by Laird as an individual; on the contrary, its provisions are quite inconsistent with such an idea. It seems, however, that Laird docqueted accounts for the claimants, in which his own debt was mixed up with some transactions of the bankrupt company; and it appears also that Laird

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is exclusively the old debt and the security bills, which amount *in cumulo* to only L.1876, are applicable to it, and are the acceptances of their debtor Robert Laird individually. On the whole, therefore, the appellants have not made out a case to entitle them to rank on the estates of the firm, and any questions of preference or competition, if any such should arise, between the creditors of Robert Laird as an individual, and 'Robert Laird' as a company, are not *hujus loci*."

did the same thing himself, in a small private ledger. But all the partners concur in saying that this ledger was accessible to none but Laird, and that the docquets were struck and signed by him without the authority, sanction, or knowledge of his copartners."

Now, that deliverance seems to me to be rested almost exclusively upon the contract of copartnery, and your Lordships will see immediately that that ground has been adopted also by the Sheriff-substitute as the ground of his judgment. The trustee says, parenthetically, in his deliverance, that this contract of copartnery was formed and carried on within the claimant's knowledge, and it is important that we should understand exactly to what extent and in what sense it is true that the copartnery of A. and J. M'Keand were aware that Mr. Laird had taken in his two shopmen as partners; for there is not a trace of evidence to show that they were acquainted with the written contract of copartnery, or knew anything whatever of its terms; and I should be very slow indeed to affirm the proposition, that any individual trader, by taking in his two shopmen as partners, and giving them a small interest in his business, and executing with them a latent contract of copartnery, can, by the terms of that latent contract, affect the interests of his own prior creditors. That would be a most dangerous doctrine, and, there- **[852]** -fore, in the absence of any evidence to show the knowledge of the appellants of the contents of this written contract of copartnery, I think it cannot affect them. They are affected only by the general knowledge that a partnership of some kind had been established between Mr. Laird and his two shopmen. The Sheriff-substitute says in his note at page 2, after quoting at large the terms of this contract, as if they were conclusive of the whole matter, "there was no stipulation in the contract that the firm should take over the individual liabilities of any of the partners, or that it should have the benefit of any of their individual assets beyond the said L.600. But at the date of entering into the copartnery, Robert Laird valued his stock, conform to jotting at the end of the stock-book No. 9/11, at L.2130, and his other assets, consisting mainly of outstanding debts, at L.6945, making together L.9125. Deducting from this sum the liabilities, which, including his debt to the appellants, amounted to L.8438, a clear balance remained of L.687. It was this balance, to the extent at least of L.600, that Laird was to put into the new concern. Accordingly his partner Thomson, examined as a witness by the respondent, has deponed—'I understood, when the contract was entered into, that Laird was worth about L.600.' The contention of the appellants now is, that after the formation of the copartnery, the debt due to them by Robert Laird as an individual, became a debt of the company, and that they are consequently entitled to rank for its amount on the company's sequestrated estates. If this view be correct, it follows that, as Laird only put L.600 into the concern as its whole capital, and as his liabilities amounted to upwards of L.8000, the firm, instead of possessing any capital, commenced business with a very large amount of debt—a supposition altogether unsanctioned by the terms of the contract of copartnery, and inferring a strange degree of imprudence in the assumed partners, Thomson and Smith."

Now, I think it must be quite obvious to your Lordships, that the whole of this reasoning, on the part of the Sheriff-substitute, proceeds on the assumption that the articles of the contract of copartnery do accurately and truly state the nature of the contract between Mr. Laird and Thomson and Smith. I am humbly of opinion that they do not, and that it is conclusively proved that the nature of the transaction between them is different entirely from that which is expressed in the articles of the contract. But then the Sheriff-substitute proceeds to say further,—"It is true that the stock belonging to Laird, in April 1850, seems to have passed, at least nominally, into the possession of the company, and to have been traded upon by them; but then it is to be remembered not only that Laird's interest in the concern was three-fourths of the whole, but that under the express conditions of article 1st of the contract, he was a creditor to the company for all the cash or goods put in exceeding his proportion."

Now, what the Sheriff-substitute means by the stock of Mr. Laird passing nominally into the possession of the company I do not know, unless he means that the company was nominal and fictitious altogether. That is the only meaning that I can attach to it. But if he does not mean that, he must mean that the stock passed into the possession of the company and was traded upon by them and used as

their stock; and that that was the fact is proved conclusively by the evidence in process. It appears to me, therefore, that the grounds of this judgment proceed on a mistaken notion of the transaction between Mr. Laird and his two shopmen, and upon an imperfect and inaccurate view of the facts. The contract of copartnery is framed upon this kind of footing, that the firm shall trade under the individual name of Robert Laird as a company firm; that the capital stock shall consist of L.600, which shall be put into the concern by the said Robert Laird, "and which shall form a debt against the company, and bear interest at the legal rate of five per cent until the same is repaid; and if the said Robert Laird shall put into the stock cash or goods to an amount exceeding his said proportion, or if the said William Thomson or William Smith shall advance cash or goods, he or they shall be deemed a creditor or creditors of the company for the amount of such advance, and shall be entitled to legal interest on the same."

Now, with reference to this provision of the contract, what was done in point of fact? Did Mr. Laird put L.600 into the business, or did he put more, and if he put more, what was it? If the company was to start with a simple clear capital of L.600, and no debt, I apprehend that one or other of two courses must have been [853] taken by the partners of the new firm. Either, they must have refused to have anything to do with the stock of Mr. Laird, as an individual, and have bought stock for themselves with the L.600, or they must have taken over the stock of Mr. Laird at a valuation, to the extent of L.600. One or other of these things they must have done. Now, did they do either of these? Most certainly not. And, therefore, in the ordinary sense of the words used in this contract, the company was not constituted by Mr. Laird paying L.600 into the business.

But it is said that he did in point of practical effect put L.600 into the business, because, as the Sheriff-substitute has pointed out, upon a valuation of his existing stock, and the state of his affairs, it was found that L.687 was just about the balance in his favour between his assets and his debts; and so he reasons that, by just continuing the business for the benefit of himself and his two shopmen, he was thereby putting L.600 into the business. Quite true,—upon the assumption that the firm took over the debts as well as the assets, but not on any other assumption. On the assumption that they took over the stock and not the debts, he was putting L.9000 into the business. That may be an over-valuation, but I do not care about the figures. He was putting the whole existing valuation of his stock into the business without deduction, if the company did not take over the debts. But if he did that, if he put his whole existing stock in trade into the company without burdening them with the debts, then he was entitled, under this clause of the contract, to interest at the rate of five per cent on what he put in. Is there the slightest appearance of his getting that in the books of this company? Nothing of the sort. On the contrary, the books of the company shew just what one expects to find in consistency with the state of the company's affairs when he became bankrupt, that the stock was taken over by the company, and no interest paid whatever on the valued amount of that stock, because the debts of the individual trader were taken over and made company debts.

But still farther, the contract goes on to provide that the company "shall keep regular and distinct books, containing all the affairs and transactions of the said joint trade and business, and they shall post and bring forward, or cause to be posted and brought forward, the books of the company, from time to time, and also keep a copy-book of letters, into which shall be copied all letters relating to the affairs of the company, and the company's books shall be patent to all the partners, and brought to a balance every year, and that on the last lawful day of the month of January, and the profit derived from the business shall be put to the credit of a reserve fund, and shall be applied towards extinction of the debts owing by the company, and used in carrying on the said trade till expiry of this contract."

Now what is the meaning of that? because, according to the view of the trustee and the Sheriff-substitute, the company started with no debt,—without having a farthing of debt; and therefore, if there was profit realised in the first year of the company, it was quite in vain to place it in this reserved fund. There was no debt at all. But the very occurrence of this stipulation satisfies me, that even in framing this contract, which was certainly not a true representation of the nature of the transaction between the parties, they could not altogether disguise or avoid expressing the fact, that the

company started with that load of debt upon it, just because it had taken over the assets of the trader, which assets were, at the time of being taken over, burdened with a trade debt.

It is needless to go over the other portions of this contract, because what I have already called your Lordships' attention to is, I think, sufficient to shew that it is quite impossible, in a case with the creditors of Robert Laird, antecedently to the formation of this connection, to take that contract as conclusive evidence of the true nature of the transaction which took place between Laird, and Thomson and Smith. Now what was the true nature of that transaction? That comes to be the next question. It was just this, that Mr. Laird being in business as a trader, and having apparently a pretty extensive business—whether it was a profitable one or not,—thought it desirable, either after consulting with the appellants, or upon their suggestion, it does not appear very clearly which, but at all events with their knowledge as his principal creditors,—he thought it desirable to give his two shopmen a small interest in the business, for the purpose of stimulating their zeal and energy in the promotion of the interests of his concern, not a very **[854]** uncommon arrangement certainly in businesses of this kind,—I might almost say a matter of every-day occurrence in such trades. But was it ever heard before, that when a transaction was entered into, the beginning, and end, and whole meaning and distinctive character of which amounted to this, that the two shopmen were to have each one-eighth share in the business as part of their remuneration for their services, that that constitutes a new company to the effect of handing over to the new firm the whole stock of the individual trader, and depriving the prior trade creditors of that individual trader of all recourse against his stock and property? Did any man ever hear of such a result flowing from such a transaction? The doctrine is perfectly new to my mind, and it is the most startling thing I ever heard, though it is expressed so clearly by the Sheriff-substitute in his note, that it is impossible to doubt that that is what is meant, and that that is the ground of his judgment. The proceedings of this company are clearly enough detailed, and I think made abundantly evident, by the productions before the Court, and I am not going through them. I merely refer not as a piece of evidence but for the sake of illustration, to the figures which are contained on page 41 of your Lordships' papers (quoted *supra*, p. 847), which have been very often referred to in the course of the discussion, and I do not care about the accuracy of the figures in point of amount, for I take them as merely illustrative of my observations. Mr. Laird was of this mind, rightly or wrongly, when he took in his two shopmen and gave them a small share of his business, that he had stock in hand to the value of L.2130. He had also, according to his estimate, stock in the hands of the agents of the company, or returns due from the agencies, amounting to L.6995, making of assets altogether upwards of L.9000. His debts, including the debt of the appellants, amounted to L.8438, and so he was above the world to the extent of L.687, 0s. 10d. That was his own estimate of his affairs, and he gave his shopmen to understand, in entering into the arrangement with him, that he was worth about L.600; so Thomson distinctly states. Well, then, unquestionably the whole of that stock, amounting to upwards of L.9000, according to his estimate—supposing it was worth one-half or one-third of that is of no consequence to this question—but the stock, whatever its value, was taken possession of by the company, or rather—because it is a more accurate way of expressing it—the trade went on exactly as it did before, with this single exception, that Thomson and Smith were each to have the chance of one-eighth share of the profit, and each to take the risk of one-eighth share of the loss, the latter alternative being of very small consequence, I suppose, because if it had issued in a loss immediately, I do not suppose they were able to meet it, and therefore the real meaning of the transaction is neither more nor less than this, that their remuneration as Mr. Laird's servants was to depend in a measure on the prosperity of the concern.

Well, this goes on, and they extend their business, but none of this L.9000 worth of assets is taken out of the hands of the company, as it is called. Nothing of the kind. It is traded upon by them, used by them in their trade. The price of it is realised to a greater or less extent,—it is in vain to inquire to what extent. And what is done with the price of the goods? It is invested in new stock for the benefit of the concern, and upon that new stock, purchased with the price of the old stock, they continue to trade, and so to turn over their money as often as they possibly can,

like wise and diligent traders. But the trade all arises from the same source. The source and fountainhead of the whole means of the company is that L.9000 worth of stock, and the company never had anything else, and their books are kept upon that principle throughout, and consistently. With reference to the books, just let me say in passing, that I cannot do otherwise than take these books, and the whole of these books as company books, because, if it were not for these books, I could not find a company at all. I should see no evidence of the existence of a company if it were not for the existence of these books, for this reason, that the contract of copartnery does not represent the company as it actually existed. Of that I think there can be no doubt, and therefore I can find the company, and the conditions of its existence, and the manner in which it carried on its trade, in these books only, which I must take as company books, as this trustee himself proposed to take them in the sequestration. And what is the evidence offered by the company books? It is this, that the whole of Mr. Laird's stock was used in the business; that no capital ever came from any other source; that he was not allowed five per cent on **[855]** it as if it had been put by him into the concern, in terms of the article of the contract, which I read to your Lordships, but that, in point of fact, the concern, as it stood in the month of January or February 1850, was just taken over by these persons who were to constitute the new firm, and the business of Mr. Laird was carried on precisely as it stood in his hands.

Now it humbly appears to me, that when parties take up a going business in that way, and take the stock, they must also take the liabilities. I cannot imagine that the two can be separated; and, upon that ground, I am very clearly of opinion that this interlocutor is not well founded, and that the appellants' claim should be allowed, subject, of course, to a new examination of the particulars of that claim, with which we really have nothing to do. I forbear to go farther into the evidence in the case, because I think it quite immaterial. This is a question of fact, and the evidence is quite satisfactory to my mind.

LORD IVORY.—I entirely concur in the opinion which has now been delivered. It is the opinion which I formed before the case was sent for consideration to the seven Judges, and I have only one observation to make. If the engagement between these parties by the constitution of this copartnery, were other than that which the Lord Justice-Clerk has so well explained, no transaction between Laird and Thomson and Smith could have been more dishonest, more inconsistent with their duties to the creditors of Laird in his former business, than that which took place. For what would it have come to? It would have come to this, that at the time when Laird was stopping his own business, and when he had assets, subject to his own debts, of L.9000 against L.8000, he was to deliver over to his partners, who were not worth a penny, property worth L.9000. If he had stopped business, and his own creditors had been made aware of this, and more especially M'Keand and Company, who are said to have concurred, and been aware of what was going on, it would just have come to this, that every one of these creditors who might have gone against the assets of Laird at the time, in such a way as to get payment of every shilling of their debts, were to be deprived of that advantage by a juggle between Laird and his two partners, by which Laird handed over to them his assets as a sale from himself to this new company, and which was but a fiction. He was to give that L.9000 of property which his own creditors had then access to, and put it out of their reach, and give it to this company, of whom Laird alone would after that have been creditor,—I mean he was to credit that L.9000 against his own partners, and his personal creditors would not even have had the power of ranking in the person of Laird for the rights of Laird in the company, because Laird himself could not have ranked in a competition with the creditors under the sequestration. Now is it conceivable that the other creditors should allow this to go on? I do not think that was intended. If it had been intended, it would have been a dishonest conspiracy to cheat the former creditors out of their remedies against the property. But what was done was this:—There was an assumption into a going business of two clerks at a certain salary. Though getting the name of partners, they had none of the reality, or substance, or power of partners. But they were placed in this relation, that they were to be free from all former debts, and that a business which was going, subject to L.8000 of debt, was afterwards to go on with a property of £9000 burdened with the former debts. I am entirely satisfied with the grounds of your Lordship's opinion.

LORD COWAN.—At the close of the discussion at the bar, the impression left on my mind was very strong, that the opinion which has been delivered by the Lord Justice-Clerk was the correct opinion in the case. But being aware that there was a difference of mind as to that matter, I considered it my duty carefully to go over the evidence, and the documents which are now before the Court. The result of that investigation has been to confirm me in my original impression, and to satisfy me upon the evidence that this debt of the appellants' was taken over by the firm at the time, and was treated as a debt of the firm throughout the existence of the company, and remains, at the date of the sequestration, a debt of the company, to be ranked upon the company assets. I had framed a very full opinion upon the whole of the evidence in the case; but, after the opinion which has been delivered by the Lord Justice-Clerk, in which I entirely concur, I think it would be a waste of your Lordships' time to enter farther into it than to state, that what his Lord- **[856]** -ship has said, and the result at which he has arrived, have my entire concurrence.

LORD DEAS.—I entirely concur with the opinions which have been already expressed, and I have nothing to add to the grounds which have been stated.

LORD BENHOLME.—I should almost think it presumptuous in me to add anything to what has fallen from my brethren who have already spoken, and I do not think I would have done so had it not occurred to me that there was an item of additional evidence that certainly had considerable weight in my own mind, and which goes in the same direction as those items of evidence which have been specified, as well as those which have been generally referred to by the Lord Justice-Clerk. It is certainly very desirable in this case, if one could do it, to reconcile the stipulations of this contract with the contents of the company books, and, as has been pointed out, I think by the Lord Justice-Clerk, the mode in which he thinks it may be reconciled is this: that whilst the contract stipulated that Laird was to put L.600 into the concern, in substance he did so by handing over to the company a business, the assets of which, diminished by its liabilities, amounted to about L.600. Now, the difference in the jotting of the valuation that was made by Laird himself, and is sworn to, is exactly L.680. How is this discrepancy to be reconciled? I find a reconciliation of it; because, in one of the company books, there is a statement of the partners' interest, and if your Lordships will turn to page 59, you will see extracts from the ledger of the bankrupts, in which the partners' accounts are stated.[1] Now, see what is the interest of the partners, and, in the first place, of Robert Laird. At 1st January 1850, capital L.687. That exactly corresponds with the balance in the valuation sworn to by Laird. "L.687—say L.600." To my mind, if this is authentic at all, and I see no reason to dispute this being the company's ledger as well as any of the others, this is just a statement

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[1] Folio 11.

Dr.	ROBERT LAIRD.				*Cr.*	ROBERT LAIRD.				
1851. Jan. 31.	Amot. of goods a/cs, &c., since 1st Feb. 1850, . L.108 15 3				1850. Jan. 31.	Capital, 687, say, .	600	0	0
	Deduct cash short drawn,	15	5	0	1851. „ „	Share of profits, ¾s,	300	0	0
		93	10	3½	1852. „ „	Do. do. ¾s,	120	0	0
1852. Jan. 31.	Amot. goods a/c, &c., since 1st Feb. 1851, L.	99	18	6	1853. „ „	Do. do. ¼s, say, .	150	0	0
1853, Jan. 31.	Amot. goods since 1st Feb. 1852, . .	134	11	0	1855. „ „	Do. do.			
1854, Jan. 31.	Do. do. 1853,	97	12	7					
1855.	Do. do. 1854,	76	18	2½					

Folio 12.

Dr.	WILLIAM THOMSON.				*Cr.*	SHOP.				
					1851. Jan. 31.	By ⅛ share of profit,	L.50	0	0
					1852. „ „	By ⅛ do. do.	20	0	0
					1853. „ „	By ⅛ do. do.	25	0	0

that what was valued at L.687 was taken by the company as a deposit of L.600 by Laird in terms of the contract; and it appears to me that the whole of the other entries here correspond with that supposition, because, supposing that Laird had L.600, the whole capital derived from this valued balance of L.687, there then is his share of the profits after the first year, for the second year, for the third [857] year. Then, as to the other partners' accounts; they have not capital, but they have a corresponding share of the profits of each year, and how are these profits deduced? If your Lordships will take the trouble, which I have no doubt you have already done, to look into the balance each year, these exact sums are deduced in this way, that the property of the company at the end of each year, struck as it then existed, is taken on the one hand, and on the other hand the liabilities of the company, —and in these liabilities there is always to be found the debt of M'Keand, such as it was at the termination of the year. I cannot imagine stronger evidence that the liability was taken over by the company than when I find the partners of that company, in striking their balance at the end of the year, deducing the amount of their profits from a comparison between their assets as they exist, and the debts, including M'Keand's, which they hold to affect that stock and capital, and deducing from that the profits, or supposed profit, which each partner was entitled to, year after year following that course. Now, it appears to me that this ledger of the partners' profits, and the annual balance from which it is deduced, are as strong evidence as can be conceived, in the first place, that Robert Laird put in the balance of his stock valued at L.680—say L.600—which he was bound to contribute under the contract; that it was accepted by the partners as at L.600, the necessary consequence of which is, that they must have taken the liabilities as well as the assets; and, in the second place, when the company, in deducing their profits, year after year, take the stock as it then exists, and deduct from that the liabilities now in question, I cannot for my life imagine that any company's books could ever more completely demonstrate that the appellants' debt was one of the liabilities that the company had to meet.

LORD PRESIDENT.—When this case was before us formerly, it appeared to me, as it still does, to be a question of evidence,—a question as to whether the new company had taken over the debts of the old company, and whether M'Keand was a proper creditor of the company for this claim of his. The question arises between the creditors of a company which had existed for a few years, the trustee acting for them, and M'Keand, who claims on the estate of the company. If I could have, along with your Lordships, thrown aside the contract of copartnery, and could have treated this as a case in which two persons were admitted into a share of a going business without any contract of copartnery, I should not have had much difficulty in concurring with your Lordships. But when parties go together in a copartnery, and do so under express articles of copartnery, I cannot hold that these persons go upon the same footing as if they went without any articles of copartnery. It may be that the conditions of copartnery are not known in all respects to the world. But it does not follow from that, if an individual trusts that company, and deals with it—that he deals with the partners, or treats them on a footing different from that which really exists. Now, in this case, the debt, which is the subject of question, was a debt which had existed anterior to the copartnery. It was a debt in which M'Keand was creditor, and Laird was debtor. In the contract of copartnery between Laird and the two other persons Thomson and Smith, there were various stipulations as to the regulation of their respective interests. The proportion which they were to derive of the profits of the company was of course regulated, and there were other stipulations. In particular, there was a stipulation that Laird should put L.600 into that copartnery. It did not signify in what form he did so, provided he did put L.600 into the copartnery. It is stated that he did so by valuing the stock in hand, and the assets he had, and the debts he had, and striking a balance. Be it so. Still he put L.600 into the copartnery;

Folio 13.

Dr. WILLIAM SMITH.

SHOP.

1851.	Jan. 31.	By ⅛ share of profit,	L.50	0	0
1852.	,, ,,	By ⅛ do. do.	20	0	0
1853.	,, ,,	By ⅛ do. do.	25	0	0

and that contract contained a stipulation, that if he put more into the copartnery, either as money or as goods, he should be a creditor of the copartnery for the excess. Now, we do not see anything like insolvency at the date of the copartnery; there is no reason to suppose anything like cheating previous creditors on the part of the partners; there is no ground for suspicion of that; they treated themselves as solvent parties, and I doubt not were sanguine of success in their business. There is no fraud pretended or alleged against them. But he was then a creditor of the company, and if any difference had arisen which brought that copartnery to a termination, or would have entitled any of the partners to bring it to a termination, say within a week [858] after, or whatever time after, without bankruptcy, I think Laird was a creditor of the company for the excess of the goods which he put into it; that he was the true creditor of that copartnery, and not whatever individuals were the creditors of Laird. I find in that copartnery no stipulation that the new company is to take over the debts of the old company, or to be entitled to the assets of Laird. And I cannot see that, at the time when that contract was entered into, these other partners understood, or that Laird understood that these other partners were becoming liable for all the outstanding debts of Laird, or that all the old creditors of Laird are entitled to claim upon the assets of the company. M'Keand was an old creditor of Laird. He also was a creditor of the company; and for all the debts that were contracted by the company to him he has been paid and satisfied. This arises out of a debt which existed anteriorly, and unless I could get rid of that contract of copartnery, I cannot get rid of the relative position of the parties, which the contract of copartnery stipulated for, viz., that for any excess of goods or money put into the concern Laird was to be a creditor of that copartnery. I do not in the least interfere with the doctrine, that if parties enter into a going concern without stipulation as to their respective interests, it is to be implied that they take the debts and liabilities. Now, in the books which were kept by Laird, who was also cashier of the company, I cannot find satisfactory evidence that this contract of copartnery was thrown aside, and that a new company was constituted between the parties on a totally different footing. I find no evidence satisfactory to my mind on that subject. There are a great many circumstances of evidence both ways, and I find, particularly in regard to the appellants, that they were careful to take almost annually from Laird an acknowledgment of the amount of his debt, in terms which I cannot read otherwise than as a special acknowledgment of him as their individual debtor. I think he remained their individual debtor, and they remained his individual creditors. That, I think, is the real position of the parties, and these are the grounds on which I entertain doubt in regard to this matter.

LORD CURRIEHILL.—I entirely concur with your Lordship. If I might be allowed to make just one observation, it is this, that while the contract of copartnery, I certainly agree with your Lordship, is of the kind you have described, it does not recognise any debts of Laird, or any of the partners that were taken in, as being debts of the company. There has been parole proof taken here, and each of the three partners has been examined, and their evidence appears to me to be conclusive upon this point. Laird himself says at the very conclusion of his evidence:—"There was never any express agreement between me and Thomson and Smith that the firm was to be liable for my old debts." Then Smith says:—"I never knew till after the sequestration that the appellants' debt was taken into the balances; but I have heard Thomson say that Laird could not strike his balance till he got the statements from M'Keand. I never saw any statement of M'Keand's debt till after the sequestration. I never knew till after sequestration what Laird owed M'Keand. I knew, however, that Laird was occasionally borrowing money from M'Keand, and paying money back. I have gone into Glasgow, and got money from M'Keand to retire bills. I did this at Laird's request. I was not aware that Laird subscribed any docquet in the appellants' books, and I never authorised his doing so. I have heard Thomson say that Laird had insured his life, and that the appellants held the policies. I did not know whether Laird paid the premiums out of his private means or out of the business." And Thomson says:—"I kept the agency books. Laird kept the other books. I had no access to them. I have seen them lying on Laird's desk, but I never examined them. He kept them in a safe, of which he carried the key. I never saw the inside of the ledger No. 1. I never saw any of the balances in the books from 12/9 to 18/9. They were kept in Laird's safe. I never saw a state of the appellants' debt during the

copartnery, nor any state made up by Mr. Laird. I knew that Laird and M'Keand had a regular balancing every year, but I did not see it. I was not aware that Laird was taking in the appellants' debt as a debt due by our concern." Without adding to what your Lordship has said, I concur in the opinion of your Lordship. It is the opinion which I formed on the first hearing of the case, and it is the opinion which I still entertain.

[859] The Court pronounced the following interlocutor:—"The Lords of the First Division of the Court having heard counsel for the parties on the note of appeal for A. & J. M'Keand, and whole proceedings, in their own presence and in presence of three Judges of the Second Division, and having resumed consideration of the cause, they, after consulting with the said Second Division, in conformity with the opinion of a majority of all the Judges who heard the case,—Find, in point of fact—1st, That the debt in dispute was originally incurred in connection with the drapery business carried on in Paisley, which was afterwards transferred to and carried on by the bankrupt under the name or firm of Robert Laird; 2d, That upon entering into the contract produced, of date 5th April 1850, the bankrupts obtained possession of the whole stock in trade which had been previously acquired for and used in the said business, then belonging to the said Robert Laird as an individual, and which greatly exceeded in value the capital of L.600 mentioned in the said contract; 3d, That the bankrupts, William Thomson and William Smith, were neither of them possessed of any individual means or estate, and neither of them contributed anything to the stock or capital used in the said business, or to the funds comprehended under the sequestration of the bankrupts as a company trading under the foresaid firm; 4th, That the debt now in dispute was assumed, taken over, and all along dealt with by the bankrupts trading under the said name or firm as a debt of the said firm or company: In these circumstances, find, in point of law, that the appellants are entitled to be ranked for the said debt upon the means and estate comprehended under the sequestration of the bankrupt as a company carrying on business under the name or firm foresaid: Therefore sustain the appeal, recal the judgment of the Sheriff appealed against, and remit to him with instructions to recal the trustees' deliverance also complained of, and to ordain the trustee to proceed in the ranking of the appellants' claim in accordance with this judgment, and to do further as shall be just, and decern: Find the appellants entitled to expenses, both in this Court and in the Sheriff Court, and remit the accounts thereof, when lodged, to the Auditor, to tax the same, and to report."

[Cf. *Nelmes & Co.* v. *Montgomery & Co.*, 10 R. 978, 981; *Heddle's Exr.* v. *Marwick & Hourston's Tr.*, 15 R. 700, 707, 708, 710; *Stephen's Tr.* v. *Macdougall & Co.'s Tr.*, 16 R. 787; Partnership Act, 1890.]

No. 134. XXIII. Dunlop 872. 15 May 1861. 1st. Div.

JOHN INGLIS, Pursuer.—*Macfarlane—Shand.*

JAMES BAIRD, Defender.—*Young—Lee.*

Process—Expenses.—Circumstances in which a defender, who had been assoilzied with expenses in respect of the irrelevancy of the action as against him, was **[873]** allowed to include in his account of expenses a charge of L.35 as the expenses incurred to an accountant for going over bank books, &c. during the preparation of the record.

See case reported *ante*, vol. xxii. p. 505.

In this case the Auditor returned the following report on the defender James Baird's account of expenses:—"Edinburgh, 18th March 1861.—In obedience to a remit by the Lords of the First Division, the Auditor has examined the accounts in presence of the agents for the parties, and taxed the same at the sum of L.154, 18s. 6d. sterling, reserving for the opinion and disposal of the Court a payment of L.35 (included in the sum above reported) which is stated to have been made to Mr. Guild, accountant in Glasgow, as 'the amount of his charges applicable to this case, for going over bank books, states, and whole accounts, making excerpts, notes, calculations, and other

memoranda of information necessary for the defence.' Mr. Guild states that he was occupied for a period equal in all to one year in this work, in behalf of all the defenders in the five actions, at the instance of individual shareholders; that his charge for the whole extends to L.630; that one-fifth of this sum, or L.105, has been paid by Mr. Baird, and that L.35 thereof is the proportion applicable to the present case. The Auditor has no means of judging either as to the necessity for the work thus charged for, or as to the reasonableness of the rate of charge, the only explanations given being the general statements now adverted to."

The pursuer objected to the charge of L.35, as unnecessarily incurred during the preparation of the record.

The defender replied by referring to the record, and schedules thereto appended, and cited the case of Miller *v.* Ure's Representatives (25th June 1853, *ante*, vol. xv. p. 781) in order to show that such an item of expense was chargeable against the opposite party, where the circumstances of the case, and the nature of the allegations, justified the charge.

The Court pronounced the following interlocutor:—"Having considered the Auditor's report on the account of expenses incurred by the defender, James Baird, No. 98 of process, and heard counsel for the parties, in the special circumstances of the case approve of the said report, and decern against the pursuer for payment of the sum of L.154, 18s. 6d., and allow decree therefor to go out and be extracted in name of Messrs. Horne and Rose, W.S., the agents disbursers thereof."

No. 137. **XXIII. Dunlop 876.** 18 May 1861. 2nd Div.—Sheriff of Kincardineshire.

ELIZABETH LAWSON, Pursuer.—*Badenach Nicolson.*

JAMES EDDIE, Defender and Advocator.—*Maclennan.*

Parent and Child—Illegitimate Child—Proof of Paternity.—In an action of filiation of a child born on 3d July, the defender admitted connection with the pursuer in December previous, but denied that there was connection prior to that month. It was proved (although she denied it) that previous to November the pursuer frequently had connection with another man;—*Held* (Lord Justice-Clerk *diss.*) that the connection in December being admitted, and there being previous opportunity, the pursuer's oath was sufficient to establish her case.

This action was raised in the Sheriff-court of Kincardineshire for inlying charges and aliment of an illegitimate child, of which the pursuer was delivered on 3d July 1859. She averred that she was a servant to Francis Mackie, farmer at Cairnbank, Feteresso, for two years prior to Whitsunday 1859: That the defender James Eddie was also in Francis Mackie's employment, as a ploughman, for the first six months of that period, and during that time repeatedly had connection with her, both in her bed, which was in the kitchen of the house, and in his bed, which was in the loft above the stable: That Eddie went to service at Bogburn, about four miles from Cairnbank, at Martinmas 1857, and at Whitsunday 1858 he went to Blackhills, about five miles from Cairnbank: That during all that time he frequently visited and had connection with her; in particular, one night in October 1858, he had connection with her, and remained with her all night, on which occasion the child in question was begotten: That about Martinmas 1858, and also on 4th December 1858, he had connection with her. On 4th May 1859 the pursuer wrote to the defender informing him that she was pregnant [877] of a child, of which he was the father, and she requested a meeting with him. He sent one of his brothers to ask her to meet with him at a place he appointed, and he met her accordingly, and was again informed that he was the father of her child. On 18th June the pursuer and defender appeared before the kirk-session of Fetteresso, when she confessed being with child to the defender, and the defender admitted the paternity.

Eddie denied that, while living at Cairnbank, he had shown more attention to the pursuer than was usual among servants in similar employment. He admitted visiting

her once while he was at Bogburn, early in the harvest of 1858, on which occasion he left her about six o'clock, and no connection took place. He stated, with reference to the meeting in the end of October, when the pursuer alleged that her child was begotten, that he accompanied the pursuer to Cairnbank, from the Martinmas feeing market at Stonehaven, along with Robert Mackie, Francis Mackie's brother, and the pursuer's sister Margaret. On that occasion the defender remained with the pursuer, at Cairnbank, sitting at the kitchen fire from about nine o'clock till two o'clock in the morning, the other couple, viz. Robert Mackie and the pursuer's sister, went to the kitchen bed together. On that occasion he arranged to visit her on Saturday, 4th December; he did accordingly visit her on that night, and had connection with her in her own bed in the kitchen. He admitted that before the kirk-session he had stated that he was the father of the pursuer's child; but he explained that, at the meeting with the pursuer, which had been arranged by his brother, he had objected to go before the kirk-session so soon after his connection with her, but she induced him to do so by stating that she was going to live at Upper Banchory, and it would save her the trouble of coming back to Fetteresso if she would appear before the kirk-session then. He farther stated, that he had been succeeded as ploughman at Cairnbank by Robert Mackie, and that during the winter of 1857-8 the pursuer had been seen with him under the bedclothes in his bed in the loft over the stable.

A proof was allowed.

The pursuer deponed she was eighteen years of age. The defender frequently had connection with her while he was at Cairnbank, and also when he visited her after he left service there. On a Saturday night in October 1858 Eddie visited and had connection with her. Two love letters to her, dated respectively 28th November, and 24th December, were produced in process, making appointments to meet her, which appointments she deponed he kept. He had written her several letters which she destroyed. She had never had connection with Robert Mackie. In cross-examination she deponed —"I commenced the practice of wakening him (Mackie) shortly after he came to Cairnbank, and at his request, and I continued the practice from about Martinmas 1857 to Martinmas 1858, when he left. Smith slept with Mackie, and I wakened them both. I never was in either loft after sunset after the defender left Cairnbank. I made the beds in the lofts in daylight. Smith was always in bed with Mackie when I wakened them. Mackie has come into the loft when I was there alone making the beds. He never laid me down in his bed or tried to do so. I never, so far as I recollect, ever went into the loft in the mornings when it was dark without a light. So far as I recollect, I always had a light with me, and sometimes lighted their lamp."

Robert Mackie deponed—He slept in the stable-loft, and in the same bed with Peter Smith. George Milne, a boy, slept in the same loft in another bed. Deponent saw the defender come to visit the pursuer at Cairnbank at night during the half-year from Martinmas 1857. Deponent did not see the defender take any liberties with the pursuer on the occasion of returning with them from the Stonehaven Martinmas feeing market in 1858. In cross-examination—"I never took her under the bed-clothes when Smith **[878]** was in the bed, or at any time. I was undressed and she was dressed when she sat on the front of my bed. I have kissed, and had her on my knee at different times. I have had my arms round her at different times. She never kissed me. I never took liberties with her person. I have had 'daffin' and wrestling with her. We have fallen together when wrestling in fun. That has happened at different times and different places about the farm. I never had carnal connection with her in my bed when Smith was in it, or at any other time or place. I don't recollect of ever being in or on my bed with her when Milne was in the loft."

Peter Smith deponed he had been a servant at Cairnbank for a year from Whitsunday 1857. The defender was there also from Whitsunday to Martinmas 1857. "He and I slept in the same bed. The pursuer made our bed. She sometimes wakened the defender and me in the mornings. She never conversed with the defender in my presence. I never saw improper familiarity between the parties. She sometimes, but not often, knocked from below on the floor to waken us. I have gone into the loft about midday and seen her alone making our beds." But on cross-examination he said—"I have seen Mackie at least four times take the pursuer in over into our bed under the clothes when he had nothing on but his shirt, and she was dressed. That

was in the morning. I have seen him twice or three times go above her in the bed, and he had carnal connection with her of her own will, and I awake lying in the bed beside them. I don't know whether or not they knew that I was awake. I have seen them together in her bed in the kitchen—once at night, when the defender was in the service. I was outside with a lighted lamp, and drew up the kitchen window, and saw Mackie and her in bed."

The following witnesses were examined for the defender:—His father deponed to having taken a medical man to see the child about a week after it was born, the defender having stated to him that the child was born two months too soon to be his. He also deponed that the pursuer had on one occasion accompanied the defender on a visit to the deponent's house.

George Milne deponed, He was in service at Cairnbank for six months from Whitsunday 1858. He had on two occasions seen the pursuer and Robert Mackie together in the stable loft; once in summer about dinner-time, and once during harvest on a Sunday forenoon. On these occasions they were both in Mackie's bed; they were both dressed; Mackie was lying above her.

John Hunter, an acquaintance of Robert Mackie's, deponed to having spoken to Mackie a short time after Martinmas 1858—"Mackie said, he had got the defender shovéd home with the pursuer on the night of feeing market at Stonehaven." Cairnbank was a little off the nearest way from Bogburn to the defender's father's house.

John Brown, a fellow-servant with the defender from Whitsunday to Martinmas 1858. He occupied the same bed with the defender. During the whole six months he had gone to bed along with the defender every night, and had always found him in bed on the morning, except on one occasion when, about three weeks before Martinmas, the defender got permission to visit a brother at Laurencekirk. He left Bogburn on Saturday morning, and did not return till Sunday morning.

The defender deponed, He had never had connection with the pursuer except once, viz. on 4th December 1858, and he was not the father of her child. He never visited her after 4th December, because he understood she was taking up with other men. On cross-examination—the pursuer was his sweetheart. He had written other letters besides those produced. While he was at Cairnbank he never had connection with the pursuer but once; and said so to her when he met her after her child was born.

[879] The following letter from the pursuer's mother was produced:—

"Hillhead Maryfield July 6th 1859

"Sir—I send you this few lines to inform you that you have got a daughter on Sabbath morning the 3 and if you dont come and settle for your child with in 10 days from this date you will be given into the hands of Falconer the lawyer in Stonehaven if you refuse paying and as you said the child was not yours but a young woman will get 6 weeks back or fore so you will better for yourself come and settle or else it will cost you a good deal more no more MRS. LAWSON"

The Sheriff-Substitute (Robertson) assoilzied the defender.

On appeal, the Sheriff (Montgomery Bell) pronounced this interlocutor:—"Recals the said interlocutor: Finds, in point of fact, that it is sufficiently proved that the defender is the father of the pursuer's child: Finds, in point of law, that the defender is liable to pay to the pursuer the sum of L.1, 10s. sterling, in name of inlying expenses incurred by her at the birth of said child, and the sum of L.4 sterling yearly for the aliment and support of said child, commencing from the birth thereof on 3d July 1859, and payable quarterly and in advance until said child shall arrive at the age of ten years complete, or be able to earn its own subsistence, with the legal interest on the foresaid sums from the date of their respectively becoming due till payment, and decerns: Finds the defender liable in expenses to the pursuer."[1]

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[1] NOTE.—After a minute analysis of the evidence:—"Without at all slighting the defender's evidence, or putting any stress on the positive denials on oath by Mackie and the pursuer, it still appears that too much weight would be allowed to it if it were permitted to overthrow the conclusive inferences otherwise derivable from the combination of important and undoubted facts above enumerated. If there was clear proof of special opportunity, occurring to the pursuer and defender, in or about October

The defender advocated; and the Lord Ordinary reported the case under the statute, by interlocutor dated 20th November 1860.

After hearing parties,—

LORD BENHOLME.—I am of opinion that the interlocutor of the Sheriff ought to be adhered to.

The main features of the case, in so far as they stand upon clear proof or admission, are these:—The pursuer and defender were fellow-servants from Whitsunday till Martinmas 1857, and although he then took service in two different places, the parties were not separated by more than a few miles until shortly before the birth of her child, which took place on 3d July 1859.

It is proved, beyond doubt, that during most part of this term he was courting her. Some of his letters are produced, and more, in the same strain, are admitted to have been written.

The defender seems undoubtedly to have intended to make her his wife; but it is nevertheless equally certain that this did not prevent him from entering upon an illicit connection with her. He admits that on the 4th December 1858 he had carnal connection with her. He also admits that, on a previous occasion, viz. the night of the Stonehaven Martinmas feeing market, he sat with her till two or three **[880]** in the morning, whilst the pursuer's sister and Francis Mackie, both unmarried persons, were in bed together in the same room.

The conception of the pursuer's child, which was full-grown at its birth, must have taken place about the beginning of October 1858. The defender was then living at Blackhills, a distance of five miles from the pursuer's residence. He had thus abundant opportunity of having that illicit connection with her at that time, which he admits he had two months later.

It is true that he denies connection earlier than 4th December, but the pursuer as positively swears that he had connection with her on a Saturday night in October, as she thinks, about the middle of the month. And it is remarkable that the witness John Brown, who was brought by the defender to prove that he, the defender, was never out of his bed at night from Whitsunday to Martinmas 1858, depones that on one occasion, on a Saturday morning, about a fortnight or three weeks before Martinmas 1858, the defender left Blackhills, where they then resided as fellow-servants, and did not return till ten o'clock of the following night. The defender said he was going to visit his brother near Laurencekirk on that occasion. If so, he had to pass at no great distance from the place of the defender's residence, and the time was sufficient for him to have visited both the pursuer and his brother. Although it is true that, in cases of filiation, no one case can form a decisive precedent for another, yet I think our practice has proceeded upon this general rule, that if the defender admits connection within the period of gestation, and if, in addition to this, it is proved that he had opportunity of connection at or about the time of conception, the pursuer's oath as to connection, at that time, will require little or no additional corroboration.

In the case of Petrie *v.* Robertson, 22d December 1825, the decision of the Court proceeded "on the ground that the rule of law with regard to the filiation of a bastard child, when the defender admits having had connection with the mother, is somewhat analogous to that which holds as to the legitimacy of a child born in matrimony, viz. that the time of the commencement of the connection will be carried as far back as necessary, or as the circumstances of the case render possible."

The only doubts that hang over this case arose from the evidence of the pursuer's connection with Robert Mackie, and her denial of that intercourse. The suggestion

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1858, supported by the pursuer's oath, her case would appear to be as well proved as any such occult case admits of being.

"The Sheriff would by no means rest much upon the pursuer's oath; it is because of the chain of important and most pregnant facts, independently of her oath altogether, that he considers the pursuer's case is sufficiently established.

"Had these facts been less material, the evidence of Smith and Milne as to the pursuer's connection with Mackie,—and several other circumstances in the case,—would have deserved more weight. But as it is, they do not appear sufficient to undermine the case of the pursuer."

has been made that Mackie may, after all, be the father of the pursuer's child. I am not prepared to say that this is impossible. But it is to be recollected that Mackie is not here on his defence. He has not been allowed. Indeed, the shape of the case rendered it incompetent for him to lead any evidence to disprove the suspicion of his being the father of this child. We are quite ignorant of the case he could make against such a charge, and still more so of the evidence he might lead in defence.

On the other hand, the present defender has had a full opportunity of defending himself; and it appears to me that the case made against him is such that, consistently with our practice in former cases, the Court cannot interfere with the decision at which the Sheriff has arrived.

LORD WOOD and LORD COWAN concurred.

LORD JUSTICE-CLERK.—I cannot concur with your Lordships. I will state very shortly the ground on which I arrive at a different conclusion. I do not intend to analyse the evidence, and it is unnecessary I should do so in explaining the ground of my opinion. We are all agreed that, without her own evidence, the pursuer cannot be held to have made out her case. Now, looking at her evidence, and seeing how she is contradicted in important facts, I cannot give any weight to her testimony; and, therefore, I am of opinion that she has failed to make out her case.

The Court pronounced an interlocutor, by which, after repeating the Sheriff's findings in fact and in law, of new found the defender liable for the expenses incurred in the Sheriff-court, and found him liable for the expenses of the advocation.

[Cf. *Ross* v. *Fraser*, 1 M. 785, 786.]

No. 138. **XXIII. Dunlop 881.** 23 May 1861. 1st Div.—Lord Kinloch.

JOHN HATLEY, Suspender.—*Monro.*

The MAGISTRATES of BURNTISLAND, Chargers.—*Hutchison.*

Bankrupt—Composition—Caution—Statute 19 *&* 20 *Vict. cap.* 79, *sect.* 143.—*Held* (*aff.* judgment of Lord Kinloch) that a cautioner for payment of composition by a bankrupt was barred by sect. 143 of the Bankruptcy Act from objecting to pay composition on a claim lodged the day before, and admitted, without objection, to be reckoned in the acceptance of an offer of composition.

The estates of John Robb were sequestrated upon the 24th December 1858. Upon the 5th January 1859 John Tod was elected trustee. At a meeting of creditors held on 31st January 1859 the bankrupt made offer of a composition of 1s. 6d. per pound. A meeting was held on 24th February for the purpose of deciding upon the offer, which, at an adjourned meeting held on 25th February, was accepted. A bond of caution was executed on 7th and 22d April 1859, in which the suspender, John Hatley (who, in the state of affairs given up by the bankrupt, had been set down as a debtor to the extent of L.280), was one of the cautioners. On 23d February, being the day before the meeting called to decide upon the offer of composition, the Magistrates of Burntisland had lodged a claim for L.1285, 2s. 11d., being the penalty and damage suffered by them in consequence of the bankrupt's failure to implement a contract for the construction of a break-water, which he had commenced, but which the Magistrates had, in consequence of his bankruptcy, to take off his hands. No objection was taken to this claim. At the meeting of 24th February the agent for the Magistrates of Burntisland moved an adjournment, "as he had no instructions to agree to the offer" of composition, which was agreed to; and at the adjourned meeting on 25th February the offer was agreed to. The claim of the Magistrates was by far the largest claim against the estate. By the bond of caution Hatley and a co-cautioner bound themselves to pay the debts owing by Hatley at the date of his sequestration, at one month

after the date of his final discharge. The bankrupt obtained his discharge on 2d May 1859. The bankrupt and his cautioners having refused to pay the composition on the sum of L.1285, 2s. 11d., for which the Magistrates of Burntisland were ranked on the estate, they charged upon the bond, and Hatley presented this note of suspension. He alleged that, on a correct accounting, the chargers were debtors to the bankrupt, Robb, and pleaded;—That the chargers' affidavit not having been lodged in the sequestration until after the meeting at which the offer of composition was entertained, and the trustee and the bankrupt having stated the chargers in the states of the bankrupt's affairs as being indebted to him, there is no good ground, on a just construction of the statute, for holding that the chargers' claim cannot now be subjected to inquiry.

The chargers pleaded;—That having duly lodged their claim and oath of verity, and documents of debt, with the trustee on Robb's sequestrated estate, and the same having been admitted without question to be reckoned in the acceptance of the offer of composition, and the debt due to the chargers not having been objected to, and notice given to the chargers of such objection as before mentioned, the letters ought to be found orderly proceeded. Farther, "the complainer is barred, with reference to the terms of the Bankrupt Act, from insisting in this suspension."

On 21st February 1861 the Lord Ordinary pronounced the following interlocutor:—"Finds that the claim by the chargers against the sequestrated estate of John Robb, sought to be enforced by the charge under suspension, was admitted, without question by any one, to be reckoned in the acceptance of the offer of composition made by the bankrupt: Finds that under the 143d section of the Act of Parliament, 19 & 20 Victoria, [882] chapter 79, it is incompetent for the suspender, the cautioner in the composition, now to object to the claim, and therefore repels the reasons of suspension: Finds the letters and charge orderly proceeded, and decerns: Finds the suspender liable to the chargers in the expenses of process: Allows an account thereof to be lodged," &c.[1]

The suspender reclaimed, but, without calling on the respondents,

The Court pronounced the following interlocutor:—"Adhere to the Lord Ordinary's interlocutor submitted to review, and refuse the desire of the note: Find additional expenses due, and remit," &c.

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[1] "NOTE.—The Bankrupt Statute provides by its 143d section, that 'neither the bankrupt nor his successor offering the composition, nor the cautioner for the composition, shall be entitled to object to any debt which the bankrupt has given up in the state of his affairs, as due by him, or admitted without question to be reckoned in the acceptance of the offer of composition; nor to object to any security held by any creditor, unless in the offer of composition such debt or security shall be stated as objected to, and notice in writing given to the creditor in right thereof.'

"It seems to the Lord Ordinary impossible to doubt the application of this enactment to the present case. The claim was lodged the day prior to that on which the meeting of creditors decided on the offer of composition; it was brought into peculiar prominence at that meeting; for not only is the mandatory for the creditors specially taken down in the sederunt, as appearing in respect of this claim, but he actually moved and carried an adjournment of the meeting till next day, to enable his constituents to make up their minds as to their acceptance of the composition. It was on his agreement, as well as that of the rest, that the composition was next day approved of. No objection to the claim was stated by any one, or in any form. It seems to the Lord Ordinary that neither the bankrupt nor his cautioner, can, under the statute, now challenge the claim, however open to challenge it may be in itself. They have themselves to blame, if they did not sufficiently attend to the proceedings which were going on. The Lord Ordinary perceives that, whilst the composition was accepted by the creditors on 25th February 1859, there was so little of any endeavour to take matters short, that the suspender does not sign the bond of caution till 22d April afterwards; and it was only on 2d May thereafter that the Sheriff granted the bankrupt's discharge."

No. 139. **XXIII. Dunlop 882.** 24 May 1861. 1st Div.—Lord Jerviswoode.

Sir WILLIAM FRANCIS ELIOTT, Bart., and his Trustees, Petitioners.—*Patton—Ross.*

GRACE THERESA BLANCHE ELIOTT and her Curator *ad litem*, Respondents.—*A. R. Clark.*

Entail—Entailed Fund—Act 10 *Geo. III. cap.* 51 (*Montgomery Act*)—11 *&* 12 *Vict. cap.* 36, *sects.* 19 *and* 26 (*Entail Amendment Act*).—Prior and subsequent to the passing of the Entail Amendment Act (1848), an heir of entail expended certain sums in permanent improvements under the Montgomery Act, for which he obtained decree, and executed, under sect. 19 of the Entail Amendment Act a bond and disposition in security for two-thirds of the sum so expended by him. Thereafter a sum was consigned by a railway company for a portion of the entailed estate, which, previous to the date of the decree, had been taken possession of by them;—*Held* (*diss.* Lord Ivory) that the granting of the bond did not operate as a discharge of all claims against the entailed estate, and that the heir of entail was not barred by the procedure under section 19 from uplifting, under section 26, the consigned sum, and applying it (1.) in payment of the sum contained in the bond and disposition in security, and (2.) in payment *pro tanto* of the balance of his expenditure on permanent improvements.

Sir William Francis Eliott of Stobs and Wells, Baronet, heir of entail in possession of the entailed estate of Stobs, expended on improvements prior to 14th August 1848, the date at which the Entail Amendment **[883]** Act came into force, the sum of L.5175, 9s. 11½d. Between 14th August 1848 and Martinmas 1858 he expended the further sum of L.4651, 0s. 3¼d. The *cumulo* expenditure thus made amounted to L.9826, 10s. 2¾d. On 1st March 1860 he obtained decree, finding that these sums were expended in improvements of the nature contemplated by the Montgomery Act, and authorising him to grant over the entailed estate a bond of annualrent for three-fourths of the expenditure prior to 14th August 1848, and for the whole expenditure subsequent to that date, or, in his option, to grant a bond and disposition in security for two-thirds of the sum for which the bond of annualrent might be granted. He executed a bond and disposition in security for L.5688, 8s. 6d. The bond was dated 1st and 4th May 1860.

On 26th July 1860 the North British Railway Company consigned in bank L.9436, 6s. 5d., being the amount of compensation payable by the company for ground taken by them from the estate of Stobs for the formation of the Border Union Railway, and for damage thereby occasioned to the remainder of the estate. This ground was taken by the Railway Company in the year 1859.

The present application was made of date 18th September 1860, under sect. 26 of the Entail Amendment Act, for authority to uplift the consigned money, in order that it might be applied (1st) in payment of the sum contained in the bond and disposition in security; and (2d) in payment *pro tanto* of the balance of the whole improvement expenditure.

A remit was made, of date 4th December 1860, to Mr. Kermack, W.S., who reported that of the whole expenditure of L.9826, 10s. 2¾d. made by the petitioner, L.9438, 16s. 10¾d. was laid out on permanent improvements, while the balance, L.387, 13s. 4d., was laid out on improvements which, though of the nature contemplated by the Montgomery Act, were not permanent improvements.

One of the three next heirs, whose consents were required by sect. 36 of the Entail Amendment Act, was Miss Grace Theresa Blanche Eliott, to whom the Court appointed a curator *ad litem*, and who entered appearance, contending that, under the 19th section of the Act, the granting of the bond and disposition in security had operated as a discharge of all the petitioner's claims on account of his improvements against the entailed estate (other than for the sum in the bond), and therefore against any sum of money coming in lieu of the estate. Lord Jerviswoode reported the cause. After hearing parties orally, the Court, on 20th February 1861, appointed minutes of debate on the whole question involved in the cause.

The petitioner pleaded;—The 26th section of the Entail Amendment Act deals, 1st, with money derived from the sale of any portion of an entailed estate, or any right concerning it, or in respect of any permanent damage done to the estate in virtue of any Act of Parliament; and 2d, with money invested in trust for the purpose of purchasing lands to be settled upon the series of heirs called in the entail. And among the purposes to which the monies derived from these sources may be applied (if not acquired in fee-simple) are payment of money charged on the fee of the estate under any Act of Parliament, and repayment of money already expended on permanent improvements; and to these the petitioner sought to apply the money in question. The fund ought to be regarded as having accrued prior to the date of the decree authorising L.5688, 8s. 6d. to be made a burden on the entailed estate. It was true, at the date of the decree, it had not been consigned by the railway company, but the ground on account of which the money in question was consigned had been taken possession of by them; and the sum to be paid was in the course of being ascertained. If the petitioner had not availed himself of the decree, no possible objection could have been made to the present application. His availing himself of one remedy provided by the Act did not preclude him from availing himself of **[884]** another and separate remedy also provided by the Act. In the recent case of the Earl of Kintore,[1] various improvements of the nature contemplated by the Montgomery Act had been executed, partly before and partly after the passing of the Entail Amendment Act. The Earl asked and obtained authority to execute bonds and dispositions in security over his entailed estate, to the extent of two-thirds of three-fourths of the sum expended. He had omitted, however, to distinguish between the sums expended prior to, and those expended after the passing of the Entailed Amendment Act. In regard, however, to the sums expended after the passing of that Act, he was entitled to have burdened the estate for two-thirds of the whole sum expended; so his Lordship afterwards applied to the Court to grant additional bonds and dispositions in security over the estate for the difference between two-thirds of three-fourths of the sum expended on improvements after the date of the Entail Amendment Act, and two-thirds of the whole sum so expended. And it was held that, by having executed the previous bonds and dispositions in security, he was not barred, under the 19th section of the Act, from obtaining the remedy then sought by him. The difficulty in that case was the same as in the present case. The petitioner, at the time he obtained his decree, was entitled to a larger repayment than that he then sought, for simply by waiting till the exact amount of the sum due by the railway company had been ascertained, he would have been clearly entitled to have obtained repayment of the whole sum expended by him in improvements. If the petitioner's construction of the Act were held to be erroneous, and he thereby fell into a mistake, he would certainly be entitled now to rectify his mistake. The heirs of entail would be in no worse position than if he had not made the mistake. His case was entitled to greater favour than that of Lord Kintore, for both the applications in that case proceeded on the same sections of the Act, and not, as in the present case, the first application on one section, and the second on a subsequent and totally independent section. By the Entail Amendment Act, an entailed estate, and sums of money to which the heirs of entail had right, were regarded as distinct matters. Sections 13th, 14th, 15th, and 16th, related to improvements executed on entailed estates of the nature contemplated by the Montgomery Act; and under the 18th section, bonds and dispositions in security might be granted for two-thirds of three-fourths of the sums expended on such improvements prior to August 1848, and for two-thirds of the whole expenditure subsequent to that date. The 19th section declares that the granting of such bond of annualrent in respect of improvements shall operate as a discharge of all claims on account of such improvements against such estate, and the rents and profits thereof, and the heirs of entail succeeding thereto. It is only on account of such improvements as are contemplated by the Montgomery Act that bonds of annualrent are authorised to be granted. Such improvements are not, however, necessarily permanent improvements. Of these remedies the petitioner has availed himself. There remains, however, a considerable sum expended on improvements, which, besides being improvements of the nature contemplated by the Montgomery Act, are also of the nature of permanent improvements. What the petitioner seeks

[1] Earl of Kintore, January 31, 1857, *ante*, vol. xix. p. 343.

under the 26th section is, not two payments for the same improvements, but that he should receive payment of a sum expended on permanent improvements, in so far as he has not already received payment for such improvements under the remedy provided in the sections referred to. The 26th section does not deal with the entailed estate at all; it is quite independent of, and bears no reference to, the previous sections. It stands by itself, commencing with the words, "that in all cases where money has been derived or may hereafter be derived from **[885]** the sale or disposal of any portion of an entailed estate," and enacting that, if not acquired in fee-simple, it shall be lawful for the heir to apply the price or other money received, to (among other purposes) permanent improvement of the estate, and repayment of money already expended on permanent improvements. The petitioner has expended the sum claimed on permanent improvements, and he is asking payment. He is met by the objection that he has already executed a bond and disposition in security for two-thirds of the sum expended on improvements of the nature contemplated by the Montgomery Act,—that the sum now claimed was included in the sum on which the amount of that bond and disposition in security was calculated,—and that, in consequence of the 19th section of the Act, all claim on account of that sum is discharged. The applicability of the 19th section is denied. The claim which is disputed is not made in respect that the improvements are of the nature contemplated by the Montgomery Act, but in respect that they are improvements of a permanent nature, and for which no payment has been received. Although the claimant has exhausted the remedy provided for repayment of sums expended in improvements of the nature contemplated by the Montgomery Act, he is only now availing himself of the remedy provided for the repayment of sums expended on improvements of a permanent nature. The discharge contemplated by the 19th section is of a limited character, and not a universal or absolute discharge. It is merely a discharge of all claims on account of such improvements against the entailed estate, and the rents and profits thereof, and the heirs of entail succeeding thereto. The discharge contemplated by the 19th section was purposely limited in its character, so as not to exclude a claim which might be made, as in the present case, not against the entailed estate, and the rents and profits thereof, but against a sum of money derived from the sale of a portion of the estate. Under the Montgomery Act, the succeeding heirs of entail are constituted debtors to the extent of three-fourths of the sum expended in improvements, in respect to their succeeding to the entailed estate, and to the rents and profits thereof; and the Montgomery Act sanctions proceedings against them. It was therefore necessary that they should be discharged, by the 19th section of the Entail Amendment Act, from the obligation so imposed on them by the Montgomery Act. The true object of the declaration was to limit the party taking the bond to the mode of recovery of the sum contained in and applicable to the particular form of security taken; and to prevent, what would otherwise have been possible,—execution for the debt in the bond, both by way of the procedure contemplated in the Montgomery Act, and by the remedies competent to bondholders. The views now submitted are supported by the opinions of many of the judges in the case of the Earl of Eglinton,[1] decided January 31, 1857. Lord Eglinton, after having obtained decree against the heirs of entail under the Montgomery Act, first proceeded against a consigned fund, and then against the entailed estate. Under his first application his Lordship obtained repayment of three-fourths of the sums expended by him in improvements, out of certain trust-funds, and a discharge was granted by him. He thereafter applied for and obtained authority to charge the entailed estate with the remaining one-fourth of the whole sum expended. The question raised was, whether, since proceedings had been taken under the 26th section of the Act, and a certain amount of funds obtained, but not sufficient to repay the whole improvement outlay, it was competent thereafter to have recourse to the remedy provided in the 14th section, for the purpose of charging the unpaid balance on the estate? The Court found that it was competent. Although the circumstances of the two cases referred to are in some respects different **[886]** from those of the present, yet the principles laid down in them are equally applicable to the present case. In both the cases referred to, the substitute heirs of entail had, previous to the second application being made to the Court, been

[1] Earl of Eglinton, Jan. 31, 1857, *ante*, vol. xix., p. 346.

discharged of the obligation imposed upon them by the Montgomery Act. It is said to have been ruled by the decisions in the cases of Panmure[1] and Wauchope,[2] that money consigned by a railway company was in truth a portion of the entailed estate, and that a disentail of the estate disentailed also the consigned money,—so it is argued, the discharge of claims against the estate, must mean a discharge of claims against consigned money. But the monies consigned in the present case, to a large extent, were awarded by reason of damage done to the amenity of the estate, and by severance. Liquidated damage done to an entailed estate by certain operations of a railway company cannot be treated as actually a portion of the entailed estate itself. But it is no more true as to the money which represents the value of the land taken. It is a money price, subject no doubt to be dealt with in a particular way, which secures the interests of the heirs of entail more or less, according to the mode in which it is to be dealt with; not securing them at all if the sum is less than L.200. In Heron *v.* Espie[3] it was held that the fund was moveable, and not to be treated as a *surrogatum* for the land,—and so was descendible, not to the heir, but to the executor of the proprietor from whom the land had been taken under the authority of the railway statute. It is thus a mistake to hold that the consigned money of the 26th section is to be held as a part of the entailed estate in the sense of the statute; and, if so, a discharge of claims against the entailed estate cannot be held to affect the heir's right to get such sums applied to extinction of one of the kind of debts to which, by the 26th section, they are expressly made applicable. The application under the 26th section may not be the satisfaction of a claim in the person of the heir of entail at all. It is not clear that permanent improvements, to repay which the application is made, must necessarily have been made by the heir who makes the application. The right, as it exists in the person of the petitioner, may enure more or less to his benefit, but he is not asserting or vindicating a claim against the entailed estate, or against the heirs of entail who may succeed him, or the rents or profits of the estate. He is seeking to get a pecuniary fund, at present under the charge of the Court, applied to one of the purposes prescribed in the Act.

For Miss Grace Theresa Blanche Eliott it was argued;—That both on principle and by authority, consigned money is to be dealt with as part of the entailed estate. The question therefore was, whether, if an heir of entail in possession avail himself of the 19th section of the Entail Amendment Act, he thereby discharges all claims for and on account of such improvements, whether against the estate or against the rents and profits of the estate, or against the heir of entail succeeding thereto, except in so far as these claims are constituted by the bond of annualrent, or bond and disposition in security. There is no limitation to this discharge. The words used are, "any improvements," and "all claims for or on account of such improvements." The petitioner's claim, whatever was its extent or nature, has, by the very language of the Act, been already satisfied, and, if so, it cannot now be brought against either the entailed estate or the heirs succeeding to that estate. His application is founded on the 26th section of the statute, but the privileges which this section confers are competent only to such heirs in possession as have existing claims against the estate, and cannot be applicable to claims which once existed, but had been discharged. It may be that sums expended by an heir of entail in executing improvements of the nature contemplated by the Montgomery Act, are also expended in executing per- **[887]** -manent improvements; for Montgomery improvements may be, as here, permanent improvements. Any claim which the petitioner had was one arising from the fact that he had expended money in permanently improving the estate, and that claim was discharged by granting the bond and disposition in security. It cannot be renewed under the 26th section of the statute. As in this case the expenditure in permanent improvements greatly exceeds the sum contained in the bond, there may be no practical difficulty in granting the application, if it is well founded. But suppose that one-half of the expenditure was on permanent improvements, and the other half on improvements which, though of the nature contemplated by the Montgomery Act, could not be regarded as permanent, what would be the rights of the heir in possession?

[1] Lord Panmure, 13th July 1853, *ante*, vol. xvii. p. 1031, note.
[2] Wauchope, 4th July 1855, *ante*, vol. xvii. p. 1031.
[3] Heron *v.* Espie, 3d June 1856, *ante*, vol. xviii. p. 917.

In such a case the bond and disposition in security, instead of being for a less sum, would be granted for a greater sum than the expenditure on permanent improvements. If a portion of the entailed estate were sold for a price of the same amount as the sum expended in permanent improvements, would the heir in possession be entitled to open up the whole transaction;—to get the bond restricted to two-thirds of the sum expended on Montgomery improvements, and to obtain payment from the consigned fund of the whole of his expenditure on permanent improvements? But it might be said that, in the case supposed, the heir of entail might get at the same result by applying the consigned fund in payment of one-half of the sum contained in the bond and disposition in security, and the balance in repayment of the remainder of the expenditure on permanent improvements, not included in the bond. In this way, no doubt, the heir would get payment of his whole expenditure, but only by opening and recasting a transaction by which all his claims were declared to be discharged, and it does not appear that there is any warrant in the statute to authorise such a course. If, instead of a bond and disposition in security for two-thirds, he had granted a bond of annualrent calculated on the whole expenditure, would he be entitled to restrict the bond of annualrent to one-half, in order that he might get payment of the whole of his improvement expenditure? It is plain that an annualrent calculated on the whole sum excludes, while it exists, the claim of the heir in possession to any other payment for improvement expenditure. He cannot claim both an annualrent and payment. If so, can he, at his own pleasure, restrict or buy up the annualrent, after having got it, in order to enable him to make a larger claim against the estate, and that in the face of the enactment which provides that the annualrent shall operate a discharge of all his claims? Or, could he wait till the expiry of the annualrent, and, if then living, claim full payment of his expenditure on permanent improvements? The annualrent excluded it, because it was given in satisfaction of the claim; and if a temporary right be given in satisfaction of any claim, whether for a sum of money or not, the claim can never revive when the temporary right comes to an end.[1] The constitution of the improvement expenditure under the Montgomery Act does not exclude the heir of entail from availing himself of the privileges conferred by the 26th section of the statute. The obtaining such a decree of declarator does not directly charge the estate with the improvement expenditure, but merely fixes the extent of the claim which in any case shall be available to the executors of the heir who laid out the money. For in no case was it competent to claim more than three-fourths of a sum which did not exceed four years of the rental at his death. And thus the mere step of preserving recourse against the rents of the estate, by taking such a decree, would not cut off the benefits conferred by the 26th section. No doubt the remedy conferred by that section of the statute may be different from and independent of those privileges conferred by the 13th and 14th sections, and so [888] long as a claim exists against the estate, it may be competent for the heir of entail to avail himself of either. But it is quite a different question whether the remedy, competent under the 26th section of the statute, is open to an heir, all whose claims in respect of his improvement expenditure have been discharged under the 19th section.

At advising,—

Lord President.—The proposal of Sir William Eliott goes a step farther than any of the cases that have occurred hitherto, and in a direction which I was not much disposed to go along with. At the same time, it appears to me that, looking at the grounds upon which the judgments already pronounced were rested, we cannot avoid the conclusion that this case must follow the same course. I think the principle upon which these judgments proceed supports the proposal now contended for. The question, no doubt, is somewhat different in this case from that which occurred in previous cases in this respect, that here we are dealing with a bond and disposition in security, the finality of which as a discharge in respect of the improvement expenditure for which it was granted is pleaded to us. But I think that the answer made is satisfactory, that in dealing with this fund for the purpose of applying it to permanent

[1] The Earl of Eglinton, petitioner, 31st Jan. 1857, *ante*, vol. xix. p. 343; and Moncrieffe, 16th July 1858, *ante*, vol. xx. p. 1264.

improvements, there is not sufficient ground for making a distinction in regard to it, so as to make the statutory discharge applicable to this particular sum.

LORD IVORY.—I confess I still hesitate very much as to the judgment to be pronounced in this case. It is not the same case with any of those which have hitherto been before us. It goes farther, and introduces the application of a totally different enactment from what we were dealing with in the previous cases. No doubt there is that consideration which your Lordship has alluded to, that if you are to gather a conclusion from the grounds of the reasoning upon which the Court by a majority formerly proceeded, it leads us to see that that reasoning does, in some measure, extend to the particular case that is now before us. But this particular case was not decided. I have all along differed from the conclusions at which the Court have arrived in the other cases; and this is just one of the things that I foresaw at starting, that we might be led by little and little to conclusions which were not anticipated when that career was first entered upon. If, however, I were satisfied that this case was within the principle recognised by these former decisions, I should not be disposed to raise any objection, merely because I differed in these cases; but I have been unable to satisfy myself that this case is by any means a corollary to these former decisions. As I read them, I see nothing more in them than this, that a party having certain rights under the statutes, but mistaking the extent of these rights, came, in the first instance, to apply to the Court for a partial remedy, and then supplemented the application which had been made by a second application, not founding on the other as matter of right, but asking to get in its integrity a remedy which he had only got in part. The result in the first application was to give him partial payment. The result of the supplementary application was to give payment in full of what he first applied for, but in regard to which he had made a mistake, and as to which the limited nature of his application prevented the Court from giving him that which he wished. But here there has been no mistake. The petitioner has had the whole remedy to which he was entitled, and he comes here to ask the Court upon independent grounds—not supplementary, but independent grounds, and, in addition to his former application, to give him the benefit of this fund. It does not seem possible to me to sustain that claim, giving due effect to the fair reading of section 19, which I read as saying this, —that if a party has taken his full remedy under the former clauses, and granted a bond and disposition in security under section 19, there is a discharge of all claim against the estate. In my opinion there is such a discharge here; and therefore I think that this claim should not be granted.

LORD CURRIEHILL.—I concurred in the opinions of the majority of the Court in the cases of Eglinton, 31st January 1857, and Moncrieffe, 16th July 1858, and I think that, on the principle recognised in these cases, the prayer of the petition now before us ought to be granted.

What we are now dealing with is a sum of money amounting to L.9436, 6s. 5d., consigned in bank, and belonging to the heirs of entail of the estate of Stobs, &c. [889] The petition prays that L.5688, 8s. 6d. of that sum shall be applied in paying a debt of that amount which has been created a real burden on the entailed estate, under the authority of the Entail Amendment Act. That debt consists of a certain proportion of a sum of L.9026, 10s. 2¾d. which has been expended by the petitioner in improving the entailed estate. And there is no dispute that the 26th section of that Act authorises that heritable debt to be paid out of the consigned money.

The only question as to which there is any dispute is, whether the balance of the consigned money can be applied in paying the remaining portion of the sum which has been expended in these improvements, in so far as they are of a permanent character. Such a claim is strongly founded in equity; inasmuch as permanent improvements on an entailed estate form in effect additions to the estate, and, indeed, additions more valuable to the heirs of entail as a body, than if additions were made to the extent of the estate by other lands being purchased with the money, and entailed on the same heirs; and, therefore, the heir who lays out his funds in making such an addition to the estate has a strong claim in equity to be reimbursed out of the estate so improved by him. But that equitable claim cannot be made effectual by the common law. And although the statute 10 Geo. III. does provide to him the means of operating his relief to some extent, yet that relief is but partial, and leaves him without the means of obtaining reimbursement of a considerable portion of his outlays. The Entail

Amendment Act of 1848, although it goes further in the same direction, still does not give him the means of operating entire relief from the entailed estate itself, or from its rents, or the heirs of entail. But when these heirs come to have right to realised money, which is in the predicament of the consigned fund in question, the Legislature does authorise him to obtain reimbursement out of such funds of all advances he may have made in making such additions to the estate by permanent improvements. The 26th section of the Act contains express authority to this effect.

The objection stated to this claim is, that it has been discharged, inasmuch as the heritable bond already mentioned was granted for payment of the improvements made by the petitioner to the extent of L.5688, 8s. 6d.; and that, by the 19th section of the Entail Amendment Act, the granting of such a bond is declared "to operate as a discharge of all claims for or on account of such improvements against such estate, and the rents and profits thereof, and the heirs of entail succeeding thereto," excepting the claims under such heritable bond. But in my opinion this objection is not well founded. In the first place, the improvements, the discharge of which is operated by the granting of such an heritable security, in terms of the 19th section, may be different from those improvements payment of which is authorised out of money belonging to the heirs of entail, in terms of the 26th section of the Act. The improvements of the former kind can consist only of either planting, enclosing, draining, or certain kinds of building, as specified in the statute 10 Geo. III., and are not required to be of a permanent nature, whereas *permanency* is an essential element of the latter; and if these improvements are permanent in their nature, it matters not of what operations they may consist. Secondly, The improvements which are virtually discharged by the granting of such heritable security are limited in amount, inasmuch as they cannot exceed three-fourths of a certain number of years' rent of the entailed estate, in conformity also with the statute 10 Geo. III., whereas there is no limit to the amount of the improvements the payment of which may be obtained out of money which is in the predicament of that in dispute. And, accordingly, even when that proportion of the expense of such improvements as are claimable under the statute 10 Geo. III. is actually paid and discharged, instead of being made chargeable on the fee of the entailed estate, in terms of the Entail Amendment Act, the remainder of the expense of these improvements (provided they be *sua natura* permanent) may still be recovered out of such money. This was settled in the cases of Eglinton and of Moncrieffe. And since the actual payment and discharge of the sum for which the heritable security was granted would not have precluded the present claim for payment of the remainder of the expense of the improvements, in so far as they were of a permanent nature, the discharge implied in granting a security for that sum cannot have a more extensive effect. These considerations show that, according to the true construction of the Entail Amendment Act, the claim which by the 19th section is declared to be virtually discharged, is not held to be the same as the claim which by the 26th section [890] may be satisfied out of uninvested money belonging to the heir of entail. And thirdly, although that money is in many respects dealt with as being a *surrogatum* for a part of the entailed estate, still it is only such a *surrogatum*, and not actually a part of the entailed estate. And the Legislature, while it still withheld from an heir of entail, who added to the value of the entailed estate by making permanent improvements upon it, the right to obtain full remuneration from the estate itself for all his outlays, did confer upon him a right to obtain such indemnification out of such uninvested money belonging to the heirs of entail. The Legislature conferred upon the heir in possession right to obtain such money for making permanent improvements on the estate. The equity and propriety of such an enactment is manifest when such improvements are to be prospective. And it appears to be no less equitable and proper that the money should be authorised to be applied in repaying the expense of such improvements which may have already been made. So at least the Legislature thought; and, accordingly, such money is expressly authorised to be so employed by the 26th section of the statute.

Lord Deas.—I am of opinion that, looking to what has already been decided, this application falls to be granted. It is an application under section 26 of the Entail Amendment Act, which provides "that in all cases where money has been derived, or may hereafter be derived from the sale or disposal of any portion of an entailed estate in Scotland, or of any right or interest in or concerning the same, or in respect of any

permanent damage done to such estate, under any private or other Act of Parliament," &c., it shall be lawful for the heir in possession, who could not acquire the estate in fee-simple, to lay out such money with the approbation of the Court, "in or towards payment of entailers' debts, or in or towards payment of any money charged in the fee of such entailed estate under this or any other Act, or in redemption of the land-tax affecting such entailed estate, or in permanently improving the same, or in repayment of money already expended in such improvements." Now, to bring the application under that enactment, taken by itself, all that is necessary is, that the money now in dispute shall have been expended in permanently improving the estate. If the case stood there, it must be conceded on all hands that the application would fall to be granted. The enactment is in its terms absolute. No doubt, however, even if the matter stood simply upon this enactment,—if it could be shown that the party had already got full payment, that would be a sufficient answer; but that is not pretended. He has got payment of certain sums, but he has not got payment of the sums now in dispute. The objection made, and the only objection, is founded on the terms of section 19 of the same statute. It is said that, although he has not got payment of the whole sums expended for permanent improvements, he has got payment of a portion of these sums, and that, by force of section 19, the claim for the balance is discharged. Now, no doubt, when we come to section 19, it bears "that the granting under the authority of this Act, of any bond of annualrent, or bond and disposition in security, in respect of any improvements executed or to be executed on an entailed estate in Scotland, shall operate as a discharge of all claims for or on account of such improvements against such estate, and the rents and profits thereof, and the heirs of entail succeeding thereto, save and except the claims under such bond of annualrent, or bond and disposition in security themselves." It is perfectly true that this enactment is likewise absolute in its terms. But it is not more so than section 26. If you take the one enactment by itself, the petitioner is clearly entitled to what he is asking. If you take the other enactment by itself, his claim may be held to be discharged. Upon the face of these two sections they are opposed to each other. Now, I take it, the rule is, that when you find two clauses in an Act of Parliament apparently inconsistent with each other, you must look to the whole statute, and reconcile these two clauses, if by any reasonable construction you can do so. Now, it appears to me that the two clauses, when thus regarded, are not irreconcilable with each other. Before we come to section 19, we find a variety of sections applicable to improvements under the Montgomery Act, and to these improvements only. These sections are immediately followed up by this section 19; and, when I contrast this clause with section 26, I do not find it difficult to reconcile the two clauses, by holding that, when section 19 says the bond shall be held as a discharge of all claims for or on account of such improvements, it means a discharge of all claims for improvements under the Montgomery Act, which is **[891]** the only Act mentioned in the preceding clauses. If the words had been "shall operate as a discharge of all claims" under the said Act, "for or on account of such improvements," &c., the case would have been clear beyond dispute; and the moment you so read the clause, it becomes equally clear beyond dispute. I have no difficulty in so reading it. I think the words "under the said Act," although not expressed, are understood. If you take the words of either of these clauses, section 19 and section 26, without reference to the context, the words contradict each other. But, looking at the context to ascertain the meaning of the Legislature, I have no difficulty in holding that the discharge which was to be operated, was a discharge of all claims under the Montgomery Act; and it is because I so construe the clause that I hold this case not to be distinguishable from the previous cases. I am not prepared to go on the ground that this money is not part of the entailed estate. I think that, substantially, it is part of the entailed estate, and if section 19 could be read as meaning a discharge of all claims for improvements against the entailed estate, I should have held that we could not grant this application. But holding that section 19 provides only for a discharge of improvements under the Montgomery Act, I think this case must have the same result with the previous cases; and that the prayer of the application falls to be granted.

The Court pronounced the following interlocutor:—"The Lords, on the report of Lord Jerviswoode, having resumed consideration of the cause, and considered the

minutes and revised minutes of debate for the parties, Find that, to the extent of L.9438, 16s. 10¾d., the *cumulo* sum of L.9826, 10s. 2¾d. referred to in the petition, has been expended by the petitioner, Sir William Francis Eliott, on the entailed estate of Stobs, in permanent improvements thereon, of the nature contemplated by the 26th section of the statute 11th and 12th Vict. c. 36: Find that it is proper that L.5688, 8s. 6d. of the consigned sum of L.9436, 6s. 5d., mentioned in the petition, should be applied in payment to Alexander James Russell, clerk to the Signet, Edinburgh, of the like sum due to him under the bond and disposition in security therein mentioned, granted by the said petitioner in his favour over said estate, on a regular discharge thereof, and of the security thereby constituted, being granted by the said Alexander James Russell, and duly recorded, and that the balance of the said consigned sum, being L.3747, 17s. 11d., should be applied in repayments *pro tanto* to the said petitioner, and the other petitioners, his trustees, for their interests, of the sum of L.3750, 8s. 4¾d., being the balance of said permanent improvement expenditure; and remit to the Lord Ordinary so to apply these findings and to proceed with the cause, and with power to his Lordship to deal with all questions as to expenses."

No. 141. **XXIII. Dunlop 902.** 25 May 1861. 2nd Div.

Major-General STUART, Petitioner.—*G. G. Bell—Dundas.*

Lady E. MOORE, Respondent.—*Sol.-Gen. Maitland—Gordon.*

Colonel C. STUART, Respondent.—*Patton—Millar.*

Appeal—Application of Judgment—Competency—Foreign—Jurisdiction—Custody of Pupil—Nobile Officium—Domicile.—Held that it is the duty of the Court to give implicit obedience to the directions contained in a judgment of the House of Lords on appeal, without any consideration of the grounds on which they proceed; and a judgment applied whereby the House of Lords (1.) sustained as competent an appeal against interlocutory judgments in a petition regarding the custody of a pupil; (2.) found that the interests of the pupil, who had a tutor-at-law in Scotland, required that he should be delivered to the petitioner (a party alleging himself to be a guardian appointed by the Court of Chancery, but who did not produce his appointment), and that the Court of Session ought to have given directions for that purpose without inquiring into the validity of the petitioner's appointment, the domicile of the pupil, or other disputed facts; and therefore (3.) reversed interlocutors of the Court of Session appointing service of the petition upon the tutor-at-law, and allowing the petitioner a proof of his averments, and remitted to the Court of Session to make such order as might be proper for causing the pupil to be delivered up, and educated in conformity to certain alleged orders by the Court of Chancery.

Observed, that the Lord Chancellor has no judicial jurisdiction in Scotland.

Observations by the Lord Justice-Clerk in applying the judgment.

Expenses.—Circumstances in which an unsuccessful litigant as to the custody of a pupil was held by the House of Lords entitled to expenses out of the estate of the pupil.

See *ante*, 20th July 1860, vol. xxii. p. 1504; 23d November 1860, *ante*, p. 51; 7th February 1861, *ante*, p. 446; 20th March 1861, *ante*, p. 595.

General Stuart appealed to the House of Lords against the interlocutors of dates 14th and 20th July and 21st November 1860, pronounced in the petition at his instance. He also appealed against the interlocutors of dates 5th, 6th, and 23d November 1860 and 7th February 1861, pronounced in the petition at the instance of Colonel Stuart, the tutor-at-law.

He submitted that the Court of Session ought to have made an immediate "decree conform," or a decree or order in the nature of a "decree conform," for the following reasons:—"1. Because the true interest and real benefit of the infant Marquis have been overlooked in the Court of Session. 2. Because the custody of the Great Seal

attached on the 10th May 1848, and [903] nothing has since occurred to displace it. 3. Because in this case the Great Seal had authority in Scotland, the education of the infant Marquis involving public considerations. 4. Because the infant Marquis, if left in Scotland, will be without protection from the age of fourteen to that of twenty-one. 5. Because the points relied upon in the Court of Session were immaterial. 6. Because the inquiries ordered by the Court of Session would have produced no result."[1]

Colonel Stuart (the tutor-at-law) prayed the House to affirm the interlocutors of the Court of Session, for the following reasons:—"1. That the orders appealed from being interlocutory, and being also unanimous judgments of the Court of Session, appeal against them is incompetent. 2. That the appellant has no interest, and therefore no title to prosecute the present appeal; and 3. That even if the title of the appellant was to be sustained, the interlocutors appealed from ought not to be recalled, as these were within the competency of the Court, and were called for by, or were right and expedient in, the circumstances in which they were pronounced."

Lady Elizabeth Moore prayed the House to affirm the interlocutors of the Court of Session, for the following reasons:—"1. Because the judgments appealed from are well founded in law. 2. Because the Court of Session could not dispose of the petition upon its merits until the averments upon which it was founded were established by proof. 3. Because the disposal of the person of the pupil, as a domiciled Scotsman, and the regulation of his education, lie with the Court of Session; and because the said Court was bound to see his rights, as a domiciled Scotsman, preserved, and was neither bound nor entitled to order him to be delivered to the appellant, in order that he might be placed under the jurisdiction of a foreign court. 4. Because, even supposing that the pupil was not domiciled in Scotland, and that the appellant had been duly appointed his guardian in England, the appellant had no authority over the pupil while resident in Scotland; and the Court of Session was bound and entitled to take upon itself the care and protection of the pupil, and not to suffer him to be removed beyond its jurisdiction, except on being satisfied that it was for his benefit."[2]

Without repeating the narrative of the facts given in the previous reports, it is proper to explain. Before these petitions were disposed of in the House of Lords, there were produced some documents which the Court had asked for on 20th July 1860, but which parties could not then furnish. From these it appeared that the petition in the Court of Chancery in May 1847, for the appointment of a guardian, which General Stuart, in his petition, stated had been presented by the tutor-at-law "in name of the infant Marquis, and himself as next friend," was presented on 3d May in name of the infant Marquis, but without the concurrence of any one as next friend, and that on 11th May the Marchioness was appointed guardian. On 10th May Lord James procured a brieve from Chancery, to enable him to serve as tutor-at-law, and his appointment was completed on 30th May. The English estates of the Marquis were under the management of trustees appointed by his father. When objection was taken to the want of sufficient evidence of General Stuart's appointment, and of the orders of the Court of Chancery, [904] his counsel, on 19th July, stated—"We have telegraphed, and if we can get additional documents, or documents in another form, they will be before the Court to-morrow." Next day no additional documents or evidence was tendered to the Court.

On 17th May judgment was pronounced by the House of Lords.

[*The opinions in the House of Lords are omitted. For these see* 4 *Macq.*; 10 *S.R.R.* (H.L.) 375.]

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[1] *Authorities quoted by Appellant.*—Johnstone *v.* Beattie, 10 Cla. & Fin. p. 122; Eyre *v.* Countess of Shaftesbury, 2 P. Wms. p. 103; Rex *v.* Viscount Purbeck, Shower's Cases in Parliament, p. 1; Fraser on Per. and Dom. Relations, vol. ii. p. 194; Dawson *v.* Jay, 3 De Gex, M'N., & G., p. 764; Hope *v.* Hope, 4 De Gex, M'N., & G., p. 328.

[2] *Authorities quoted by Respondents.*—Logan *v.* Fairlie, Jac. p. 193; Wellesley *v.* Duke of Beaufort, 2 Bligh, N.R. 124; Stat. 1555, c. 35; Stat. 1696, c. 8; *In re* Hodge, 3 Kay & Johnstone, p. 215; Ersk. Inst., 1, 7; Morison *v.* Earl of Sutherland, M. 4595; *ex parte* Watkins, 2 Ves. 470; *ex parte* Ord; Barton *v.* the Scotch Mining Company; *ex parte* Birchell, 3 Atk. 813; Stephens *v.* James, 1 M. & K. 627; Stat. 48 Geo. III. c. 151, sect. 15.

[913] The following order was pronounced :—"It appearing to this House that, when the Court of Session pronounced their said interlocutor of the 20th of July 1860, the interests of the infant Marquis of Bute required that he should be delivered to Major-General Stuart, to be educated according to the scheme settled by the Court of Chancery, and that the Court of Session ought then to have given such directions as were proper for accomplishing that object; and it further appearing to this House that the interests of the infant Marquis of Bute still require that he should be so educated: It is therefore ordered that the interlocutors complained of be reversed, and the cause remitted back to the Court of Session in Scotland, to make such order or orders as may be proper for causing the infant Marquis of Bute to be forthwith delivered to Major-General Charles Stuart (unless he shall previously have been so delivered) in order that he may be educated as aforesaid, according to the directions of the Court of Chancery; and that the costs of all parties in the matters be paid out of the estates of the infant Marquis of Bute."

General Stuart now presented a petition to the Court to apply the above judgment, and grant warrant to the Earl of Galloway to deliver up the Marquis to the petitioner, to "be educated according to the directions of the Court of Chancery."

When the petition was moved,—

Lord Justice-Clerk.—My Lords, by this petition we are called on to make an order, for the purpose of carrying out certain directions contained in a judgment of the House of Lords, pronounced on the 17th of this month, regarding the custody and education of a pupil, the Marquis of Bute. It is our constitutional duty to give implicit obedience to these directions, without any consideration of the grounds on which they proceed, and this is a duty which the Court always performs promptly and cheerfully. But the present case is distinguished by one peculiarity, which I believe to be entirely unexampled, and which makes it indispensable, that the performance of our duty should be accompanied by a few words of explanation. The House of Lords, exercising a purely appellate jurisdiction, have pronounced a judgment disposing of this case on its merits, while the Court of Session (the Court of radical jurisdiction) had never applied its mind judicially to a consideration of the merits, and could not, when the case was before them, consistently with their ordinary rules of procedure, pronounce any judgment on the merits. I make this statement, not by any means for the purpose of impugning the legality of the judgment of the House of Lords, as involving an usurpation of the functions of a Court of radical jurisdiction. I am very far, indeed, from even desiring to suggest a doubt on the subject; my only object is to explain distinctly the position in which this Court now stands. When General Stuart presented his petition to us in the last week of the summer session, we gave him a preference over all the other suitors before us, such as is never conceded except in cases of extreme urgency. But the petitioner failed to convince us that we could then, with propriety or safety, make any order, in an application of an entirely unprecedented kind, which appeared to us to involve considerations of the gravest difficulty. The case, therefore, necessarily stood over till after the vacation; for no one could have seriously proposed that we should leave to a single judge in vacation, the final disposal of so serious a case. On the reassembling of the Court in November, answers having been lodged for the tutor-at-law and for Lady Elizabeth Moore, the parties were at issue on matters of fact, which appeared of essential importance to the determination of the question raised by the pleadings. We had before us competing claims to the guardianship of the pupil—the claim of the Scotch tutor-at-law, and the claim of a guardian appointed by the Court of Chancery in England. The most material fact in determining that competition, seemed to be, whether the pupil was a Scotchman or an Englishman, and upon that matter of fact, the parties were entirely at variance. They were not even agreed which of the titles of guardianship was the earlier in date, for the petitioner contended that his title drew back to the date of the original appointment of Lady Bute as guardian by the Court of Chan- [914] -cery, while the respondents denied that such was the effect of the Chancery proceedings. This also, being foreign law, was matter of fact requiring to be proved. We therefore appointed a proof to be taken, by our interlocutor of 21st November, and evidence was led before our Commissioner by General Stuart; and on inquiry I find that the proof would, in all probability, have been completed within a few days or weeks, when the farther

progress of the General's proof was stopped by an injunction issued by Vice-Chancellor Stuart, prohibiting the General from proceeding farther with his petition to the Court of Session. Since the date of that injunction, on the 13th December, of course no farther proceedings have been or could be taken on the petition at General Stuart's instance; and the Court therefore, on the application of the tutor-at-law, made such arrangements for the residence and education of the pupil as seemed to them in the circumstances most expedient. To have adjudicated on the merits of General Stuart's petition without any inquiry into disputed facts, apparently most material, would have been inconsistent with the settled rules and practice of the Court. The General, if he thought the facts immaterial, might, without admitting these facts, have renounced his right to prove them, in which case we should have given judgment immediately. But this he distinctly declined to do, and hence the interlocutor of 21st November, allowing him a proof. Had the General been allowed to proceed with his proof, it might have been completed in the month of December, and the petition would have been disposed of on its merits not later than the month of January. The delay, therefore, since the month of January, is ascribable solely to the order of the Vice-Chancellor restraining General Stuart from farther proceeding in the Court of Session. It is thus beyond all question that this Court has never had an opportunity of considering the merits of the petition, the prayer of which they are now directed by the House of Lords to grant. For this singular position of the case this Court is in no way responsible. In what has been laid before us as an authorised report of the observations of the Lord Chancellor in moving the judgment of the House of Lords, it is stated that the refusal of the Court to interfere without inquiry was rested on the decision of the House of Lords in Johnstone *v.* Beattie. The noble and learned Lord is reported to have said:—"I do sincerely believe that this decision was the true cause why the Court of Session in this case refused to interfere." And, in another place:—"I must use the freedom to observe, that whatever opinion the Scotch Judges may justly form of the decision of this House in Johnstone *v.* Beattie, they would have acted with more dignity, and more magnanimously, as well as more judicially, if they had calmly and promptly considered what was for the benefit of the infant." I feel sure, that in noticing this passage, I shall at once be acquitted of any want of courtesy or deference towards one, whom, both officially and personally, I regard with the highest respect and esteem. But I must say it is truly lamentable, that the Court of Session, and the rules and principles which guide and regulate its proceedings, should be so little appreciated or understood in the Court of Appeal. The judgment of the House of Lords in Johnstone *v.* Beattie, being pronounced on an appeal from the English Court of Chancery, is not an authority binding in Scotland; and when it was brought under the notice of the Scotch Judges, and the legal profession in Scotland, incidentally, some years ago, it was universally felt that, however sound an exposition it might furnish of the rules of English Chancery law, it involved a violation of the principles of international law, recognised in Scotland and all the States of the Continent of Europe, —so direct and unequivocal, that I believe the very last thing that would ever enter into the mind of a Scotch Judge would be to follow the authority, or adopt the principle, of Johnstone *v.* Beattie. If it was cited to us in the course of the arguments, it must have been for some collateral purpose merely; and, so far from giving rise to any spirit of antagonism or retaliation on the part of the Court, it did not in the slightest degree influence or affect the mind of any member of the Court, in deliberating on the proper course of procedure to be followed in this case. The Court, therefore can hardly have sacrificed any of its dignity by following Johnstone *v.* Beattie. Indeed, I am quite at a loss to understand how the dignity of this Court can have been truly involved—either compromised or enhanced—by its proceedings in this case. We are not in use to seek the promotion of our dignity, except by a simple and un-
[915] -pretending discharge of our duty. We have no opportunities for the display of magnanimity. We must be content to rest our reputation on a faithful observance of our oath of office, which binds us to administer the law of Scotland; and we strive to do so, with the lights we have, to the best of our ability. We have also another duty occasionally to perform, which is, to carry out the orders of the House of Lords adversely to our own original opinions, and to this duty we address ourselves most cheerfully, and with the fullest reliance on the wisdom of that most honourable House. But we are now (I think for the first time) required to execute a judgment of the

House of Lords, without the possibility of knowing whether, if we had been allowed to consider and decide the case, our judgment would or would not have been in accordance with that of the Court of Appeal. The form of the order will be, to apply the judgment, and, in terms thereof, to authorise and ordain Colonel Stuart and the Earl of Galloway to deliver the person of the pupil to the petitioner, and to this effect to recal the interdicts formerly granted.

The Court pronounced the following interlocutor:—"The Lords having considered the petition of Major-General Charles Stuart to apply judgment of the House of Lords, and heard counsel, apply the judgment, and, in terms thereof, authorise and ordain Lieutenant-Colonel James Frederick Dudley Crichton Stuart and the Earl of Galloway to deliver the person of the pupil, the Marquis of Bute, to the petitioner, and, to this effect, recal the interdicts formerly granted, and decern."

[Cf. *Free Church* v. *Overtoun*, 42 S.L.R. 9.]

No. 142. **XXIII. Dunlop 915.** 30 May 1861. 2nd Div.—Sheriff of Lanarkshire.

PETER BEATTIE (Inspector of Poor of the Barony Parish of Glasgow), Pursuer.—*Fraser—J. Burnet.*

JAMES DUNLOP KIRKWOOD (Inspector of Poor of the Parish of Govan), Defender.—*Mure—Millar.*

EBENEZER ADAMSON (Inspector of Poor of the City Parish of Glasgow), Defender.—*Patton—Thomson.*

Poor—Settlement—Residence—Stat. 7 & 8 *Vict. c.* 83, *sect.* 76.—A lad earning his own livelihood, resided in his father's house in Govan, the parish of his birth, till Whitsunday 1847. He thereafter [*being upwards of* 14 *years of age*] continued to be employed and took his meals in Govan, but he slept in his father's house in the City Parish of Glasgow till July 1852, with the exception of a period of between six weeks and three months, when his father having left Glasgow in search of employment, he left his father's house and took lodgings in Govan, where he resided till his father's return to the City Parish, after failing to obtain work elsewhere;—*Held*, that the residence in Govan in 1849 was of such a character as to interrupt his industrial residence in the City Parish, and prevent the acquisition of a residential settlement; and that on his becoming a proper object of parochial relief in 1852, the parish of his birth was liable for his support.

Poor—Relief—Stat. 7 & 8 *Vict. c.* 83, *sect.* 71—*Expenses.*—Circumstances in which the Court fixed the rate at which a parish was entitled to charge for relief of the maintenance of a pauper lunatic, and found the pursuer of an action against two parishes entitled to the expense of an advocation.

Samuel Hare, a workman in a factory in Glasgow, became insane, and was committed to the asylum of Barony Parish Poorhouse, at Barnhill, on 15th July 1852, on a petition at the instance of the inspector of poor of that parish. This action was raised before the Sheriff of Lanarkshire in 1858, by the inspector of the Barony, in order to recover from the parish in which Hare should be found to have a settlement, the expense incurred in his apprehension, and in maintaining him in the lunatic asylum, amounting to L.156, and for relief of his maintenance as a pauper in time coming. The parties called as defenders were the inspector of poor of the Parish of Govan, the parish of birth; and the inspector of poor of the City Parish of Glasgow, **[916]** where Hare had his residence when he became chargeable as a pauper. Statutory notice of his having become chargeable as a pauper had been sent to both parishes in 1852.

It was averred for the inspector of Govan;—That the pauper had acquired a settlement by residence in the City Parish of Glasgow subsequent to Whitsunday 1847. It was pleaded—(1.) The pauper having no settlement in Govan, the inspector was entitled to absolvitor. (2.) The *mora* on the part of the pursuer was a sufficient bar to

his recovering any advances, except subsequent to his renewed claim. (3.) The pursuer was only entitled to recover the actual outlays on the maintenance of the pauper; the sums charged for maintenance, being at the rate of 9s. 6d. per week to 15th July 1857, and afterwards at the rate of 10s. per week, were excessive.

It was averred for the inspector of the City Parish;—The pauper did not reside in that parish for five years continuously from Whitsunday 1847.

It was proved that James Hare, the pauper's father, resided in Govan from the time of the pauper's birth till Whitsunday 1847, when he removed to the City Parish. Samuel Hare was then upwards of fourteen years of age, and earning wages sufficient for his own support, by working at a mill in the parish of Govan. After James Hare left Govan, Samuel slept in his father's house in the City Parish, and for sometime his meals were sent to him to his work in the parish of Govan. He continued to reside with his father till July or August 1849, when his father left Glasgow and was absent for some weeks in search of work. During his father's absence, Samuel left the City Parish for some weeks and resided in Govan, but after his father's return he returned to his father's house in the City Parish, and resided there till his father finally left Glasgow for Arbroath in July 1850; his stepmother remained in Glasgow; Samuel lived for some time in her house, and afterwards in lodgings, but always in the City Parish, till a few weeks before July 1852, when his mind became unsettled. He left his lodgings, and after wandering for a short time about the Barony Parish, he was taken charge of by the pursuer and committed to the asylum at Barnhill. The case turned on the question, whether the pauper's absence from the City Parish during 1849 was of such a nature as to interrupt the continuity of residence. The pauper's father deponed, that about nine or ten months before he went to Arbroath, he left Glasgow for about five weeks in search of work. When he left, his wife and his son Samuel were living in the house. When he returned, he found his wife in the house; Samuel was not there, but Samuel returned to the house the second day afterwards. Samuel had left the house in consequence of a dispute with his stepmother. The pauper's stepmother corroborated her husband's evidence.

Mrs. Lawrie, with whom he lodged in Govan, deponed,—Samuel Hare "was working in Centre Street Mill, in Govan Parish, when I was living in Cook Street. Hare took his breakfast and dinner with us for some time, and went home to the other side of the river at night. He paid me regularly every fortnight for his meals. We flitted from Cook Street to Nicholson Street, Govan, about 10th August 1849; at all events it was in August 1849, and the week after we so flitted Samuel Hare came to lodge with us. He was then still working in Centre Street Mill. He continued to lodge with me at all events till Hallowe'en, but how long after I don't remember. I remember him quite well at supper on Hallowe'en. When he lodged with us he slept in our house every night; was not one night absent. He paid me regularly every fortnight. He appeared at this time to be about sixteen or seventeen years of age, a very stout healthy lad, and both able and willing to earn his living, and I knew he supported himself by his own industry. My daughter Ruth had a baby born in our house on 3d December 1849. Samuel had left me before this child was born, but it is so long ago I don't recollect how long he had been away. I think about a week. At this time [917] my husband, three daughters, myself, and Hare lived in the house. Two of daughters were grown up. House consisted of a room and kitchen. Hare slept with my husband in the kitchen, myself and daughters slept in the room. This arrangement continued all the time Hare was with us. He paid 4s. a-week for board, lodging, and washing. I did not know his father. Hare gave as a reason for coming to my house that he and his stepmother could not agree."

Mrs. Lawrie's evidence was corroborated by the evidence of her husband and of her daughter.

The pursuer proved that the average cost of maintaining pauper lunatics in the Barnhill Poorhouse for the years 1854, 1855, 1856, and 1858, was 9s. 8d. per week; that the Barony Parochial Board were charged 10s. per week for pauper lunatics at Gartnavel Asylum, being 6d. per week less than the rate charged other parishes; at Garngad Asylum paupers were charged for at the rate of 10s. 6d. per week; and in no asylum, to which paupers were sent from the Barony Parish, was the rate less than 9s. 7d. per week. It was proved by the defenders that the Barony Parish had charged other parishes at the rate of 7s. per week; and there was produced an extract from the

half-yearly returns made to the Board of Supervision of the average cost per week of maintaining the inmates of the Barony Poorhouse, shewing that from 1854 to 1859 the lowest average was 4s. 6¾d., and the highest 5s. 10¼d.

The Sheriff-substitute (Smith) pronounced an interlocutor, which, after findings in fact, proceeded:—"In law, finds that when Samuel Hare became chargeable on the Barony Parish, he had acquired a settlement by residence in the City Parish of Glasgow, he having lived continuously in said parish from Whitsunday 1847 till a few weeks before 15th July 1852, and having supported himself during all that period by his own earnings, without having recourse to common begging, and without having applied for or obtained parochial relief, and that his short absence from said parish in the autumn of 1849, in the circumstances, did not in law break the continuity of his residence in said parish, said absence having been caused solely by his father's temporary absence in search of work, and his own quarrel with his stepmother: Finds, therefore, that the defender Adamson, as inspector of the City Parish of Glasgow, is bound to reimburse the pursuer, as inspector of the Parish of Barony, for the sums expended in the board and maintenance of the said Samuel Hare, and to free and relieve the pursuer from his maintenance in time coming: Therefore decerns against the defender Adamson, in terms of the conclusions of the summons; assoilzies the defender Kirkwood: Finds the defender Adamson liable in the expenses incurred both by the pursuer and the defender Kirkwood; but in respect a considerable portion of the evidence led by the defender Kirkwood was led to show that the charges made by the pursuer were excessive, in which he was unsuccessful, modifies his expenses to three-fourths of their taxed amount."

The defenders appealed, and the Sheriff pronounced this interlocutor:—"For the reasons stated in the following note, adheres to the interlocutor under review on the general question of the liability of the City Parish of Glasgow; but on the *quantum* of aliment decerned for, finds that, in the whole circumstances of the case, 8s. a-week during the period libelled is a sufficient reimbursement to the Barony Parish for the aliment and maintenance of the pauper lunatic in question; and finds that the aliment at that rate during the period libelled on, along with the other items in the account annexed to the summons, amounts in all to the sum of L.130, 14s. sterling, for which, with interest as libelled, decerns against the defender Adamson: Finds the defender Kirkwood, as representing the Parish of Govan, entitled to full expenses as against the defender Adamson, and so far varies or alters **[918]** the interlocutor appealed against; but *quoad ultra* adheres, and dismisses the appeal for the defender Adamson, and decerns."[1]

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[1] "NOTE.—It is admitted here that the pauper in question was born in the Parish of Govan, and the whole question at issue is whether that settlement by birth has been lost, and another one acquired by industrial residence during the statutory period of five years. On that point the plea of the Parish of Glasgow, generally speaking, is, that the residence of five years by the pauper has been lost by the intermission of a few months during the five years, when the pauper returned to the parish of his birth. The facts of the case which bring out this question appear to be these."—[Here followed a narrative of the facts down to the pauper's removal, on 10th August 1849, to Lawrie's house.]

"The reason of this change of residence was that he had had a difference with his stepmother, in the absence of his father, who had left town in search of work. After the 10th of August he slept at Mary Lawrie's, in the Parish of Govan, and continued at his former employment, which was in the Parish of Glasgow, until the end of October or beginning of November 1849, being a period of two months and three weeks, when, his father having returned, he resumed his former residence in the Parish of Glasgow, where he continued to reside till the expiry of the five years and six weeks. The whole question is, whether this intermission broke the industrial residence in the Parish of Glasgow? The dates above given are taken from the evidence led by the Parish of Glasgow. It is to be observed, however, that the father of the pauper says that the residence of his son out of the Parish of Glasgow was for five or six weeks only, being the period during which he, the father, was absent in search of work. But the Sheriff thinks that the evidence led by the Parish of Glasgow on this head is more specific and trustworthy, and therefore he assumes the intermission of the

[919] The case was advocated, both at the instance of the inspector of the City Parish, and at the instance of the pursuer, by the latter on the ground that the rate of maintenance found due by the Sheriff was inadequate.

The Lord Ordinary reported the case, in terms of the statute, by interlocutor dated 5th December 1860.

It was argued for the inspector of the City Parish;—The evidence of Mrs. Lawrie, her husband, and her daughter, clearly made out that the pauper's absence from the City Parish in 1849 extended to a period of three months, their recollection being shown to be correct by reference to circumstances in which they corroborated each other. The tendency of recent decisions had been to require that the residence

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residence out of the parish to have been two months and three weeks. But it was of a temporary nature only, being occasioned entirely by the temporary absence of his father, and his quarrelling with his stepmother, and it was accompanied by no change of employment or occupation, and was terminated immediately on the father's return. While it lasted, too, the residence was a mere temporary arrangement only, for it appears that the Lawries' house consisted only of two rooms, and that the pauper, who was then a lad of sixteen, slept in the one room with Lawrie, the father, and that his wife and three daughters were packed into the next room, which was evidently a temporary arrangement. In determining the legal question, whether this sleeping out of the parish during a period of two months and three weeks broke the continuity of the residence, the Sheriff is well aware that it has been decided by the Supreme Court in several cases, and is now fixed law, that the fact of the residence is alone to be looked into, and that the intention with which any change of it may have taken place is not, as in questions of domicile, to be regarded. But admitting this to be the case on the one hand, it appears to be equally settled on the other, that it is a material circumstance to inquire whether the absence, such as it has been, was of a permanent or of an accidental character, and whether it was followed by an immediate return to the parish where the industrial residence was broken off. In the case of Bride *v.* Chisholm, 19th December 1857, it was held that the continuity of residence was not broken in the case of a lunatic pauper by two absences, one of five and the other of three months. In the case of Mackenzie *v.* Cameron, 10th December 1858, two periods of absence, one of six weeks, and the other of four months, during the five years, were held not to break the continuity of the residence, in respect they were both of them of an accidental kind only, and neither of them occurred either at the beginning or the end of the five years. These decisions appear to the Sheriff to recognise the principle, that although the *animus* of the removal is not much to be regarded, yet it is material to inquire whether the removal was of a temporary and passing or more permanent character. And, in the circumstances of this case, it appears to the Sheriff, as it did to the Sheriff-substitute, that the removal by the pauper was of the former character only. In regard to the rate of charge, the Sheriff is of opinion that, upon the whole evidence, the sums of 9s. 6d. and 10s. a-week, successively charged in the account annexed to the summons, are somewhat excessive. He is well aware that the charge for a lunatic pauper is necessarily higher than for an ordinary one, in consequence of the greater amount of watching and care which lunatics require. But, on the other hand, it is clear that one parish is not entitled, at the expense of another parish, to make a profit by a pauper, whether sane or lunatic. The parish charged with his maintenance is entitled to be indemnified, but nothing more. The whole question, therefore, in so far as the rate of aliment is concerned, is what has it really cost the Barony Parish to maintain this lunatic pauper? Now, it appears from the evidence in process that the highest rate returned to the Board of Supervision is on an average of 5s. 10½d. for each pauper a-week, and that the average sum which they charge other parishes for lunatic paupers is 7s. a-week. It is not alleged here that the lunatic pauper was violent, or required particular watching, and therefore, if 8s. a-week is allowed, it seems amply sufficient for the whole time, even although there has been, the Sheriff is glad to say, a considerable improvement in the accommodation for pauper lunatics recently in the Barony Parish workhouse. The Sheriff is aware that the charge for lunatic paupers at Gartnavel Asylum is 10s. 6d. a-week, but the accommodation there for lunatics of all classes is much superior to what it is in the Barony Parish lunatic ward, or probably any other pauper asylum in Scotland."

necessary to the acquisition of a settlement should be strictly continuous.[1] The absence here founded on must be held to have broken the continuity of residence in the City Parish, it being clearly proved that during the whole period of the pauper's absence from the City Parish in 1849, he resided in the parish of Govan, where the mill in which he was employed was situated. The absence was not incidental to, but must be held subversive of, his residence in the City Parish.

It was argued for the parish of Govan;—It could not be said that the pauper had shown any preference for the Parish of Govan, or by a residence there for a few weeks as a temporary lodger interrupted the continuity of his residence in his father's house in the City Parish. The cause of his absence from his father's house was merely temporary, as was shown by his return to it when his father came back. What might have been the pauper's intention when he left his father's house could not be easily discovered, but that he merely intended his absence to be temporary was shown from the fact that he became a lodger in a family who made a temporary arrangement for his accommodation, and that as soon as his father returned the pauper also returned to the City Parish.[2] The period of absence was not so long as to interrupt the continuity of residence, much longer periods of absence having been held not to have that effect.[3]

LORD JUSTICE-CLERK.—The only question on which we have hitherto heard parties, is, whether this pauper has retained his birth-settlement in the parish of **[920]** Govan, or has acquired a settlement in the City Parish of Glasgow by residence in that parish for five years. The Sheriff-substitute and the Sheriff have held that the pauper did acquire a settlement by residence in the City Parish. The question thus determined by them is, like all questions depending upon the continuity of residence, a question of some difficulty and subtlety.

One peculiarity of the residence in this case is, that the *terminus a quo*, and the *terminus ad quem*, are both fixed. The pauper went to reside in the City Parish at Whitsunday 1847, and left it a few weeks before 15th July 1852. Another peculiarity is, that the character of the residence was clearly industrial. The only difficulty is, whether the continuity of the residence was not disturbed in the interval. In some cases that have come before the Court, the interruption of the continuity of the residence has been before the expiry of the period of five years. In these cases we have always held that that interruption was fatal to the plea that a settlement had been acquired by such residence. This case, however, raises different considerations.

The first inquiry naturally is, how long was the residence interrupted? the second, what was the nature of the interruption, and the character of the residence out of the parish? The duration of the absence is not very clearly fixed. The best witnesses on that point are the parties with whom the pauper lived during his residence in Govan, viz., Mrs. Lawrie, her daughter, and her husband. The import of their evidence is, that he came to lodge with them in the month of August, and was still lodging with them at Hallowe'en. Whether the old or new style is still adhered to in that part of the country, and whether the witnesses depone to his having been with them at Old or New Hallowe'en, does not much signify. The import of their evidence is, that the pauper lodged with them something under three months. The evidence of the pauper's father and stepmother reduces the period of absence. The father says he was absent for five weeks, and the stepmother confirms that statement; and it was only during that absence of his father for five weeks that the pauper was absent from the City Parish; for the father says, "I left my wife and Samuel in the house when I left, and when I came home Samuel was absent, but returned on the second day, I think, after I came back."

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[1] Hutchison *v.* Fraser, 11th Feb. 1858, *ante*, vol. xx., p. 545; Aberdeen Infirmary *v.* Watt, &c., 15th Dec. 1858, *ante*, vol. xxi., p. 117; Grant *v.* Reid and Miller, 25th May 1860, *ante*, vol. xxii., p. 1110.

[2] Hay *v.* Cumming, 6th June 1851, *ante*, vol. xiii., p. 1057.

[3] Hay *v.* Kirkpatrick, 9th July 1851, *ante*, vol. xiii., p. 1313; Roger *v.* Maconochie, 5th July 1854, *ante*, vol. xvi., p. 1005; M'Kenzie *v.* Cameron, 10th Dec. 1858, *ante*, vol. xxi., p. 93.

I think, if it was necessary to determine which of these two sets of witnesses were entitled to belief, I should rather prefer the parties with whom the pauper lived in the Parish of Govan. But I do not attach much importance to the length of the absence. I think the pauper's object in leaving the City Parish, and the character of the residence in Govan, are of far greater importance.

We must consider the circumstances of the pauper at the time. He resided in his father's house—that is, he slept in it; and I am not aware that he had any other connection with the City Parish than that. But though the place where a man sleeps is perhaps the true test of the place of his residence, still the pauper worked in the parish of Govan, and took his meals there. The seat of his industry was in the Parish of Govan, and he transferred to that parish, when his father went away from the City Parish, his only connection with the City Parish,—that was, his bed,—and he afterwards slept as well as worked in the Parish of Govan. Now what was the cause of the change? The pauper could not live comfortably with his stepmother. But that was only after the father left Glasgow in order to obtain work elsewhere; his object being, by getting work elsewhere, to disconnect himself with Glasgow. Though he left his wife and his house in Glasgow, it was with the object and purpose of removing his family and residence that he went from Glasgow. For the time his object was defeated, and he came back unsuccessful. But shortly afterwards he did succeed in getting work at Arbroath, and there he settled himself. Now the question is, whether the pauper's absence from the City Parish, when his father was away in search of work, can be described as incidental to, or as subversive of his residence there, though it may have been followed by a return soon afterwards?

After giving all attention to the facts, and considering the decisions of this and of the other Division of the Court, I come to the conclusion, that this was not an absence incidental to, but subversive of the residence in the City Parish. The return to the City Parish I regard as purely accidental, and not a continuation of the former residence there. The cause of the absence is perfectly clear. When the pauper left the City Parish he had no longer any inducement to remain there; **[921]** he had a plain inducement to draw him in another way, viz., to be near his work in Govan. The moment he left his residence under his father's roof, Govan is the place of residence which he selects for himself. Therefore, I think this is an interruption of the continuity of residence sufficient to prevent the acquisition of a settlement in the City Parish.

Lord Wood.—I am of the same opinion. The case, so far as hitherto argued, seems to me to turn entirely on the effect of Samuel Hare, the now pauper's absence from the City Parish of Glasgow, during the currency of the five years' residence, by which it is contended he acquired a settlement in that parish. Apart from that absence, which occurred, as it may be stated, in the middle of the residence, there was a five years' residence in the City Parish, for the whole currency of which Samuel Hare supported himself by his own industry. I do not consider it of any materiality to fix with precision the length of the absence from it. It may, I think, be taken to have been of three months' duration, but even if shorter, the absence would be sufficient to break the continuity of the residence, while, if of that length or longer, it might not do so—all depending on the character or quality of the absence.

I agree with your Lordship that continuous residence for five years is necessary to the acquisition of a settlement, and that, on the other hand, to constitute such residence, personal presence during all the time from day to day is not essential. There may be personal absence for a shorter or a longer time, and if it cannot be held to have a temporary character while it lasted, and to be properly incidental to the general residence, then it will interrupt the continuity of the residence, although the absence were for a shorter time than, upon any view of the evidence, could be found to have been its duration in the present instance.

Therefore, the whole question is, what was the character of Samuel Hare's absence from the City Parish of Glasgow, whether of two months or three months' duration? —and I have certainly felt that that is a point not altogether free from difficulty. If it could be held that James Hare, the pauper's father's leaving the City Parish was only meant to be temporary, it having been his definite intention to return to it, and occupy his old house, it appears to me that there might be a good deal to say in support of the

view that the pauper, although, on quarrelling with his stepmother, he left the house, and went to Govan, where he had work, and took up his residence there, did so from the first with a temporary purpose;—that the tie between him and the City Parish was not broken;—and that when he returned to that parish to reside there, and prolonged his residence in it till the five years were completed, the absence in Govan caused no break in the residence. But upon full consideration I have not been able to adopt that view. I think James Hare, the father, when he left the City Parish, is to be looked upon as having gone from it with the intention of permanently leaving it. No doubt he did return to it, but his returning was a mere accident. He might never have done so, and would not have done so had he succeeded in getting work elsewhere, as he desired and expected to do. And accordingly, although on failing to get work he did return, he shortly afterwards left the City Parish for good, having obtained employment at Arbroath.

But this being the state of the case as regards James Hare, the father, I am unable to find sufficient ground for holding that the absence of the son, Samuel Hare, from the City Parish, when he took up his abode in the Parish of Govan, in the house of Mrs. Lawrie, had, in its outset, or during its continuance, the character of an absence properly incidental to his residence in the City Parish, such as in the ordinary course of life must frequently and almost unavoidably occur, and which could not, in any reasonable view, be held as interrupting the continuity of residence in the City Parish before and subsequent to the absence. Samuel Hare had, previously to his leaving the City Parish, worked in the Parish of Govan, and spent the day there—taking his meals in Mrs. Lawrie's, and returning at night to the City Parish. But on his father leaving that parish, he went to reside in Govan, where his work was; and, in the circumstances, it appears to me that the sound inference is, that his connection with the City Parish was thereby dissolved, there being no room for supposing that when he left it, a return to that parish was contemplated, or that it was not a removal having no quality in it which had any reference to the preceding **[922]** residence in the City Parish, to which parish he had then no tie that can give a colour or complexion of a temporary nature to the absence that took place, either in its origin or during its continuance. On the contrary, nothing could be more natural than that the pauper, when his father left the City Parish for the purpose stated, should abandon the City Parish for good as his residence, and settle in that of Govan, without at all looking back to the City Parish as his proper abode, or to his ever again becoming a resident in it, although future events might ultimately induce him to return to it. I am therefore constrained to hold that his absence from the City Parish is to be viewed as standing from the first, altogether apart from any prior connection with the City Parish by his residence there; that the renewal of that residence, when it did take place, was purely accidental; and that the absence therefrom was not incidental to the residence there, and, consequently, broke the continuity of that residence, and that hence the pauper had not a continuous residence for five years in the City Parish. Then, if so, it follows that he acquired no settlement in the City Parish, and that Govan, the parish of his birth, is the parish of his settlement as a pauper, and his maintenance falls upon that parish.

Taking that view of the case, I am of opinion that the interlocutors complained of ought to be recalled, to the effect of finding that Govan is the parish of the pauper's settlement. There is another point still remaining for discussion, viz., the amount which can be claimed by the Barony Parish for the aliment of the pauper.

LORD COWAN.—I am of the same opinion. The whole question turns upon the character of the pauper's absence from the City Parish during the currency of the five years. In Hutchison *v.* Fraser, and other cases, in which the views of the Court have been expressed as to the meaning of "continuous residence," the character of the absence has always been deemed of the greatest importance. I have given the case every consideration in my power, and I cannot agree with the result arrived at by the Sheriffs. As to the length of the absence, I take the same view of the import of the proof as that taken by the Sheriffs, and explained in the notes to their interlocutors. The Sheriff-substitute takes the length of the absence at from three to four months; the Sheriff takes it at two months and three weeks. I assume as matter of fact that the absence was about three months, which was taken to be its endurance in the argument before us. I cannot view this absence for three months in the light of a casual accidental occurrence. It must be viewed in connection with the other facts

and circumstances of the case established by this proof, and having these in view, it seems to me quite clear that this young man, for he was then of the age of sixteen, was separating himself from his former residence when he went to reside in the Parish of Govan. At that time he had no particular connection with the City Parish beyond sleeping there; in point of fact his industrial residence was in the Parish of Govan. The pauper's father had left Glasgow in search of work; the pauper himself then went to Govan, where he had a natural attraction, from his work being there. His father left Glasgow in order to get work elsewhere; and had he succeeded, the pauper would never have returned to Glasgow,—at least such is the inference to which I am irresistibly led by the proof; for on the evidence I can find no reason to infer that, when the pauper left the City Parish, he left it with any other intention than that of breaking off his connection with it. True, the father returns to Glasgow, having failed to get work elsewhere, and then the pauper returned to his father's house, but this was quite accidental. The absence was not a temporary absence, nor incidental to his residence in Glasgow. It was quite different in its character from the absence in the previous cases which have been held to interrupt the continuity of residence. Looking at the whole circumstances, I concur in the views of your Lordship. I consider the judgment of the Sheriff to be wrong, and I am of opinion that the settlement of the pauper is in the Parish of Govan.

Lord Benholme concurred.

The pursuer craved expenses in the advocation at the instance of the City Parish, and argued in support of his motion;—The defenders had not, as is usual in such cases, agreed by minute that the liability for the pauper's maintenance lay between them. He had been cited in the advocation, and required to appear and maintain the judgment he had obtained in the **[923]** Sheriff Court; moreover, he had no notice that the plea of *mora*, stated against him for the Parish of Govan, was not to be insisted in.

It was argued for the Parish of Govan;—The pursuer's presence by counsel at the debate was unnecessary; his counsel was not called on, and the Court would not have allowed the defenders to urge the plea of *mora* without notice to the pursuer.

Lord Justice-Clerk.—The defenders have not excluded the pursuer from the discussion in this Court, as they might and should have done; and they come here after the pursuer has been put to prove his case, still insisting in the plea of *mora*. It is a serious thing for a defender in such an action to state any defence which the pursuer has an interest to controvert. I think that in the circumstances the pursuer is entitled to a watching fee, which I would propose your Lordships should modify at five guineas.

The other Judges concurred.

The Court pronounced this interlocutor:—"Alter the interlocutor of the Sheriff-substitute and Sheriff complained of: Find that the pauper Samuel Hare did not, at any time before he became an object of parochial relief, reside for five years continuously in the City Parish of Glasgow: Therefore find that the settlement of the pauper is in the Parish of Govan, as the parish of his birth; assoilzie the defender Adamson from the conclusions of the summons, and find him entitled to expenses both in this and in the inferior Court, and remit to the Auditor to tax the same and to report: Find the respondent Peter Beattie also entitled to expenses, and modify the same to five guineas."

On the note of advocation for the pursuer being called, it was argued in support of it;—The sum of 8s. per week awarded by the Sheriff was inadequate, seeing that it was proved by the evidence of the governor of the poorhouse that prior to 1858 the amount expended on pauper lunatics amounted to 9s. 9d. per week. The settlement of claims against other parishes did not preclude the pursuer from his claim to be restored against his actual outlays. The Sheriff's principle of what was reasonable would be a good ground for fixing the rate at 8s. if there was any ground for objecting to the rate charged, which was the actual cost.

Lord Justice-Clerk.—I see no reason to disturb the Sheriff's judgment on this point. During the earlier years of this lunatic's maintenance in the asylum, the rate charged against other parishes was 7s. per week, and the board can scarcely go back

on their own acts and charge a higher rate for these years. That does not apply to the later years, during which the cost of maintenance may have been higher. I think the Sheriff has awarded a fair average.

The other Judges concurred.

The Court pronounced the following interlocutor in this advocation:—"Repel the reasons of advocation, and remit the case simpliciter to the Sheriff: Find the advocator liable in expenses to the respondents Adamson and Kirkwood, and remit," &c.

[Cf. *Hamilton* v. *Kirkwood*, 2 M. 111, 113.]

No. 143. **XXIII. Dunlop 923.** 31 May 1861. 2nd Div.—Lord Jerviswoode.

Viscountess HAWARDEN and Others, Petitioners.—*Young—Macfarlane.*

GEORGE DUNLOP, Respondent.—*Sol.-Gen. Maitland—Moir.*

Judicial Factor—Appointment—Competition—Succession—Sequestration—Agent and Client.—A proprietor disponed his whole heritable property to his law-agent *ex facie* absolutely, but admittedly in security of advances, and the agent was infeft. On the client's death an earlier deed was found, disponing the client's whole property, heritable and moveable, to the agent, and appointing him executor. **[924]** The agent's proceedings to obtain confirmation, with a title to administer moveable estate situated in England, in order to which he required to satisfy the Commissary that the deceased died domiciled in Scotland, were opposed by the deceased's representatives. In an application at their instance for sequestration of the whole heritable and moveable estate, on the ground that the debts in consideration of which the disposition was granted were not really due, and that the deed, being granted in favour of the granter's agent by whom it was prepared, was null,—*Held* that there was no ground for sequestration of the heritable property, which the deceased had during his lifetime put the agent in possession of, but that a factor should be appointed to recover and manage the moveable estate, to which no title had been made up, and to which none could be completed till the question of the deceased's domicile was determined.

John Fleeming, Esq. of Biggar and Cumbernauld, succeeded to the Elphinstone peerage in July 1860, and died in January 1861. Before he succeeded to the title of Lord Elphinstone, Mr. Fleeming, besides property held by him in fee-simple, was possessed of the estates of Wigtoun, Biggar, and Cumbernauld. These estates were entailed by the Earl of Wigtoun in 1741. The succession under that entail having opened to the entailer's daughter, Lady Clementina Fleeming, she, with consent of her husband, Charles Lord Elphinstone, in 1779 disponed part of the estate in feu to her son William, on condition that the disponees should possess the estate on the footing and in terms of the entail of 1741. William Elphinstone was infeft on the feu-disposition; and in 1780 he executed a new entail in favour of his mother and a series of heirs. This entail was not recorded till 1826. It was supposed that the feu-disposition executed by Lady Clementina Elphinstone, and the re-entail by her son, was a device resorted to with the view of getting quit of a condition contained in the entail executed by Lord Wigtoun, to the effect, that if any heir of entail, other than an heir-male of himself or his brother Charles, succeeding to the dignity of the peerage, the person so succeeding should be bound to denude in favour of the next heir.

When Mr. Fleeming succeeded to the estate, it was found that previous to the recording of the deed of entail of 1780, debt to a considerable amount had been contracted, with which Mr. Fleeming was advised he was entitled to charge the estate. He was also advised that the entail was defective, and he was entitled to treat the estates as his fee-simple property. Both of these views were opposed by his sister, Lady Hawarden, the next heir under the entail; but to accommodate her brother, and, if possible, relieve him from his difficulties, she and the other heirs of entail consented to a private Act being obtained, whereby he had power to burden or sell part of the

estate, and re-entail the remainder. This business was partly managed by Messrs. G. and G. Dunlop, W.S.; and about the year 1845 Mr. George Dunlop, the respondent, one of the partners of that firm, was appointed Mr. Fleeming's law-agent, and the late Mr. Ramsay of Barnton, his factor and commissioner. On Mr. Ramsay's death in 1850, Mr. Dunlop was appointed his factor and commissioner. On Mr. Fleeming's succession to the title of Lord Elphinstone, Mr. Dunlop continued to manage his whole business, and was so acting at the date of Lord Elphinstone's death. It was then found that, by a disposition and settlement executed in 1854, his whole estate was bequeathed to Mr. Dunlop, who was appointed sole executor.

Lord Elphinstone was not married. His nearest surviving relations at his death were his sisters, Viscountess Hawarden, and Mrs. Bontine, spouse of Mr. Bontine of Ardoch, and John Henry M'Alister, the only son of the marriage between a deceased sister and Mr. M'Alister of Loup.

Mr. Dunlop presented a petition for confirmation to the Commissary of Dumbarton, wherein he designed himself executor to Lord Elphinstone **[925]** under the disposition and settlement executed in 1854; and in order to include the personal estate in England in the same inventory, under the provisions of the Act 21 & 22 Vict. c. 56, sect. 9, the petitioner prayed the Commissary to find that Lord Elphinstone died domiciled in Scotland, and that it was competent to include property in England and Ireland in the inventory of his personal estate. Lady Hawarden and the next of kin of Lord Elphinstone opposed this application, and a record was ordered to be made up.

Lady Hawarden thereafter filed an affidavit in the Probate Court in England, narrating Lord Elphinstone's death; that she was one of the persons entitled to his personal estate, in case he should be pronounced to have died intestate; that it had been alleged that his Lordship had executed a will in the Scotch form appointing Mr. Dunlop as his executor. Upon this affidavit a citation was issued, calling upon Mr. Dunlop to appear and propound the will in his favour. Mr. Dunlop appeared, and after various procedure in the suit, the Court refused a motion made by Mr. Dunlop to stay proceedings till the conclusion of the proceedings in the Scotch Courts.

Mr. Dunlop made a partial delivery of the titles of the entailed estate to Lady Hawarden's agent, but after having some correspondence with him relative to the transfer of the titles, he refused to give up possession. On delivery being refused, her Ladyship's agents proceeded to let the grass parks of Cumbernauld. Mr. Dunlop brought a suspension and interdict of these proceedings, in which it was stated by him that the disposition of 1859, though *ex facie* absolute, was in security only; that it had been revised by counsel, and that a back-bond was framed, but was not executed during Lord Elphinstone's life. Lady Hawarden then presented a petition, praying for sequestration of the rents, &c. of the entailed estate, and for the appointment of a judicial factor to manage it. A petition, praying for the same appointment, was also presented by Mr. Dunlop. Both petitions were answered. They were conjoined by the Lord Ordinary, and a factor was appointed.

The present petition, praying for sequestration of Lord Elphinstone's fee-simple and personal estates, was then presented to the Lord Ordinary on the bills at the instance of Lady Hawarden and her husband, Mrs. Bontine and her husband, and their marriage trustees, and Mr. M'Alister. The petitioners averred that Mr. Fleeming was ignorant of business, and had no knowledge of his affairs but such as was communicated to him by Mr. Dunlop, and all that was communicated to him was that his affairs were in a very embarrassed state, and that he was largely indebted to Mr. Dunlop on his factorial and business accounts. That in these circumstances Mr. Dunlop had obtained a complete ascendancy over the deceased, and procured the deed of 1854 by fraud and circumvention. That the deceased had, on 28th October 1856, granted Mr. Dunlop a bond and disposition in security for L.9455, 3s. 1d., therein stated to be then due by Mr. Fleeming to him. On 9th May 1859, the deceased granted Mr. Dunlop a bond and disposition in security over the same subjects for L.8000. On 14th November 1859, the deceased executed a disposition, whereby he acknowledged to have received from Mr. Dunlop L.15000, and in consideration thereof disponed to Mr. Dunlop his whole entailed estates, under a declaration that they were conveyed only in so far as permitted by the entails. There were also disponed the whole properties held by him in fee-simple, besides various bonds and policies of insur-

ance on Mr. Fleeming's life. So far as the deed was a conveyance of heritage, it was recorded in the Register of Sasines. The deed was prepared by Mr. Dunlop himself, and it bore to be granted for certain good causes and considerations. It was represented by Mr. Dunlop to be a mere security for sums alleged to be owing Mr. Dunlop on his accounts as his agent and factor, should the deceased's death take place before these **[926]** accounts were paid. It was also averred, that on a proper accounting no sum whatever was then, or was at the date of the petition, due to Mr. Dunlop, and the deceased was not informed that its effect would be to transfer his succession absolutely to Mr. Dunlop. Whatever sum was due to Mr. Dunlop was satisfied or secured by various deeds and securities granted to him by Mr. Fleeming, *inter alia*, the two bonds and dispositions in security for L.9455, 3s. 1d., and L.8000 respectively, besides which Mr. Dunlop received various other bonds for money expended on the improvement of the entailed estate, which were assigned for onerous causes, and the proceeds received to account of his claims against the deceased. In 1854 the deceased left Scotland *animo non revertendi*. His establishment at Cumbernauld House was broken up, and the house let. He never returned to Scotland, and died in England. Subsequently to 1859, when he divested himself of his whole property, he had no real estate in Scotland. Lord Elphinstone having died domiciled in England, the petitioners were, by the law of England, under which his property fell to be distributed, entitled to his whole moveable property. It was also maintained by the petitioners, that the deed of 1859 having been taken by an agent from his client without due consideration or the intervention of any neutral person, was absolutely void.[1]

Answers were given in for Mr. Dunlop, who averred;—The deceased occupied the position of Lieutenant-Colonel Commandant in the British Foreign Legion till it was disbanded. He always took an interest in the state of his own affairs, and was fully informed regarding them. The respondent was the intimate friend of the deceased, and had latterly acted in the management of his affairs under a factory and commission dated in 1850. In security of large sums disbursed by him, he received the bonds for L.9455, 3s. 1d. and for L.8000, and also the disposition of 1859, which, though *ex facie* absolute, was in reality only granted in security, and had never been averred by the respondent to have been granted to him on any other footing. The disposition conveyed also the entailed estates of Wigtoun, Biggar, and Cumbernauld, subject to the conditions and prohibitions of entail, but so far only as they were effectual. On the deceased's succession to the title and estates of Lord Elphinstone, the sums due under the above mentioned bonds were still unpaid, and a farther debt of L.3000 had been incurred; but he was then enabled to make arrangements for paying off his debt to the respondent, and at his death a loan for that purpose was being effected with the Scottish Union Insurance Company. Lady Hawarden raised an action against Lord Elphinstone for declarator—that by his succession to the peerage he had forfeited right to the entailed estates of Biggar and Cumbernauld. To this action defences were lodged, in which it was maintained that the entail was defective and ineffectual. He had been advised by counsel that the entail was invalid, and had executed in 1855 a conveyance of the property in favour of himself in fee-simple. Upon the deceased's death it was found that he had executed the will of 1854, containing a disposition of his heritable and moveable estate in favour of the respondent, and the heirs of his body, the respondent being appointed sole executor and universal legatory, but under the declaration that the deed was granted subject to all debts and legacies he might direct to be paid by any writing under his hand. Upon Lord Elphinstone's death a copy of the will was sent to Lady Hawarden's agent in London, who admitted the respondent's position as executor nominate, and, with their knowledge and approval, the whole management and expense of the funeral devolved upon him; he disbursed various sums for servants' wages, and received possession of Lord Elphinstone's repositories and effects, both in London and at his **[927]** residence in England, where he died. Since the date of the disposition of 1859 he had been infeft and in full possession of the fee-simple property in Scotland. The petitioners gave no indication of any intention to dispute the validity of the will of 1854 till they appeared as objectors to the proceedings before the Commissary of Dumbarton. In the proceedings before the Commissary, an order was pronounced on 26th March 1861, ordering the objectors to revise their

[1] Anstruther *v.* Wilkie, 31st Jan. 1856, *ante*, vol. xviii. p. 405.

objections; but, though the time appointed for doing so was long past, that order had not been obtempered, and the petition under answer had been presented. Lord Elphinstone never lost his Scotch domicile; at the time of his death he had made arrangements for returning to Scotland, which had been partly carried into effect. It was maintained that no grounds in law had been stated why the prayer of the petition should be granted. The case of Anstruther *v.* Wilkie, cited by the petitioners, being the case of a deed *inter vivos*, challenged by the granter, was not an authority in the case of a deed granted *mortis causa*. A deed of the nature of a testament granted in favour of a party's agent, was perfectly good.[1] As regarded the moveable estate sought to be sequestrated, the respondent was in possession as executor nominate under a deed that was unreduced; as such, he was entitled to confirmation, and even the dependence of an action of reduction would not warrant sequestration and the appointment of a judicial factor.[2] With regard to the heritable estate, the distinction between the fee-simple property and the entailed estate was obvious—the fee of the former was subject to Lord Elphinstone's disposal, and had been conveyed by a deed *ex facie* regular; in the case of the latter, the possession of the respondent might be imputed to the conveyance in his favour of Lord Elphinstone's liferent right, and it was still to be determined whether his Lordship had power to convey the fee.

On 3d May 1861 Lord Jerviswoode, Ordinary officiating on the bills, pronounced this interlocutor:—"Sequestrates the personal estate of the late John, fourteenth Lord Elphinstone, formerly John Fleeming of Biggar and Cumbernauld, and the rents, issues, and profits of the estates of Croybank, Palacerigg, and Tannoch, referred to in the petition, which belonged to the said Lord Elphinstone in fee-simple, and nominates and appoints William Moncrieff, chartered accountant in Edinburgh, to be judicial factor on said estates, real and personal, with the usual powers, he finding caution before extract, and decerns."[3]

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[1] Barry *v.* Butlin, December 1838, 2 Moore's P.C. Reports, p. 480.

[2] Hyndford, 5th December 1769, Mor. p. 14,347; Mackay *v.* Dalrymple, 9th March 1796, Mor. p. 5239; Graham *v.* Bannerman, 28th February 1822, 1 Sh. & D., p. 362.

[3] "NOTE.—This case presents features which are, in several respects, peculiar; and, therefore, numerous as are the precedents to which reference may be made in any question of such a complexion, it can scarcely be said to be directly ruled by any of them.

"The Lord Ordinary has, after consideration, come to the conclusion that the safe course, with a view to the protection of the ultimate rights of both parties, without affecting seriously the present interests of either, is to appoint a factor as craved.

"As explained at the debate, the present application has reference to the moveable estate of the late Lord Elphinstone, and also to certain lands which were held by his Lordship in fee-simple, the entailed estates having already been placed under sequestration in a previous process.

"As respects the moveable estate, the Lord Ordinary cannot say he feels much difficulty in acceding to the prayer of the present petition, for it appears to him to be obvious that the right to it forms the subject of direct and active competition in suits now in dependence in the Courts both of England and of Scotland, and that no possession of it can be alleged by the respondent, of a character such as to bar the present application.

"As respects the heritage, the case is in some respects different. To this the respondent maintains his right of possession under two separate deeds, which differ materially in their form and object. The first is the disposition and settlement of 13th February 1854, and on which sasine has been taken, and which is referred to in the answers, whereby Lord Elphinstone conveys to the respondent his estates, heritable and moveable, and appoints him to be his sole executor and universal legatory.

"This deed has been objected to by the petitioners as being an insufficient title to the executry, both in the Commissary Court of Dumbartonshire, and in the Probate Court of England, in the proceedings mentioned in the petition; and, looking to the nature of the questions there raised regarding it, and which go to affect its general validity, as a deed on which the respondent can found to any effect, the Lord Ordinary cannot, as he thinks, deal with it as conferring a right sufficient to protect him in the uncontrolled possession of the property thereby conveyed. It is true that the respondent has taken infeftment, according to the existing forms, under this deed. But, while this

[928] Mr. Dunlop reclaimed. Along with his reclaiming note there were produced—1st, A copy circular letter, dated 6th April 1860, addressed to the tenants on the Biggar and Cumbernauld estates by Mr. Dunlop, informing them that the proprietor's whole interest therein had been conveyed to Mr. Dunlop, with entry as at Martinmas 1859; 2d, Form of receipt for rent granted by Mr. Dunlop, as commissioner for the proprietor for rents due previous to 1859; and 3d, Form of receipt granted by him for rents due subsequent to that date.

It was argued in support of the reclaiming note;—This was an appeal to the *nobile officium* of the Court, in circumstances in which such an application had never been sustained. The allegations of fraud made against the reclaimer were *prima facie* groundless. It was apparent that the deceased was embarrassed; he had succeeded to an encumbered property, and funds had been found to provide for his debts by his agent, who required to have [929] some security. It was not averred that the deceased got advances from any other quarter than from his agent. There was no reduction of any of the deeds raised by the petitioners. As regarded the heritable estate, the disposition of 1859 had been intimated to the tenants; and afterwards the respondent, who had previously granted receipts for rents as the proprietor's factor and commissioner, granted the receipts as proprietor, and that during the deceased's life. Where a party infeft was in actual possession, as here, the Court were never in use to invert that possession on such vague statements as were made by the petitioners. As to the moveable estate there was raised a question of domicile, but the presumptions were in favour of the deceased having retained his Scotch domicile. He was the proprietor of one Scotch entailed estate, and in hopes of succeeding to another, and to a Scotch peerage, at the time when he left Scotland, which he did solely on account of his health. The will of 1854 was good by the law of Scotland. On the deceased's death the reclaimer had been allowed to take possession of all his moveable effects; but, in order to get an apt title, he had been obliged to go to the commissary for confirmation. Had the respondent merely applied for confirmation as executor nominate, without seeking to embrace in his inventory property in England, he would have at once obtained it. That he took the course allowed by the new Act did not make any difference. There was an allegation that the will did not carry moveables in England, but that at best depended on the petitioners succeeding in establishing an English domicile. There was no such competition as would entitle the Court to take the management from the

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aids his formal title, it does not, as the Lord Ordinary thinks, materially strengthen his position in the question in equity, with which the Lord Ordinary has here to deal.—See the cases of Brown, 29th May 1845, and Elliot, 27th May 1843.

"The other deed on which the respondent founds is the disposition *ex facie* absolute, dated 25th November 1859, of, *inter alia*, the lands here in question, and on which also sasine has followed. This deed purports to convey to the respondent extensive heritable estates, and also to assign to him several policies of insurance.

"The respondent alleges that, since the date of this disposition (Ans., p. 5), he has been in full and uninterrupted possession of the lands in question; and it would appear he has, since the death of Lord Elphinstone, let certain grass parks for the season 1861. But it is admitted by him that the deed was granted merely in security of advances, and not as an absolute disposition in property. Therefore, the right of the respondent to hold under this deed is truly dependent upon the state of his pecuniary transactions with the deceased, as to which the information given in the answers is by no means precise, and as to which parties are not agreed. If it be the case that the respondent has claims, in security of which he is entitled to hold the subjects under this deed, it is presumed that the present sequestration of these subjects will not ultimately injure that security, while the very character of a right *ex facie* so complete, and on which sasine has followed, gives the opposing party a material interest to see that it is not, pending inquiry, open to be used to their detriment.

"Looking, then, to the circumstances of this case, including the peculiar relation held by the respondent with respect to the deceased, as his confidential agent, during the whole period of these transactions, the Lord Ordinary thinks, as he has stated, that the petitioners are entitled, in the present position of matters, to the protection which they here seek."

party who had the proper title thereto, especially where no reduction had been brought.

It was argued for the petitioners;—This was a case in which the title to manage the estate might be long undetermined. An interdict had been obtained in the Bill-Chamber against any wood cut in Lord Elphinstone's lifetime being sold, or any of the estate interfered with. The reclaimer was now prevented from uplifting the rents and policies of insurance until a case involving a question of domicile should be determined. Some explanations were necessary where a client had signed deeds dispossessing himself of his whole estate in favour of his agent, who prepared the deeds.[1] It was not stated by the reclaimer that he had exhibited accounts of his intromissions to the deceased, though it was distinctly stated by the petitioners that he had not done so. The policy upon which the law required explanation of the circumstances where a conveyance *inter vivos* was executed by a client in favour of his agent, applied with greater force to the case of a conveyance by will.[2] This application was merely made to insure the preservation of the deceased's estate till the determination of all the questions that were raised. Where the validity of a will, prepared by the agent of the granter in favour of the agent, was in issue, the *onus* would lie on the grantee to prove the validity of the will. That would be the application in this Court of the rule of English law as stated in the authorities cited.

It was stated at the bar in reply to a question from the Court;—There were seven policies of insurance on Lord Elphinstone's life,—four were specially conveyed by the deed of 1854; two policies of insurance subsequently effected were conveyed along with these four policies by the deed of 1859; and shortly after its execution, a further insurance to the amount of L.12,000 was effected by Mr. Dunlop for his own protection. The only policy assigned by these deeds, of which the assignation was intimated, was one for L.6000, the other having been previously assigned to special creditors, whose claims would nearly exhaust the amount contained in them. The policy for L.6000 **[930]** was pledged to the insurance company for certain advances, which had been reduced to L.1200, but the balance of L.4800 had been paid to Mr. Dunlop.

At advising,—

Lord Justice-Clerk.—My Lords, this is an application for sequestration of the whole estates, real and personal, of the deceased Lord Elphinstone, with the exception of the estates which he possessed as an heir of entail, presented by his nearest relatives, some of whom are his heirs-portioners in heritage, and others are his next of kin. The respondent in the petition is Mr. George Dunlop, W.S., who says that he is in possession of these estates by virtue of certain deeds executed by the deceased Lord Elphinstone. It appears to me that it is indispensable, in considering the merits of this petition, to distinguish between the heritable and the moveable estate of the deceased, because the grounds of this application, in reference to the one and to the other, are different; and, I think, the rule applicable to the one and to the other, in a question of sequestration, is somewhat different also. In the first place, with reference to the heritable estate, Mr. Dunlop alleges that the whole of it has been conveyed to him by a deed executed by the deceased in the year 1859, upon which he was infeft during the deceased's lifetime. Now, it is alleged on the one hand by the petitioner, and admitted by the respondent Mr. Dunlop upon the other, that that conveyance, though *ex facie* absolute, was, in truth, intended as a security for Mr. Dunlop's advances, whatever these may be; and we must therefore take that to be the state of the fact. But it is nevertheless quite true, and of great importance in this question, that for the purpose of securing these advances Mr. Dunlop received from the deceased a title of property; because, although he is only entitled to hold that title of property until he shall be paid his advances, it is not a bit the less on that account in law a title of property, carrying with it all the rights of ownership, so long as it remains unrenounced and undischarged. While Mr. Dunlop is infeft under that deed, he is not only entitled to the unconditional and unqualified possession of the estate, but there is not a single act of ownership that he is not entitled to perform, subject always

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[1] Hunter *v.* Atkins, 2 Tudor's Leading Cases in Chancery, p. 495.

[2] Baker *v.* Balt, 16th May 1858, 2 Moore's P.C. Reports, p. 317; Barry *v.* Butti, 2 Moore's P.C. Reports, p. 480.

to this condition, that he may be stopped and his right defeated by paying off the advances which the title of property is intended to secure. Now, under this deed we have it admitted by the petitioner very distinctly and clearly, that from the 24th day of November 1859, when infeftment was taken upon the deed, or rather as the petitioner says, from the date of the deed itself, he, Mr. Dunlop, had the entire possession and control of the estates in virtue of that deed. That is the statement of the petitioner upon the sixth page of his petition. Now the death of Lord Elphinstone did not put an end to the operation and effect of that deed of 1859. Nothing could put an end to it but a complete payment or discharge of those sums in security of which it had been granted. Until that takes place, the deed must receive full effect. Now I must say that I have never seen an example of a sequestration of the rents of a landed estate, where it was admitted that the party against whom the application was presented, was in the entire possession and control of the estate under a disposition *ex facie* absolute; and I am not prepared to grant a sequestration of the rents of a landed estate under such circumstances. I think the remedy is, in such circumstances, inappropriate and inadmissible. In that view of the case I do not find it necessary to lay much stress upon the deed of 1854, although that deed also conveys this heritable estate expressly, and was followed by infeftment in favour of Mr. Dunlop, after the death of the granter. But I may say that if Mr. Dunlop had here been standing upon the deed of 1854 alone, with the infeftment following upon it, I could not have granted this application any more than I can under the existing circumstances; because although certain statements have been made in this petition, to the effect that that deed is liable to serious objections, no challenge whatever of the deed has been brought, and it remains not only an existing but an unchallenged title, secured by infeftment, to those estates, the rents of which are proposed by this petition to be sequestrated. But it appears to me that the respondent's case, as regards the heritable estate, depends chiefly upon the deed of 1859, and upon that I am disposed to rest my opinion. Then, my Lords, we come to consider the position of the personal estate of the deceased. Now Mr. Dunlop, by the deed of 1854, which conveys moveables as well as heritage, is **[931]** executor nominate of the deceased, and if under that nomination he had applied in ordinary form for confirmation, it does not appear to me from anything that I can see in the papers before us, that his application could have been successfully resisted, or that Mr. Dunlop's confirmation could even have been materially delayed or postponed by any opposition upon the part of the petitioners, unless at least they had brought a challenge of the deed of 1854, containing this nomination of him as executor, upon some intelligible and relevant ground. But then what is the course that Mr. Dunlop has taken under this deed of 1854? He has made an application to the Sheriff of Dumbartonshire, under the 9th section of the recent Confirmation Act, to obtain such a confirmation as will enable him to have an active title to the personal estate in England as well as in Scotland; and for the purpose of accomplishing that, it is necessary that he should, as a preliminary, satisfy the Commissary of Dumbartonshire, that the deceased died domiciled in Scotland. But that matter of fact is disputed by the petitioners, and they accordingly have joined issue with him in the Commissary Court of Dumbartonshire; and we are informed now that the Sheriff contemplates ordering a proof upon the question of fact, which of course necessarily implies that the ultimate decision of the question, whether Mr. Dunlop is to be confirmed executor under that application to the Commissary of Dumbartonshire, will not be determined for a very considerable time. The application of the petitioners to obtain letters of administration in England I do not think has much bearing upon this question. But my opinion is founded entirely upon the circumstance that there is in the Commissary Court of Dumbartonshire a question raised which must be determined before Mr. Dunlop can obtain confirmation as executor under the application which he has thought fit to present, and that that question cannot be determined for a very considerable period. In the meantime there is no party who has any legal title to intromit with any part of this executry estate. No doubt a considerable portion apparently of the executry estate consists of policies of insurance upon the late Lord Elphinstone's life; and these policies of insurance are the subject of assignation, some of them in the deed of 1854, and a still larger number of them in the deed of 1859; and if the assignations of the policies of insurance in either or both of these deeds had been completed by intimation, I think Mr. Dunlop would have stood in a very different position, because

in that case he would have had a good title to the policies, and consequently a good title to uplift and discharge the sums contained in these policies, now that these sums have become due by the death of Lord Elphinstone. But then it was admitted to us, for we desired an explanation upon that subject, that none of these assignations had been intimated, with the exception of the assignation of a single policy in the deed of 1859—a policy for L.6000 by the Scottish Union Insurance Company; and with regard to that policy, it appears that after paying off certain preferable debts, for which it had been impignorated, there was a balance of L.4800 due, and that balance was paid to Mr. Dunlop, and is now in his possession. That balance of L.4800, therefore, forms no part of the executry estate, and we have nothing to do with it. Mr. Dunlop of course will in due time be called to account for that sum in a general accounting between the parties, but it forms no part of the executry estate. So far as the other policies of insurance are concerned, Mr. Dunlop has not secured any active title, or any title which could enable him to uplift the sums contained in these policies, and so they stand just in the same position as the rest of the moveable estate of the deceased. The whole moveable estate is *in bonis defuncti*, and there is nobody with any title to intromit with or uplift any part of it, and there is no immediate prospect of anybody obtaining such a title. Now, it appears to me that that is just the state of matters in which it is right for the Court to interfere, and to grant the prayer of this petition, appointing a judicial factor to manage this moveable estate in the meantime for the benefit of all concerned. The conclusion, therefore, at which I arrive is, that we ought to adhere to the Lord Ordinary's interlocutor in so far as he grants the prayer of the petition *quoad* the moveable estate, but that we should alter it, and refuse the petition *quoad* the heritable.

Lord Wood.—I entirely agree with the distinction which your Lordship has drawn between the heritable and moveable estate. In regard to the one, I think **[932]** it clear that we cannot sequestrate it, and in regard to the other, on the contrary, I think it necessary that we should sequestrate it, and for the reason which your Lordship has stated, that there is no party who has a legal title to intromit with the moveable estate, and that it may be a very considerable time before anybody can obtain a title, in consequence of the form of proceeding which Mr. Dunlop has adopted before the Sheriff of Dumbartonshire. That being the state of the case, the moveable property is not to be left in a condition in which it may be damaged or lost, but some person must be appointed to recover and manage it. What may be recovered under the sequestration by the judicial factor is a very different thing. Apparently a great portion of the executry consists of policies of insurance assigned to Mr. Dunlop by the deeds executed by Lord Elphinstone, and founded on by the petitioner. As to one of these policies, the assignation has been intimated, and the amount paid to Mr. Dunlop, and he will have to account for it. And, as to the others, I think it was stated that Mr. Dunlop had made no intimation of them, because they had been previously assigned to creditors of Lord Elphinstone in debts which would more than exhaust these policies, so that Mr. Dunlop could have taken nothing by an intimation to the insurance company, of the assignations in his favour. But what portion of the moveable estate may be recovered by the judicial factor we have nothing to do with. We will sequestrate the moveable estate, and the judicial factor will of course do his duty.

But, in regard to the heritable estate, on the grounds which your Lordship has stated, I am satisfied that we cannot interfere to sequestrate it. It is needless that I should go over these grounds again; but this is a particularly strong case, because we have not only, in my opinion, clear evidence that Mr. Dunlop was in possession under the deed of 1859, and had been in full possession and full control of the estate subsequent to the infeftment in November 1859, which was taken during Lord Elphinstone's life, and, indeed, from the date of the deed itself; but we have the admission of the petitioners, that, from the date of the infeftment, he has been in the full possession in every respect. And, certainly, it does not in the least degree affect the question of sequestration that it so happens that while the deed is *ex facie* absolute, Mr. Dunlop admits that he holds it as a security for the advances which he had made. Still it is a title of property, and he is in possession as proprietor, and with all the rights of ownership of a proprietor, although he has admitted that he holds it as a security, and, consequently, may be wiped off whenever the advances which he allows it to be a security for are paid. But, in the meantime, he was entitled to enter into

possession for that purpose, and to hold, as proprietor, for that purpose, and it is just the same in my opinion as regards the question of sequestration as if it had been an absolute deed, as to which there was no admission of its being a security for advances. Then there is no reduction. Now, is there any case where such an application has been granted, where a party is in possession, with no challenge of the deed, in virtue of which the possessor so held—with no reduction? I do not know that reduction would have made it any better; but we have no reduction, and nothing stated that in reality raises any competition as to the heritable estate.

I do not, however, mean to say that there might not be a case, notwithstanding possession, in which it might be made apparent to the Court that the estate should be sequestrated. I do not think it necessary to say that absolutely. But I am quite satisfied that, in the present case, nothing of the kind has been made out. For all that we have is mere averment,—averments of deception, or that the advances were not made which are alleged to have been made. There is nothing in the shape of fact except one fact, namely, that the deed was executed by Mr. Dunlop, the agent for Lord Elphinstone, and that that deed was prepared by him in his own favour. But I am yet to learn that there is anything absolutely incompetent in an agent who has made advances taking security from his client over his estate, and entering into possession, and holding it as an available security till it is set aside, or that it is enough to deprive the deed of effect, merely to say that it was prepared by the agent in his own favour. That may make it a case for inquiry, and it may be difficult to support it afterwards; but I apprehend that here there is no ground whatever for doing anything else than was done in those other cases where possession has been had, and where the Court has invariably refused to sequestrate the estate where that was the state of the matter. And, **[933]** therefore, merely further observing that I fully concur in your Lordship's observations in regard to the deed of 1854, I have only to add that I agree in the result to which your Lordship has come.

LORD COWAN.—I am of the same opinion. I am not aware of any case, and I have gone over all the decisions having reference to applications for sequestration of landed estates, and cannot find in the reports any case in which the Court have ever sequestrated a landed estate and its rents and proceeds where the party is infeft as absolute disponee and in possession of the estate, and where there is no existing competition or reduction. I will not say that cases may not occur where we might interfere; but certainly in this case there are no special circumstances sufficient to exclude it from the operation of a general principle, which hitherto have been always recognised in applications for the sequestration of a landed estate and its rents. No sequestration has ever yet been granted where the party is infeft and in possession, and where there is no reduction of his title and no depending competition, as in the case of a ranking and sale. And I am not prepared in this case to depart from the practice of our predecessors. As regards the moveable estate, I have nothing to add in stating my concurrence with your Lordships' views.

LORD BENHOLME concurred.

The Court pronounced the following interlocutor:—"The Lords having heard counsel on the reclaiming note for George Dunlop against Lord Jerviswoode's interlocutor of 3d May current, Adhere to the said interlocutor in so far as it grants the prayer of the petition *quoad* the moveable estate, and refuse the petition in so far as it prays for a sequestration of the heritable estate of the said deceased."

[Cf. *Rhind* v. *Sheach*, 2 R. 1004.]

No. 144. **XXIII. Dunlop 933.** 5 June 1861. 1st Div.—Lord Ardmillan.

The LORD-ADVOCATE, Pursuer.—*Lord-Adv. Moncreiff—Sol.-Gen. Maitland—Fraser.*

The COMMISSIONERS OF SUPPLY for the COUNTY OF EDINBURGH, Defenders.—*Young—Marshall.*

[4 Macq. 387; 10 S.R.R. (H.L.) 538.]

No. 146. **XXIII. Dunlop 965.** 6 June 1861. 2nd Div.—Lord Kinloch.

WILLIAM STUART STIRLING CRAWFURD, Complainer.—*Patton—Montgomery Bell.*

ARCHIBALD STEWART (Collector and Inspector of Poor for Blair-Atholl), Respondent.—*Sol.-Gen. Maitland—J. T. Anderson.*

Poor—Assessment—Property—Lease—Shootings—Construction of Statute.—Held (*aff.* judgment of Lord Kinloch), that a lessee of shootings in a parish where the assessment for the poor was imposed, one-half upon the owners and the other half upon the tenants or occupants of the "lands and heritages," was liable to be assessed, in respect of his lease, as a tenant or occupant of lands or heritages.

[966] Mr. Stirling Crawfurd, in 1852, obtained from the Duke of Atholl a lease for seven years of "the lodge of Dalnaspidal, with the furniture therein, conform to inventory, together with the exclusive privilege of shooting and sporting over all and whole the shooting grounds of Dalnaspidal, Mealnaletterich, Corlienean, and part of Dalnacardoch, conform to the marches thereof," at the annual rent of L.520; binding himself "to pay the wages due to the keepers to be appointed by the said noble Duke for taking charge of the said grounds, and also to pay all other wages and expenses incidental to the proper protection of the game; and farther, the said W. S. S. Crawfurd undertakes to use the subjects hereby let in a sportsmanlike manner, and not to overshoot the same in any one year, and especially in the last year of this lease that he shall not kill a greater quantity than in any of the previous seasons, but shall maintain and leave a sufficient stock on the grounds for breeding;" obliging himself also "not to allow his keepers or others to shoot hares on the grounds hereby let, after he and his friends have left said shooting for the season." By the minute of lease the Duke reserved to himself "the whole red deer that are now or hereafter may be upon any part of the said lands, with power to hunt for, stalk, and kill the same at all times when he shall see proper; and he farther reserves the fishing in the whole lochs and burns on the grounds let, the tenant and his friends having the privilege of rod-fishing during their stay at the lodge."

Mr. Crawfurd also obtained, in 1855, a lease of the shootings on the adjoining lands of Badnabeist from Captain Boxer Stewart of Urrard, at the rent of L.100 per annum.

The Parochial Board of the parish of Blair-Atholl, in which these lands are situated, and in which the assessment for the poor is imposed, "one-half upon the owners and the other half on the tenants or occupants of lands and heritages within the parish, rateably, according to the annual value of such lands and heritages," having assessed Mr. Crawfurd, in respect of these leases, as a tenant or occupant of lands, at the rate of 8d. per pound on a rental of L.590 (being the rental of the lands as entered in the valuation roll), and having threatened to enforce the assessments for 1858 and 1859, by the summary procedure authorised by the Poor-Law Act, he brought the present suspension.

The note having been passed on consignation, a record was made up.

It was admitted by the respondent that the whole lands were also let as grazings, and that the tenants of the grazings, as well as their landlords, were assessed on the rental derived therefrom; but the respondent alleged that the rental of the lands as grazings was considerably diminished in consequence of their being let and preserved for shootings.

The complainer alleged that the right acquired by him under the minute of lease was a mere personal franchise delegated to him by the proprietor under the conditions therein mentioned. It was not of any value, but was, on the contrary, a cause of heavy expense. The expense of gamekeepers, dogs, and relative expenses, were stated to amount to between L.300 and L.400 per annum.

The complainer pleaded;—(1.) The personal franchise or privilege of shooting game for sport is *sua natura* in habile to render the holder of it assessable for the poor, whether it happens to remain in the person of a qualified landowner, or to have been delegated by him, either onerously or gratuitously, to a third party. Such franchise

or privilege is not a subject susceptible of having the relations of landlord and tenant applied to it. (2.) The so-called shooting lease above mentioned being truly and intrinsically of no annual value whatever to the suspender as lessee, but, on the contrary, being merely a source of heavy expenditure for purposes of sport and recreation necessarily involving considerable patrimonial loss, is not a **[967]** lease under which the lessee is assessable in the contemplation of the Poor-Law Act. (3.) The omission of shootings, or the personal franchise of shooting, from the careful enumeration of subjects comprehended under "lands and heritages" in the Poor-Law Act, must be presumed to have been made *ex proposito*, and, at all events, it has the effect of excluding shootings, or the personal franchise of shooting, from rendering the holder thereof assessable under the said Act. (4.) A so-called shooting-lease affords no criterion whatever of the tenant's amount of means and substance or patrimonial estate, either proportionally with other tenants of land in the parish, or in any other manner whatever. But it is only as such assumed criterion that the Poor-Law Act has authorised the rent or annual value of leases to be used as a basis for imposing assessment. (5.) The poor-rate is a personal tax, and the suspender being elsewhere already fully assessed for the poor,—if he shall now be subjected to additional assessment in Blair-Atholl, solely in respect of his exercising a personal franchise for the purposes of sport within that parish,—he will be thereby exposed to double assessment, which is contrary to a fundamental principle in the poor-law of Scotland. (6.) In any view, the expenses which are requisite for keeping up the subjects of the so-called lease in their actual state must be deducted from the amount of rent when viewed as the basis of assessment. (7.) The personal privilege of rod-fishing during the suspender's stay at the lodge on Dalnaspidal, when viewed as the basis of an assessment for the poor, is open to every objection to which the shooting franchise is liable, with the addition that, in point of pecuniary consideration, it is quite insignificant, and no pecuniary consideration was either asked or given for it. (8.) The small lodge at Dalnaspidal being merely an accessory to the shooting-franchise, and a minor subject in a lease, which can yield no annual value to the lessee, the occupancy of it by the suspender, especially for so brief a period, cannot render him assessable as a tenant or occupant under the Act; at all events, the suspender can only be thereby made liable for assessment to the extent of the annual value of the lodge itself as an unfurnished tenement, which would not exceed L.10. (9.) The suspender has had no tenancy or occupancy of any subjects within the parish of Blair-Atholl to which liability of assessment for the poor is legally attached.

The Lord Ordinary, on 30th January 1861, pronounced the following interlocutor: —"Having heard parties' procurators, and considered the closed record, and whole process, finds that the suspender is liable to be assessed for the relief of the poor in the parish of Blair-Atholl, as tenant or occupant of lands or heritages within the said parish, in respect of the leases referred to in the record; and appoints the cause to be enrolled, in order to be proceeded with and brought to a termination in accordance with the prefixed finding."[1]

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[1] "NOTE.—The question in the present case regards the liability for poor's rates of the suspender, Mr. Stirling Crawfurd, in respect of his being a lessee of shootings in the parish of Blair-Atholl. The assessment for the poor in that parish is made on the principle, sanctioned by the statute, 'that one-half of such assessment shall be imposed upon the owners, and the other half on the tenants or occupants, of all lands and heritages within the parish, rateably, according to the annual value of such lands and heritages.'

"By the principal lease referred to, Mr. Crawfurd took from the Duke of Atholl, for the space of seven years, 'the lodge of Dalnaspidal, with the furniture therein, conform to inventory, together with the exclusive privilege of shooting and sporting over all and whole the shooting grounds of Dalnaspidal, Mealnaletterich, Corlienean, and part of Dalnacardoch.' The rent payable was L.520 per annum. The suspender engaged in a similar lease with Captain Boxer, of the lodge and shootings of Badnabeist, at a rent of L.100 per annum.

"It was stated by the suspender that in both these cases, more especially the last, the lodge was comparatively of little value; in the last case, indeed, uninhabitable. The Lord Ordinary has in his judgment assumed these statements, being desirous of

[968] The complainer reclaimed, and argued;—The cases of Macpherson, Sinclair, and Menzies, referred to in the Lord Ordinary's note, did not decide **[969]** the present

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meeting the broad question of the assessability for poor's rates of a tenant in a game lease.

"The legal character and effect of a lease of shootings have more than once come into controversy in recent times. The law may be said to have exhibited on this subject a process of transition, adapting itself as it advanced (which it is fitting the law should do) to the altered circumstances of social life.

"In the year 1826, a question arose whether a lease of shootings was effectual in the tenant's favour against a singular successor in the property of the lands; or, in other words, whether it fell under the protection of the Act 1449, c. 18, passed, as its terms bear, 'for the safety and favour of the poor people that labour the ground.' It was found that it did not do so. And Lord Cerehouse, in the note to his interlocutor, characterised such a lease as merely a personal privilege, exercised by delegation—(Pollock, Gilmour, and Company *v.* Harvey, 5th June 1828, S. vi. 913).

"If this had remained permanently imprinted, as the true character of a lease of shootings, there would thereby have been afforded a strong argument against making such a lease the foundation of assessability to the poor. It does not, indeed, deprive a lease of its character as such that it is not protected by the statute 1449; for several sorts of lease are in this predicament, as, for instance, leases which have no definite ish. But, according to the view taken in the case of Pollock, Gilmour, and Company, it might fairly be said that a lease of shootings was no proper lease at all, but the mere exercise, in the proprietor's room, of an optional recreation.

"But, as leases of shootings became more and more common, and were turned into ordinary sources of pecuniary profit to landed proprietors, they came to be regarded by the law (and the Lord Ordinary thinks rightly), as truly involving an increased produce from the land, and enhanced value to the property. In the case of Macpherson *v.* Macpherson (May 24, 1839, D. i. 794, 5 Bell's Appeals, p. 280), the decision of which was affirmed in the House of Lords, the rent received for the shootings was found proper to be taken into computation, in fixing the jointure of a widow who was entitled, under the entail, to 'a fourth part of the free rents of the estate.' Lord Campbell remarked, in giving his opinion in the appeal,—'I can see no reason in the world why, if the produce of the ground is devoted to the feeding of game, the profit thence arising should not be considered the annual rent of the land, just as much as if the produce of the ground is devoted to the feeding of four-legged animals, deer, cattle, or sheep:—it is a rent received substantially for the use and occupation of the land.'

"Before this case of Macpherson was decided in the House of Lords, another case had arisen and been determined in the Court of Session, and the judgment in that case was quoted to the House of Lords, and received their approbation, viz., the case of Sinclair *v.* Duffus, 24th November 1842, D. v. 174. The question in that case was, whether the rent of game, actually let, and in use to be let, was to be computed, in estimating children's provisions, competent under an entail to the extent of two years' rent of the estate. The question was decided in the affirmative, on a reference for opinion to the whole Court. The position laid down by Lord Moncreiff, whose opinion was concurred in by the majority, was, 'that whenever the proprietor of an entailed estate has actually let the power over the game frequenting a particular part of it, the rent payable by the tenant is legally a part of the rental of that estate.'

"It still remained undetermined whether, where the shootings were not actually let, their estimated value was to be brought into computation in such a case. But in the case of Menzies *v.* Menzies, 11th March 1852, D. xiv. 451, which had reference to a widow's locality, limited to a fourth part of the lands and estate, it was determined, 'that the value of the shootings on the locality of the land, although they had not been previously let, were to be taken into computation along with the values of the other shootings on the estate, in ascertaining whether such a provision exceeded the extent allowed by the entail.'

"After these decisions, the Lord Ordinary cannot consider a lease of shootings as importing any other than the ordinary relation of landlord and tenant, in the case of land under lease. Its character, he thinks, is fixed to be that of a lease of land for a particular use; and the yearly return to be rent of land, in the proper sense of the

question; they turned, not upon the nature of the right of shooting, but upon the fact that rent was actually derived, or was obtainable, **[970]** for it,—which was held to be

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term. He cannot in this view arrive at any other conclusion, than that both parties are liable to the assessment for the poor, in respect of their interest under the lease.

"And, first, to take the case of the landlord: how can it be disputed, after these decisions, that the rent payable under the lease of shootings is, in legal character, just an addition to the annual value of the land owned by him? It is in respect of such value he becomes liable to assessment. The tax, though sometimes loosely spoken of as a tax on land, is properly a personal tax. It is not a tax on land, but a tax on an individual in respect of land. The amount of the assessment is determined by the value of the land. It seems wholly impossible, after the decisions in question, to exclude the game rent, in the estimation of this value. In other words, the landlord in such a lease is rateable to the poor in respect of his interest under the lease.

"But, if the landlord in the lease be liable in the assessment, so equally must the tenant, for the tenant's part of it. It is impossible to discriminate the cases. There cannot be a half-tax, leviable on only one of the parties. The assessment, once fixed to arise, is, under the statute, divided equally between landlord and tenant. It is interest in the land, valued in the same way to both, which raises the assessment into operation. The tax is here also a personal tax. The rent is merely a measure of the tenant's means and ability. The suspender, as the tenant of shootings, is in law a tenant or occupant within the parish of Blair-Atholl, liable, equally with his landlord, in the support of the poor of the parish, according to the statutory measure of pecuniary capacity, and therefore of enforced charity.

"The difficulties raised by the suspender were mainly founded on two circumstances, of which neither the one nor other is, in the view of the Lord Ordinary material.

"The first of these was, that the occupation was unbeneficial; it neither did, nor by possibility could, yield him a pecuniary return. Pecuniarily it was a source of loss, not of gain. But the authorities rule, that it is not indispensable to assessability for the poor that the occupation should be pecuniarily beneficial. Land may be occupied for the purest purposes of recreation, and yet the tenant be assessable. Suppose that ground occupied under a lease is all laid down in a flower garden and shrubberies;—the tenant must unquestionably pay poor's rates. Land may be let for a deer forest, and any other use of it absolutely excluded; yet, it is supposed that no doubt could exist of the liability to poor's rates of both landlord and tenant in such a case.

"The other circumstance relied on was that, in occupying the ground for the mere purpose of shooting wild animals, the suspender was drawing no part of the produce of the soil, and therefore could not be said to be a tenant or occupant of land in the proper sense of the term. This, it was said, could be maintained with more force, that the land was actually let to other tenants for pasture, and the character of tenant belonged, it was maintained, exclusively to the tenants of the grazings. But again, it is at variance with authority to assume it to be necessary to the character of tenant of land that the lessee draw the produce of the soil, in the ordinary sense. In the case of the Edinburgh Water Company *v.* Hay, a judgment of the Court, affirmed by the House of Lords (M'Queen's Appeals, vol. i. p. 682), laid the poor's rate on the Water Company, in respect of the ground occupied by their pipes, and for no other reason. Suppose that, in place of being let for shooting game, the land is let for shooting at a target—a large tract of it leased, as may be figured in these times, for rifle practice, or artillery drill, and exclusively confined to this purpose—the mere circumstance that the land is diverted from its ordinary use, and no produce drawn from the soil, would not, it is conceived, affect the responsibility to assessment, of landlord and tenant respectively. The case of the deer forest has been already referred to. The most absolute limitation to the keeping and shooting of deer will not, it is thought, exempt from liability in respect of the land so devoted. The tenant of the deer forest is tenant of land, in the statutory sense. Suppose the limitation not absolute, and the forest in part let for grazing; the result will merely be to introduce two simultaneous tenants, each for his respective use of the land. The value of the land is compounded of the rents payable by both. The Lord Ordinary cannot see that it is different where, as in the present

sufficient for the decision of these cases. Here the question was, whether the right of killing game was within the meaning of the words "lands and heritages" as used in the Poor-Law Act? It had been decided in Pollock, Gilmour, and Company *v.* Harvey, by Lord Corehouse and the First Division of the Court, and by a large majority of the Judges in the cases above referred to, relative to provisions to widows and children, that the right of killing game was not a real right, and not a right of property. It was sometimes an incident of the right of property; but not always. It was not a necessary incident of the right of property; because a proprietor, unless he had a ploughgate of land, did not possess it.[1] It could not be held, therefore, that a person acquiring the privilege for the purpose of recreation and sport, by delegation from the proprietor, was assessable as tenant or occupant of lands and heritages. If it were so held, the result would be, that every proprietor who did not let the game on his estate would be assessable both as owner and occupant of the right of killing game, although the whole lands should be let to agricultural tenants. The Valuation Act, though it included let shootings in the term "lands and heritages," yet undoubtedly did not, and was not meant to increase the subjects assessable, but only to afford a uniform mode of valuing such subjects as were assessable.

[971] LORD JUSTICE-CLERK.—I have no hesitation in expressing my concurrence in the able and well-reasoned judgment of the Lord Ordinary.

The assessment under the Poor-Law Act is a personal tax; and it depends on the mode in which the Poor-Law Boards elect to proceed under the 34th section of the statute, on what class of persons the tax is to be laid. In this parish, as in most parishes of Scotland, it is laid entirely on those persons who represent the real property in the parish, one-half of it on the owners, and the other half on the occupiers of the property; and it is obvious, that in determining whether any assessment is regularly laid on, the most important inquiries are, whether the property in question is real property within the parish, and whether the person assessed is in the condition of being either an owner or occupier of that property.

As to the first of these questions, there is no difficulty whatever. Nobody contends—and this is the fallacy of the reclaimer's argument—that shootings are in law

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case, the land is partly let for grazing, and partly to the game tenant, for the purpose of his shooting other game than deer. In legal construction, the tenant of the game is in the same category with the tenant of the grazings. He is tenant of the land for a particular use. He pays rent for that use, and thereby increases the value of the land to the landlord. He is therefore liable as tenant in the one-half of the assessment for the poor, specially levied in respect of that increased value.

"An argument was raised by the suspender on the interpretation clause in the Poor-Law Amendment Act (8 and 9 Vict., cap. 83, sect. 1), which purports to define what the phrase 'lands and heritages' shall 'extend to and include.' It is declared to include 'lands,' and 'fishings,' and a great variety of other particulars. But shootings are not comprehended. The Act was contrasted in this respect with the more recent Lands Valuation Act (17 and 18 Vict., cap. 91, sect. 42), which, in defining 'lands and heritages,' expressly declares the phrase to comprehend 'shootings and deer forests, where such shootings or deer forests are actually let.' The inference drawn was, that, under the Poor-Law Act, shootings were *ex proposito* excluded.

"It occurred to the Lord Ordinary, that the argument from the Lands Valuation Act was a two-edged weapon, which might perhaps be employed against the suspender as much as in his favour. But, be this as it may, the Lord Ordinary conceives that the case is properly to be determined by reference to the terms of the Poor-Law Act exclusively; and therein by a sound consideration of the meaning applicable to the word 'land' as used in that statute. If the Lord Ordinary is right in holding that the suspender is, in legal construction, a tenant of land for a particular use, the question is thereby solved. It may be that this implies a change of nomenclature from what would have been employed in former times. But a change of nomenclature is an incident of progress. The word 'land,' used in the Poor-Law Amendment Act, is a comprehensive term, which expands itself, naturally and properly, to meet every change of use, and practical alteration of value."

[1] Trotter, 8th July 1809, F.C.

separatum tenementum. The real property, in respect of which the assessment has been imposed, is land in the most natural and ordinary sense of the term. It is the estate of Dalnaspidal that is proposed to be assessed; and it is said that the parties who stand to that estate in the position of owners and occupiers are respectively the Duke of Atholl and Mr. Stirling Crawfurd. But the terms "owner" and "occupier" have, under the Poor-Law Act, a special meaning. We have nothing to do under the Poor-Law Act with titles. A party is owner under the Act if he is in the civil possession of the lands; for the interpretation clause of the statute says, that the term "owner shall apply to liferenters as well as fiars, and to tutors, curators, commissioners, trustees, adjudgers, wadsetters, or other persons who shall be in the actual receipt of the rents and profits of lands and heritages."

And so with regard to the occupation of the land; the person holding the land under the owner, and who is in the personal occupation of it, is to be held the occupier under the statute, without regard to his title of possession.

Now, the Duke of Atholl is undoubtedly the owner, but it is said that Mr. Stirling Crawfurd is not, within the meaning of the Act, the tenant or occupier of these lands, because the lands were in the occupation of another tenant, who rents them for grazing. But I see no difficulty in holding that lands may be occupied for two different purposes at one and the same time. If the owner can turn his land to a double account, by letting it to one party for shooting and to another for grazing, and if he gets rent from both, I do not see why the one of these is more properly the occupier of the land than the other; and, therefore, the question is, whether, having regard to the annual produce or value of these lands, as measured by the payments made by the occupiers to the owner, the Duke of Atholl and Mr. Stirling Crawfurd are not respectively the owner and occupier of Dalnaspidal.

Mr. Stirling Crawfurd pays a game rent—that is, an annual consideration for being allowed to shoot on these lands. If it were an open question whether such a rent was a part of the actual annual value of the lands or no, the case might require further consideration. But the question is not open. The cases of Macpherson (24th May 1839, 1 D. 794, aff., 5 Bell's App. 280) and Duffus (24th November 1842, 5 D. 174) conclusively fix that a shooting rent is part of the annual produce of an estate. Thus, in Sinclair *v.* Duffus, Lord Moncreiff says:—"Whenever the proprietor of an entailed estate has actually let the power over the game frequenting a particular part of it, the rent payable by the tenant is legally a part of the rental of that estate;" and Lord Campbell in Macpherson's case says:—"It is a rent received for the use and occupation of the land."

Following that principle, I conclude that the rent, on which this assessment has been calculated, is paid and received for the use and occupation of the land by Mr. Stirling Crawfurd; and, therefore, we have here all the elements for a legal assessment. There is the relation of owner and occupier, and the annual value, being a rent paid by the one and received by the other for the use and occupation of the lands.

That is all the length I find it necessary to go. Whether it might be possible to lay on an assessment in respect of the value arising, or capable of arising, from good shooting subjects unlet, is not at present before us. I not only do not give an opinion on that point, but at present I have none. I shall only say that the **[972]** Poor-Law Act does not seem to contemplate or authorise any assessment on the latent or undeveloped capabilities of land.

LORD WOOD.—I am of the same opinion. The Lord Ordinary has given reasons for his judgment which I think quite satisfactory.

LORD COWAN.—I concur. The question is simply whether this rent is part of the annual value or rent of these lands. On the authorities referred to by your Lordship, I cannot doubt that it is.

LORD BENHOLME.—I quite concur; and I shall only make one observation with reference to the Valuation Act. It appears to me to apply so far as to give the basis of assessment; and as, according to the interpretation clause, shootings are only to be included in the valuation when let, Mr. Patton's anticipations with regard to unlet shootings are without foundation.

The Court adhered, with expenses from the date of the Lord Ordinary's interlocutor.

No. 146[2]. **XXIII. Dunlop 972.** 6 June 1861. 2nd Div.

CATHERINE ALLAN, Petitioner.—*Fraser.*

Bankruptcy (Scotland) Act, 19 & 20 *Vict.*, *c.* 79, *sect.* 48—*Process—Petition—Register of Inhibitions.*—In a sequestration of the estates of John Mackenzie, awarded by the Sheriff-substitute at Peterhead on 22d May 1861, upon the petition of Catherine Allan, a creditor, there was an omission to transmit the abbreviate to the keeper of the Register of Inhibitions, as required by the 48th section of the Act. The Court, on a petition by Catherine Allan explaining that, as the bankrupt had no heritable estate, the omission was of no practical consequence, granted warrant to the keeper of the register to receive and record the abbreviate, and to write and subscribe a certificate in the form specified in the statute.—*Authorities cited.*—A B, petitioner, 20th May 1851, Scot. Jur., vol. xxiii. p. 441; Munro *v.* Dickson, 21st June 1851, *ante*, vol. xiii. p. 1209.

No. 147. **XXIII. Dunlop 972.** 7 June 1861. 1st Div.—Lord Kinloch.

JESSIE ROSS, Pursuer.—*Millar—Macpherson.*

DONALD MACLEOD, Defender.—*Gordon—Crichton.*

Held (by Lord Kinloch, and acquiesced in), that a pursuer is not barred from bringing a declarator of marriage founded on promise *subsequente copula*, by having previously, but after the date of the alleged *copula*, brought an action of damages for breach of promise, in which action the defender had been assoilzied.

Held (*alt.* judgment of Lord Kinloch), that a promise to marry, which, when followed by *copula*, will found a declarator of marriage, cannot be proved by parole evidence of courtship and engagement; (2) in the circumstances of this case, *copula* had not been proved subsequent to a written promise of marriage.

Question, how far a written promise of marriage, unqualified in its terms, may be qualified by the circumstances under which it was granted?

Opinion that if, during a course of illicit intercourse, a promise of marriage be given, and the intercourse thereafter continues as formerly, these facts will not, *per se*, constitute marriage.

Jessie Ross brought a declarator of marriage against Donald Macleod, alleging that in November 1855, while she was living with her mother, who kept a lodging-house in St. James' Square, she became acquainted with the defender, that he visited her very frequently, and courted her with a view to marriage; that in the month of February they became engaged, and that this was generally understood by their friends to be the case. On the proof that was led, the Court had no doubt that these facts were established.

[973] Jessie Ross further averred (Cond. 4) that, "relying on the repeated promises and declarations of the defender, and their mutual engagement to marry, she permitted the defender to have carnal intercourse with her," in her mother's house, in March and April 1856. (Cond. 7.) "In addition to the repeated verbal promises of the defender to the pursuer during the period of their courtship, and the intercourse of man and wife which followed their engagement, the defender gave the pursuer a holograph promise of marriage, in the following terms:—'I hereby declare that I shall make you my lawful wife, before God and man, within three months from this date.' (Signed) 'D. MACLEOD. April 12, 1856.'" (Cond. 8.) "In reliance upon this written promise, the pursuer allowed the defender to cohabit, and have carnal intercourse with her during the said month of April, and during the months of May, June, and July 1856, in the said house, No. 13 St. James' Square."

Macleod denied that any verbal promise to marry had been given, and that carnal intercourse had taken place; and stated that Jessie Ross "never till the raising of the present action, alleged that any marriage had taken place or been constituted. Of date August 1856, she instituted against him an action for breach of promise of marriage,

said to have been made by the writing quoted in article 7 of the condescendence, from which action the defender was assoilzied by interlocutor pronounced by Lord Kinloch, Ordinary, on 25th June 1858, and which judgment was acquiesced in by the pursuer." He gave the following answer to the 7th article of the pursuer's condescendence:—"Admitted that the defender, on the occasion of his being in the house of the pursuer's mother on or about the 12th April 1856, was induced by the latter to write the document here quoted, but explained that he did so at her suggestion, and merely to calm and pacify the pursuer, who appeared to be violently excited, and threatened self-destruction. This excitement the defender now believes to have been feigned. Explained further, that it was never intended that the writing should constitute, or be viewed as a promise of marriage by the defender, by which he was to be bound to marry the pursuer; and it was stated by the defender to the pursuer and her mother at the time, that he wrote the document in question merely at the solicitation of the latter, and with the object above stated. On the occasion of a subsequent visit, the pursuer, at the defender's request, and on his insisting that the writing should be destroyed, professed to destroy it, and burnt a paper which she assured him was that which he had written in the circumstances above mentioned. In so doing, and preserving the paper, the pursuer acted deceitfully and fraudulently, and with an intention to deceive the defender, and relying on the assurance given by her, he understood and believed that the writing had been destroyed."[1]

The pursuer pleaded;—1. The defender having courted the pursuer with a view to marriage, and having entered into an engagement and made promises to marry her, on the faith of which she submitted to his embraces, has contracted a valid marriage with the pursuer by promise *subsequente copula*. 2. The defender having refused to adhere to or aliment the pursuer as his wife, the pursuer is entitled to decree of adherence and aliment as craved.

The defender pleaded, *inter alia*;—2. The writing relied on by the [974] pursuer having been written without any intention of thereby constituting a promise of marriage, but for a different and temporary purpose—to calm the excitement under which the pursuer appeared at the time to be labouring, and to prevent her threat of self-destruction being carried out—the same cannot be founded on as constituting such promise. 3. The pursuer having pretended to destroy the said document, and given the defender an assurance that she had done so, and, in so doing, having acted fraudulently and deceitfully, is not entitled to found thereon, nor to insist in the declaratory conclusions of the action. 4. At all events, the pursuer having, by her said conduct and actings, discharged the said alleged promise, and departed from and renounced any supposed claim or right under the said document, marriage cannot be constituted by any alleged *copula* subsequent thereto, even if it could be proved that such took place. 5. The pursuer having, in the action of breach of promise raised by her against the defender, maintained that the said promise had been broken, thereby discharged the said promise, and renounced and departed from any right, or supposed right, to found thereon as a promise which by subsequent *copula* could constitute marriage. 6. The pursuer is now barred from founding on the said writing as a subsisting promise, or as a promise which *subsequente copula* constituted marriage. 7. No sufficient or relevant ground has been set forth to support the alternative conclusion for damages.

The first discussion was limited to the plea that the pursuer was barred from insisting in the present action. The Lord Ordinary (Kinloch) pronounced the following interlocutor:—"Having heard parties' procurators on the closed record, finds that the pursuer is not legally barred from insisting in her conclusions for declarator of marriage, and to that extent repels the defences, reserving their effect *quoad ultra*: Allows the pursuer a proof of the facts averred by her in the record in support of these conclusions, and to the defender a conjunct probation: Grants diligence," &c.

[1] In the record in the Sheriff-Court case referred to, which was produced in this action *in modum probationis*, the defender Macleod had stated—"During one of his visits, and when the defender said this, the pursuer rose and took a paper from a box and burnt it, and said that his excuse for not marrying her no longer remained, for she had now destroyed his promise. The defender never believed that it was the document he granted which the pursuer thus destroyed, and he told her so at the time."

Macleod reclaimed; but afterwards withdrew his reclaiming note, and the proof was proceeded with.

The evidence as to the *copula* was to the following effect:—

Catherine Fraser had been a servant in the house, and was about fourteen years of age at the date of the circumstances spoken to. She deponed that she had been in the service of the pursuer's mother up to 15th May 1856; and that, between February and that time, the defender had spent six nights in the house along with the pursuer, two at least of which were subsequent to the date of the written promise, and she had, on more than one of these occasions, seen them in bed together. The whole of the rooms set apart for lodgers had been let to a Mr. Chisholm, a Mr. Fraser, and a Mr. Woodyer, and a cabinet-maker. On three of these occasions, when Macleod slept in the house, he and the pursuer had spent the night in a parlour let to one of the lodgers, and on one occasion in Mr. Woodyer's bed-room during a temporary absence of Mr. Woodyer. She also gave the following evidence:—"He and Jessie Ross passed that night together in Mr. Fraser's bed-room. Mr. Macleod left the house next morning about eight o'clock. I think that was about the end of April. I do not recollect what day of the week that was. I saw Mr. Macleod and Jessie go into Mr. Fraser's bed-room together about nine o'clock that evening. They shut the door; and Mr. Fraser came home about ten o'clock at night. He was expected home that night. When I opened the door to him, he took off his boots in the dining-room, and went to his bed-room; but the door was locked, and he could not get into it. Interrogated, Are you sure it was Mr. Fraser, and not Mr. Chisholm, that was in the house at that time. Depones, I cannot exactly say. I think it was Mr. Fraser. Mr. Fraser had to lie on the sofa in the dining-room all that night. At seven o'clock next morning Miss Ross came out of Mr. Fraser's bed-room and made [975] breakfast for Mr. Macleod. I saw her come out of the bed-room. She took the breakfast into the dining-room, and Mr. Fraser and Mr. Macleod breakfasted there together. . . . There was no lodger in the house that night, except either Mr. Fraser or Mr. Chisholm; one or other of them was in the large bed-room that night. The lodger who rented the dining-room knew that Jessie Ross used it as her sleeping room. Interrogated, Did either of them know that Mr. Macleod passed the night in the dining-room along with Jessie? depones, Oh, yes. Mr. Fraser knew it perfectly well, and so did Mr. Chisholm. Interrogated, How did they know it? depones, Because, in passing backwards and forwards, they saw Mr. Macleod's boots at the dining-room door; and they also must have heard Jessie and Mr. Macleod conversing together in the dining-room at night. Interrogated, How did they know that they were Mr. Macleod's boots? depones, One morning I carried his boots by mistake to Mr. Fraser's room, and he brought them into the kitchen, and said they were Macleod's boots. Both Mr. Fraser and Mr. Chisholm saw Mr. Macleod often about the house, and knew him by name. Mr. Fraser never made any inquiry whose boots they were. Neither Mr. Fraser nor Mr. Chisholm ever made any remark to me about Macleod passing the night in the dining-room with Jessie Ross." She deponed to having been told one Sunday evening by Jessie Ross, that she had got writings from Macleod; that Jessie Ross had seemed to her to be quite well all that day, and she had never heard that she was ill; that, about a fortnight afterwards, she "heard Macleod ask Jessie to give him the paper back again. She said, no. They were quarrelling all that night about it;" when she had gone to bed, she had left them in the dining-room. She also deponed that, on a subsequent night, "Macleod and Jessie passed the night together in the bed in a little room beside the kitchen."

Chisholm deponed to having lodged in the house till after the middle of April; that there were there, at the same time, a lodger named Woodyer, and one "who, to the best of my recollection, was a person named Fraser, a cabinet-maker. He frequently found the parties in his parlour; and one evening, returning home about seven, at which hour he was generally out, I went to my bed-room door for the purpose of dressing for the theatre, and found the door shut and fastened, so that I could not get in. I called to the servant girl to inquire the reason of its being shut. She said there was some person in the room. I turned back along the passage to the kitchen." "It took me a minute or so to get a candle from the girl, and by that time my door was open. The pursuer and defender came out of the room, and came together into the kitchen." He deponed that one morning he went to the dining-room, and "on opening the door I

found the pursuer and defender both there, and they had evidently been sleeping on the sofa, from the appearance of the room and the sofa, on which there were bed-clothes, which were in a state as if parties who had been lying on them had just turned out. There were articles of wearing apparel, shoes and stockings, lying about the room. The pursuer had on a morning wrapper, and the defender had his trousers on, without his coat." "I never breakfasted in the dining-room with the defender." "Depones, I never complained of the pursuer and defender's using the dining-room in the way I have described. I did not like it; but I said nothing, preferring to leave the house, which I did on account of what I saw was going on. I got tired of it, and simply left the house."

Alexander Fraser deponed he was a builder, and lodged with Mrs. Ross for three months prior to 3d June 1856, when he left and was married. There was no lodger of the name of Chisholm in the house when he was there, but he was told that one of that name had preceded him in the rooms he occupied. "To the best of my remembrance I slept in my own bed-room every night during the whole three months that I occupied the [976] lodgings. I never slept in any other room in the house except my own bed-room. Interrogated, During those three months, do you know if Mr. Macleod, the defender in the action, ever slept in the house? depones, I am not aware that he did; but it occurs to me that it is possible that I occupied another apartment for a short time, both night and day, to accommodate other lodgers, and that, therefore, I should qualify the statement which I have made as to having occupied the same rooms during the whole of my stay." "Interrogated, Did the servant girl ever bring to you the defender's boots instead of your own? depones, Not that I remember. Interrogated, Did you ever see the defender's boots standing at your dining-room door? depones, I do not think I did. Interrogated, Did you ever take a pair of boots from your own bed-room into the kitchen, and say, 'these are Macleod's boots?' depones, Never. Interrogated, Were you ever kept out of your dining-room in consequence of its being occupied, or said to be occupied, by the defender and pursuer? depones, I do not think I ever was. Interrogated, If you had been kept out either of your dining-room or bed-room by the pursuer and defender occupying either of them all night, would you have recollected the circumstance? depones, I certainly should."

It was proved that the pursuer had, soon after the breaking off of the intimacy with the defender, said to more than one person that she had taken care "to be free of" Macleod; and she and her mother, who had died early in the course of the action, had both spoken of his having spent one night in the house.

The evidence of Mrs. Ross, the pursuer's mother, given in the breach of promise case, was produced in *modum probationis*. She had deponed to Macleod's having taken her aside, before the date of the written promise, and announced his intention of marrying her daughter, and of his having spent a night in the house.

There were also witnesses who deponed that Mrs. Ross had told them that Macleod had spent nights in her house both before and after he had given the written promise of marriage. Mr. Dickson, who had been the pursuer's agent during the earlier part of the litigation, deponed that he had precognosced Mrs. Ross with a view to the present action, and that she had told him that Macleod had passed several nights in the house both before and after the date of the written promise. He also deponed that she had stated that, on one occasion, she had seen the pursuer and defender in bed together.

The action which has been referred to as brought by the pursuer in the Sheriff-court was one of damages for breach of promise of marriage, and in it the defender had been assoilzied. In his second statement in his defences to that action, the defender, after explaining the circumstances under which he came to visit at the house of the pursuer's mother, averred,—"On the occasion of each and of all of these visits the pursuer was very marked in her attention to the defender, and treated him with the appearance of great affection upon her part, and ultimately it was understood between them that marriage would be the result of their intimacy." To which the pursuer replied—"Admitted that it was understood between them that marriage would be the result of their intimacy."

Two letters from the defender to the pursuer were produced, dated respectively 19th December 1855 and 30th January 1856. The first commenced:—"Dear Miss Ross,—I am in receipt of your kind note. I am truly glad to find you taking so deep

an interest in me," &c. The second began:—"My dear Jessey,—I send this note according to promise. My *dear*, I could willingly go to see you this night, but I must be moderate in my visits. You are a good, kind creature, and will forgive my extra anxiety to see you. Dear *Jessey*, please let me know if it will be convenient for you to see my children on Saturday first. I always feel great pleasure in [977] being in your company—especially when out walking together. I sincerely trust Saturday first will not be a busy day with you. . . . I particularly wish you to study the time you and I may go out to get that article I promised, as you have taken such an interest in my welfare and to a particular object. I wish to let you see that any trouble you may be at on my account is not overlooked."

The import of the rest of the evidence is sufficiently given in the opinions delivered.

The Lord Ordinary (Kinloch), on 21st November 1860, pronounced the following interlocutor:—"Finds it proved that, in or about the beginning of the year 1856, the defender courted the pursuer with a view to marriage; and, in the course of this courtship, promised to marry her; and ultimately, by letter bearing date the 12th day of April 1856, and delivered to the pursuer, engaged to make her his wife within three months from that date: Finds it further proved that, on the faith of the defender's promise to marry her, and subsequently to such promise being made, the pursuer admitted the defender to carnal knowledge of her person; and that sexual intercourse took place betwixt them in the house of the pursuer's mother, on various occasions, in the months of February, March, and April in the year 1856, and both prior and subsequently to the delivery of the letter of 12th April aforesaid: Finds, that by force of such promise *subsequente copula*, the pursuer and defender became in law married persons: Therefore, finds and declares that the pursuer, Jessie Ross, and the defender, Donald Macleod, are married persons, husband and wife, of each other; and decerns and ordains the said defender to adhere to the said pursuer as his lawful wife, and to treat, cherish, and entertain her at bed and board as such, and to perform towards her all the conjugal duties of a husband to a wife, and in nowise to leave or desert her in time coming: Appoints the case to be enrolled for the disposal of any other conclusions in the summons which may be insisted in: Finds the defender liable in the pursuer's expenses of process hitherto incurred."[1]

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[1] "NOTE.—There is no doubt, as the Lord Ordinary thinks, that, in the beginning of the year 1856, the defender courted the pursuer with a view to marriage, and that this courtship issued on 12th April 1856 in his binding himself by a serious engagement, or what the pursuer was entitled to consider such, to make her his wife within three months from that date.

"It appears to the Lord Ordinary to be also proved that sexual intercourse took place between the parties in the house of the pursuer's mother on several occasions in the months of February, March, and April 1856. On this point the evidence of Catherine Fraser is direct and express; and the Lord Ordinary can discover no grounds on which to hold this witness to have been perjured,—the only supposition on which her testimony could be set aside, for the nature of the evidence excludes any idea of mere mistakes. There are contradictions to the witness on minor points, and a not unnatural confusion in her mind as to the precise date at which the lodger Chisholm left the house, and Mr. Fraser succeeded to his rooms. But the substance of the evidence given by Catherine Fraser, the Lord Ordinary cannot hold to have been discredited, however little it may speak for the modesty of the parties, or the decency of the house. Her testimony is corroborated by that of other witnesses, particularly John Chisholm, and of the pursuer's mother, Mrs. Ross, of which the last was given at second hand in consequence of her death.

"Considering the sexual intercourse to be proved, it appears to the Lord Ordinary to be the only fair inference of which the case admits, that the pursuer allowed such intercourse in consequence of the defender having previously promised to marry her. The pursuer's chastity otherwise is not impeached; and there is no just ground for holding that, if a promise of marriage had not been made, the pursuer would have yielded her person to the defender's embraces.

"What the defender mainly contended was, that, by our law, a promise of marriage can only be proved by writ or oath; that the only written promise relied on is that contained in the document of 12th April; that it is only sexual intercourse posterior to

[978] LORD PRESIDENT.—This case is a declarator of marriage, founded upon the ground of promise *subsequente copula*. The Lord Ordinary has found the marriage

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that date which would constitute marriage; and that sexual intercourse posterior to that date is not sufficiently established.

"It may be true that, by our law, a direct promise in words cannot be proved by witnesses; although, somewhat anomalously, such evidence is sufficient to establish a declaration *de presenti*. But it by no means follows that facts and circumstances may not be established by parole evidence, out of which the Court may infer that a promise had been made. That a promise of marriage may be competently so proved appears to the Lord Ordinary to be the first conclusion from the decision of the case of Campbell *v.* Honeyman, both here and in the House of Lords,—8 Shaw, 509, and 5 Wilson and Shaw, 92. For although a great many letters were referred to in that case, these were only items of a general proof. The Lord Ordinary assents to the view of that case expressed by Lord Jeffrey in the subsequent case of Harvie *v.* Inglis,—at first, in discussing the relevancy, and afterwards in considering the merits,—15 Shaw, 964, and 1 Dunlop, 536. The case of Monteith *v.* Robb, 5th March 1844, 6 Dunlop, 934, was cited to the Lord Ordinary as containing authority to an opposite effect. But, whatever vague expressions may be gleaned out of the opinions, the substance of the decision in that case was simply that an averment of courtship, without an averment of promise, was not sufficient. The Lord Ordinary concurs in so holding. Courtship *subsequente copula* is not a mode of constituting marriage by our law. Promise *subsequente copula* undoubtedly is. And according to the authority of the case of Campbell *v.* Honeyman, as the Lord Ordinary reads that case, the promise may be proved by the facts and circumstances occurring in the course of a courtship,—this result, of course, not necessarily arising in every case of courtship, but only where the facts and circumstances are such as legitimately infer that a substantive promise had been made.

"There is written evidence of a promise in the present case in the document of 12th April 1856. But it does not follow, as the defender argued, that no regard is to be had to any circumstances occurring previously. Such a document may throw a great deal of retrospective light on prior transactions. If the document had run thus,—'Having some time back promised you marriage, I now engage to have the marriage celebrated within three months from this date,'—there could be no doubt of its proving an anterior promise. The actual document in the present case is not incapable of a similar construction. Viewed, at all events, in connection with the other evidence, the Lord Ordinary is disposed to consider it as not only itself a promise, but as warranting the inference of a promise anteriorly made. The prior intercourse, not less than that which followed, is thus, in the view of the Lord Ordinary, intercourse subsequent to a promise of marriage.

"But supposing that the promise could only be taken as of the date of the written document, there is the testimony of Catherine Fraser, which the Lord Ordinary does not feel warranted to disbelieve, that sexual intercourse took place afterwards; which is sufficient to satisfy the legal requirement.

"Probably the greatest difficulty in the case is the fact of the pursuer having formerly brought an action against the defender for breach of promise of marriage, therein assuming that no marriage had taken place. In that action the Lord Ordinary assoilzied the defender, holding a promise to have undoubtedly been made, but no breach of promise to have taken place at the date of the action,—the defender up to that date not having refused to marry the pursuer, but merely having postponed the period of the ceremony. The pursuer endeavoured to explain the reason of the previous action by saying that she had not then communicated to her law-agent the occurrence of sexual intercourse, and in consequence was not sufficiently advised of her legal rights. This is not an improbable explanation. But, however this may be, the fact of the prior action having been raised cannot preclude the pursuer from her legal remedy in the present process, if sufficient grounds have been shown for obtaining that remedy. Whatever doubt may be cast on the policy of the law in holding a promise *subsequente copula* to constitute very matrimony, the doctrine is firmly established; and the Lord Ordinary feels himself compelled to give it application in the present case."

[979] established. His views both as to the facts of the case proved, and as to the law applicable to the case, are fully set forth in his note, and the terms in which his Lordship has expressed his interlocutor, are very carefully framed, so as to give effect to the view expressed in his note. I am unable to concur in all his views as to the facts, or the law of this case. There are some facts as to which there is no sound reason for doubt or difference of opinion. In the first place, that from about the end of 1855 or the beginning of 1856, till some time in April of that year, the defender was a frequent visitor at the house of the pursuer's mother, and during that time, or part of that time, was courting the pursuer. In the second place, that on or about the 12th April 1856, he gave the pursuer a holograph writing, quoted in the condescendence, containing a promise to marry her within three months from that date. The writing is not addressed to the pursuer, but I think the evidence is sufficient to instruct that it was intended for her, and was delivered to her. On the other hand, there is no evidence at all to support the averment of the pursuer, that the defender cohabited and had carnal intercourse with her during the months of May, June, and July 1856. But there are still to be considered important events, said to have occurred in February, March, and April 1856. The pursuer avers that, in February or March, there was a promise to marry, followed by copula on the faith of the promise. She avers that this took place before she had got the writing of 12th April. She also avers that, after she got that writing, there was further intercourse. The question of fact as to whether there was or was not carnal intercourse after the writing of 12th April, if settled one way, would probably remove any material interest on the part of the pursuer to inquire as to either promise or copula anterior to that date. No doubt there are matters alleged by the defender that might raise questions. There are certain circumstances alleged of deception on the part of the pursuer in obtaining the writing. I am not prepared to hold that these, as alleged, even if established—and I doubt if they are established to the full extent that they are alleged—would absolve him from the legal consequences of having got the pursuer to yield to his solicitations after having given her such a document. However, the substantial interest of the pursuer is to establish by proof intercourse after she had obtained the writing of 12th April. That is the most simple and obvious case presented by her at all events, and it is the case which I think it proper first to examine. Upon that point the averment is very general. As to the months of May, June, or July, perhaps I ought to say that, in my view of it, the evidence negatives the averment. Then as to April, the averment is still vague. There are no dates specified, but there is some evidence as to one occasion after the 12th April, and the question arises, whether that evidence is sufficient. No objection was taken to the vagueness of the statement, and if that one occasion is established, it may make out the pursuer's case, or at least may make it out subject to the weight that may be given to the circumstances I have alluded to.

The only witness to that act of alleged carnal intercourse after 12th April is Catherine Fraser. The Lord Ordinary says her evidence "is sufficient to satisfy the legal requirement." That is the use of the evidence, and the question comes to be, how far that evidence of Catherine Fraser is to be relied upon, or what circumstances there are to support it in reference to that particular occasion. The statement of Catherine Fraser herself is plausible, and the time is pretty clearly fixed. In the first place, there seems to be little doubt that this written document of promise was delivered to the pursuer upon a certain Sunday, and it is stated that on the night preceding that Sunday the defender had slept in the house. That was the fourth occasion on which the defender is spoken of as remaining in the house. Catherine Fraser's evidence on that part of the case is the same substantially with the others. I mean, that it fixes the occasion on which the document was given.

Then she says, "I saw Macleod in the house all night after that occasion once. Interrogated, When was that? depones, I think it was just about a week after, but I don't remember what night of the week it was. On that occasion I let him into the house myself, but I do not recollect at what hour. He staid all that night in a little bed-room near the kitchen. Jessie Ross was with him all that night. Miss Ross was in the bed in that room when Mr. Macleod came into the [980] house that night. When he rung the door bell she cried to me to come into that room, and said that she could not be seen because she was very bad. I let Mr. Macleod into the house, and he then followed me into that room where Jessie was in bed. She told him to go home,

but he staid still, and I left them in the room together. About seven o'clock the next morning I went back into the room, and I then saw them both in bed together. Mr. Macleod gave me a message from the bed to go for something, but I do not recollect what it was, and Jessie was still in bed with him when he gave me the message." As to this occasion, I do not find any corroboration of Catherine Fraser. But I think it of some importance, in reference to it, to look to her own farther evidence. She depones, that about a fortnight after the Sunday on which the writing was given she "heard Mr. Macleod ask Jessie to give him the papers back again. She said, 'No;' she was crying sore. That was all I heard. They were quarrelling all that night about it. It was between nine and ten o'clock at night that I heard this; and I then went to bed, and left them together in the dining-room. Jessie was still crying sore when I left them." She does not say that Macleod remained in the house all that night. Now here was an occasion within a fortnight after delivery of the paper under the peculiar circumstances which occurred. The defender is asking it back, and insisting upon it, and apparently a quarrel between the parties takes place in respect of her not giving it back. Now, I look upon that as an important event in the history of the intercourse that was going on. The defender was then aware that he had given that paper. He insisted on having it back. The pursuer refused to give it back, and the parties quarrelled in regard to it. If the carnal intercourse that is said to have taken place between them after the 12th April had been placed between the date of the delivery of the paper and the date of the quarrel, there would have been less objection to the evidence of Catherine Fraser on that subject than there is. But she herself says she "heard that conversation on a night before that on which Macleod and the pursuer passed the night together in the bed in the little room near the kitchen;"—that is, after having had that quarrel about the delivery of the paper, after he was aware of the importance of it, and insisted upon its being given back to him. She says it was after that. I think that is a most incredible thing of itself, and goes to shake my readiness to believe the evidence of Catherine Fraser in regard to this paper.

But her evidence is in other respects materially shaken. In the evidence of Douglas, at page 40, to whose service she went, it appears that she had left the service not at the time she herself says, but between terms, and that she had left it by reason of being dismissed. But it appears from that evidence that Douglas and his wife had called on Miss Ross to know about her, and what was then stated as the reason why she had been dismissed the service was something in connection with Macleod, which led to their putting some questions to her about it; and then Douglas having had some conversation with her about it, is asked, "Did Catherine Fraser then inform you that Macleod had only remained one night in Miss Ross's house? depones, She did." Now then, that is a most material shaking of Catherine Fraser's evidence, who speaks to various occasions on which he had remained all night with the pursuer, and the only night as to which there is any material corroboration of her statement of the defender having remained in the house all night is one long anterior to that date.

There are statements of Mrs. Ross imported into this case to which I am not disposed to attach very much importance. In the first place, I attach none to the account that Mr. Dickson gives of what she said to him in precognition, after the case was to be rested on different grounds from those alleged in the previous action, especially as she was so nearly connected with the pursuer; and also because Mr. Dickson himself speaks with great hesitation as to confidence in his recollection. Therefore I throw apart that part of the case which is deduced from that wisely and judiciously hesitating evidence of Dickson. And as to the evidence gathered from Mrs. Ross's statements to other parties, I have this remark to make upon it, that I think there is as much, if not more, tending to contradict the evidence of Catherine Fraser than supporting it. In particular, I think it appears, from the statement of several persons to whom she spoke at a time when there was not the same motive to make these allegations, that she said Macleod had remained only for one night in the house in the room in which her [981] daughter was, that during that time he was in a state of more or less intoxication, and that her daughter was trying to get out, and, as Mrs. Ross herself says, she stood at the back of the door the whole time; that is, at all events, not placing the parties in the position here described. I think, therefore, there is a complete defect—a want of sufficient evidence to instruct carnal intercourse between these parties after the delivery of that letter of 12th April.

Now, although the pursuer has, in my opinion, failed in this branch of the case, there still remains the other case, as I may call it, presented by her, rested on the promise and copula prior to 12th April. The Lord Ordinary has found both cases proved. He has found that there was a written promise on 12th April, and intercourse after 12th April. But he has also found that there was intercourse at an earlier date, and the terms of the interlocutor is in accordance with these findings. That involves two considerations, one of fact, and one of law. I cannot subscribe to the views which the Lord Ordinary has taken in regard to the law on that part of the case. The Lord Ordinary says he reads this letter as instructing, "not only itself a promise, but as warranting the inference of a promise anteriorly made,"—that is to say, it would be evidence under his own hand to instruct a promise anteriorly made; and then he goes on to say,—"The prior intercourse not less than that which followed, is thus, in the view of the Lord Ordinary, intercourse subsequent to a promise of marriage."

Now, I think that the document in the present case does not admit of any such construction. I do not say that it is inconsistent with previous promise. But that this writing bears that construction is a proposition I cannot assent to. It is not inconsistent with there being a previous promise. Neither is any written promise inconsistent with there having been a previous promise. But that this letter, in its terms, implies a previous promise, is a proposition I cannot assent to. That there was courtship between the parties, will not alter the nature of the letter. If it did, if it had this effect, that present promise after there had been previous courtship were to be inferred as proof of antecedent promise, that would be a new doctrine in evidence, and it would almost amount to this, that courtship itself, followed by intercourse, would make marriage,—a doctrine which I hold to be no doctrine in the law of Scotland, and which the Lord Ordinary himself says is not a mode of constituting marriage by our law. I hold the doctrine of the law of Scotland to be this, that the promise which is requisite in order to make marriage, by reason of its being followed by intercourse, is a promise as to which the proof is of a limited kind. It must be proof by the writ of the party, or by the oath of the party. The Court must derive its knowledge of the promise direct from the party himself, either from his hand or from his mouth, and if it comes from his mouth, it is not to be distilled through the recollection or evidence of parties who repeat it. It must come direct from the party to the Court. It must be admitted by him on oath, and if so, that would supersede proof, for we do not require proof of what is admitted on oath. The fact of there having been a previous courtship, may, in some cases, be a fact of importance in order to enable us to read with more certainty, the document, or series of documents, or course of correspondence. But still it is from the document, or series of documents constituting the correspondence, that the evidence is deduced. They may require construction, and the facts which enable you to construe them may be important. But still the evidence is the evidence of the party, and I must say that that is the view in which I have always read the case of Honeyman. I have not read that case as a departure from the law. I read that as a case in which the promise was collected from a series of writings of the party, writings perhaps read by the light of the actings and conduct of the parties. But still those actings and that conduct were only the means of construing in their true light the writings of the party. I am aware that in some cases there has been an expression of opinion which might be construed into indicating a looser state of the law. But when you come to look at the actual decisions on the point, and generally when we come to look at the views which are expressed as necessary to the decisions in question, I do not find that the doctrine, that a promise is to be proved by writ or oath, has been shaken or departed from. These loose expressions, sometimes used *obiter*, or *quasi obiter*, may be ground for building theories, from which intercourse may be deduced. If so and so was the evidence of the party, why should not so and so follow? But that is a most dangerous [982] system of reasoning,—dangerous to the law; but it is the system of reasoning which the Lord Ordinary has been led to adopt in this case, and follow out from step to step from remarks which were not decisions, and which occurred in cases in which it was not necessary to decide the point. In recent cases in our law the judgments have been carefully expressed with the view, if possible, to exclude a departure from what I hold to be the fixed law, and to correct any looseness of expression or faulty notions on the subject. I see almost no limit to conjectural

reasoning. You may conjecture a promise in circumstances in which you may think it probable there was a promise. But these are all matters of conjecture. They are not proof. They are inferences from circumstances which are not that evidence of promise which the law requires, and it would be very hazardous, indeed, to allow that species of suggestion and inference to take the place of direct and absolute evidence at first hand from the party. It would be even, I think, more dangerous than allowing parole proof of positive promise of marriage. Therefore, in the first place, I differ from the Lord Ordinary as to the construction of this letter, and I differ as to the view which he takes as to the establishing of a promise by intercourse, such as he has referred to in this case.

But I have a farther view of this case. I am not satisfied on this evidence that there was carnal intercourse between these parties at all. This defender seems to have been a person of not the most refined habits, nor of the most temperate character, and it appears that he did go to this house repeatedly in a state in which he was considerably affected by liquor; and it appears, or it may be assumed—for the evidence is slender upon it—that upon one occasion, perhaps there is evidence of more than one occasion on which he may have remained in the house all night; but it does not follow from that, that he had carnal intercourse with Jessie Ross or Catherine Fraser, or any other inmate of that house. Probably Jessie Ross, if there was carnal intercourse, was the most likely person. But the circumstance of his being in the house all night is not by any means conclusive on the subject, more especially if Jessie Ross was a person of those very correct habits which are spoken to by her mother and some of her friends. In a case of this kind the evidence that would satisfy the Court in dealing with a question of paternity is not sufficient to establish intercourse. In a case of paternity you start with this proposition, that there was intercourse with somebody. That is an established point in the case. Now, I desiderate here evidence that Jessie Ross had intercourse with anybody, and if she was on trial for that matter, if it was matter of trial, I would say that she was entitled to an acquittal. The evidence upon that point rests substantially on the testimony of Catherine Fraser, with the corroboration of that one occasion, I think, by a person of the name of Chisholm. Now, Catherine Fraser's evidence appears to me to be in no respect to be relied on, and for various reasons. I think she is contradicted in many important matters as to which she could have been under no mistake. In the first place, I think she is contradicted in her averment that she left the service at the time she says. I think it is proved otherwise that she was dismissed from service, dismissed in reference to statements that she had made which Jessie Ross took umbrage at. And what was the statement? It was in reference to the fact that Macleod had slept in the house the whole night, and that Catherine Fraser had stated that in a manner, or given publicity to it in a way which might lead to scandal in regard to Jessie Ross, and therefore she was dismissed. Now, if that be the state of matters, it suggests to us, in the first place, that there was only one occasion on which Macleod slept there all night; in the second place, that that was an occasion on which there had not been sexual intercourse; and, in the third place, that Jessie Ross felt herself in such a position that she was not at the mercy and under the control of Catherine Fraser in regard to her conduct, and which led to her dismissal.

Then, in regard to the occasion on which she says this intercourse took place; she says that there were six occasions on which the defender slept all night with the pursuer.

Now, there is a confusion in her mind as to the period when she says the first intercourse took place. I do not attach any great importance to that. I think that it may have been a mis-recollection, and it is not proof of itself of intentional misrepresentation. Then she says the next time that he passed all night in the house was again in the dining-room, and then the third time was in Fraser's bed-
[983] -room. Now that is a very positive statement—a statement that Fraser came home about ten o'clock at night, that he could not get into his bed-room, that he had to sleep all night on the sofa, that the next morning breakfast was taken into the dining-room, where he and Macleod breakfasted together. Now Fraser swears positively no such thing ever happened; and it will not do to say that it might have been Chisholm, because Chisholm was never kept out of his bed-room there, and had to sleep in the dining-room. The only occasion on which Chisholm speaks to having

been kept out of his bed-room was one evening that he came home unexpectedly, not at ten o'clock at night, but to dress for the theatre, and he then went to his bed-room door for the purpose of dressing, and found it locked, but got in in a minute or two. Therefore that story is wholly untrue about the lodger being obliged to sleep in the dining-room. It is an invention—a palpable invention—not a thing about which the witness could be under a mistake—not want of recollection. It is an invention of fact—of two facts. Now, when I find a witness of this kind dealing in invention, I cannot give any faith to that witness's testimony. On the contrary, there is an immediate suspicion of all the witness says. There are other matters of importance in her testimony. She alludes to carnal intercourse on six occasions. Mrs. Ross does not seem to have spoken to these occasions, but I place little on that, because we have little distinct evidence from her except in the other case, which does not go to support this. There is, however, one occasion on which Macleod stayed all night, which does derive support from Chisholm's evidence. Chisholm himself is not very clear about his dates, because he talks of this polling that he was so busy about as taking place in March; but, as I read the evidence of the polling Sheriff, it was really in February. Therefore his recollection is not very clear. But he speaks to going into the dining-room in the morning, and having the impression that the pursuer and the defender had slept together on the sofa. And on cross-examination he says,—"The sofa, I daresay, would have presented the same appearance if one person had slept on it. I saw nothing to show that two persons had slept on it. It was a large sofa, about a couple of feet broad." A narrow bed for one—a very narrow bed for two—a couple of feet broad. Now, then, what does this come to? It is this; that going into the dining-room at the time he expected to breakfast, he found persons—for it does not go further—had slept there. The defender had not a coat on, and it does not appear whether he had shoes on or not. The pursuer was in a morning wrapper, and Chisholm was expecting his breakfast. Now, put this case, that the defender slept in the house all night, and that the daughter had gone into the room in order to get him out, in order to get breakfast ready—for is there anything more than that,—Is that evidence that would convict Jessie Ross of having had carnal intercourse with him, or slept with him that night? Decidedly not; and that is the only part of the case in which I think Catherine Fraser derives corroboration. There are other points in which she is contradicted, and which I do not think it necessary to go into, for I think her evidence is totally unreliable when she says that Jessie Ross slept with Macleod all night, and that she saw them in bed together. There is no corroboration of that whatever. Farther than this, there are statements of other parties who heard from the pursuer herself that she had no intercourse, that she was quite free of him, and that she had taken care not to have any intercourse with him. Then, again, there is a practical act. She brings an action for breach of promise of marriage. If the story be true that there was a marriage before, that there was a promise *subsequente copula*, then that was not a case for breach of promise. But her case for breach of promise was put on the footing that there had been no such marriage. Again, the defender expressed his willingness to implement his promise. But she would not have him. Therefore I say, there is here, in her own conduct, as well as in her expressions to her companions, strong indications that she regarded her position in regard to him to be, not that of his wife, but of a person whom he had ill-used by refusing to marry her, after having promised to do so. There are no results to show that Jessie Ross had had carnal intercourse. If there had been, such circumstance might have fixed the paternity on this party from his intimacy with her. But that is wanting; and the question is, whether this second view of her case, and the position which she takes, after having tried her rights in an action, is supported by facts—whether there is that which would have established this connection between the parties if it had been for her interest to maintain that it had not taken [984] place? I see nothing sufficient for that purpose in this case; and upon these grounds I am of opinion, in the first place, that there is no proof of intercourse after the date of that letter. Farther, that the view of the Lord Ordinary as to the law as to the retrospective effect of that letter, is not sound; and, farther, I am of opinion that the case fails on the proof of intercourse prior to that letter.

LORD IVORY.—I should have felt much relieved if I had been able to take the clear view of the case, either as to fact or law, which your Lordship has done. I

hesitate to say that I have come to a different conclusion. The case has caused me the greatest anxiety, and, so far as one who has hesitated so much can be said to have come to an ultimate judgment, my present opinion is that the pursuer has not made out what is necessary to entitle her to succeed in this action of declarator of marriage, founded on promise *subsequente copula*. I do not say that there are not elements here, which, if they had been more satisfactorily brought out, and if there were not discrepancies which weaken their effect, would support the conclusions of the action. But the evidence which has been adduced is of such a character as not to satisfy my mind of the safety of declaring marriage in regard to a promise given under the circumstances which we have here. It is perfectly clear that the intimacy and acquaintance between the parties very soon assumed the shape of courtship. It is impossible to dispute that on the face of the evidence. It begins with the defender's own letter of January, in which he speaks of an object they both had in view, which, taken in connection with all the circumstances, cannot be taken to mean anything else than the future relation of husband and wife. He called on the pursuer to visit his children, and to take charge of them in her walks, and he makes her presents; and the words of the letter, read by the light of what happened afterwards, prove that even at that early date they were keeping company together on the footing of future marriage. "I particularly wish you to study the time you and I may go out to get that article I promised, as you have taken such an interest in my welfare, and to a particular object. I wish to let you see that any trouble you may be at on my account is not overlooked." If the defender had alleged that the intercourse between them was illicit—led to carnal connection—it might have been said that this was some present to give her with a view to the particular object, to induce her to give him the opportunity of holding such intercourse with her. But he denies that, and it is not, therefore, in his mouth to say that, and therefore I can give no interpretation to that except that it has reference to the future relation of marriage. Then I am the more led to take that view of the matter from what is stated in the record in the inferior Court process. In article 2 of the defender's paper, he says,—"Ultimately it was understood between them that marriage would be the result of their intimacy." That is his own statement—a substantial allegation by him, and acquiesced in by the pursuer, for she just repeats his words in her answer.

All their acquaintances congratulated them on their relation, and there is no contradiction in regard to that. That comes very near to being a promise of marriage. Keeping company in each other's society, going about amongst their friends; and all this, according to the defender, was on the understanding that the matter was to end in marriage.

Well, there is not only this courtship, and this relative position of the parties, but on the face of the evidence there is positive testimony that they had connection at that time. The witness Fraser speaks to six different instances in which the defender stopped all night with them; and all that I gather out of that, however, for practical effect, is that there is evidence of carnal connection between the parties; and, upon the whole, I have no hesitation in regard to there having been connection, illicit or otherwise, between the months of January and April, when the document so important in this case was passed between the parties. That does not rest on the single evidence of Catherine Fraser. It rests on the evidence of various other parties. Catherine Fraser speaks to seeing them in bed together. The mother speaks to seeing them in bed together. Chisholm speaks to finding the pursuer and defender together in his room, when he came home one night in order to dress for going to the theatre; and I cannot put all these things together and say that they do not completely corroborate Catherine Fraser in regard to there having been acts of connection prior to 12th April. If, therefore, any opinion I have formed were to rest on the [985] question whether this evidence of Catherine Fraser was to be believed, I do not think it is so shaken that I can refuse belief to it. There are some discrepancies on the point of date, but that is not of much importance, for there is not a witness in the case who is accurate in regard to that. Chisholm is wholly wrong as to dates. He is wholly contradicted by the evidence of Mr. Shirreff in regard to the polling and election of Mr. Black. I do not disbelieve Chisholm more than Catherine Fraser, but when I see a person in his position falling into such slips in point of time and other-

wise, I cannot give him faith, and refuse faith, it may be qualified faith, to Catherine Fraser. So, again, the man Fraser says he was there for three months prior to 3d June, and he gives us his *causa scientiæ*—a very special occurrence—viz., that he was married on that day, and left the house on that account. That gives you a later period of time; but if he is right in regard to that, then Chisholm is wholly wrong in the time he gives for his departure from the house, because it is said that he was out of the house before Fraser came to it. I do not, therefore, withhold my credence from the general substance of Fraser's testimony. But I am cautious in dealing with it, and I am bound to make the best I can of it. But I cannot, upon the faith of these witnesses, discrepant and contradictory of one another, hold that they contradict Catherine Fraser's testimony on this fact, or go so far as to withhold *in toto* all faith in her testimony. Now, all of these—Fraser, Chisholm, the mother, and the girl Fraser —concur in this, that in the period before April they found the parties in such circumstances as it is impossible, according to my view of it, to withhold the belief that they were in the position which the law always presumes that intercourse might have taken place, and is therefore held to have taken place. The mother says she saw them in bed together. Catherine Fraser says the same thing, and Chisholm speaks to finding them in undress—the woman in a morning wrapper, and the man in his trousers, without his coat; and he drew the conclusion that they had been in that kind of intercourse which I have referred to. There is one remark perhaps to be made in regard to Chisholm, and it is a remark which tells also in regard to Fraser. It may so far reconcile the points of time they are speaking of. We hear something of a cabinetmaker, who never afterwards appears. Fraser is not a cabinetmaker, but he was a builder, and at that very time he was going backwards and forwards to certain houses in the neighbourhood, and it would not be very strange if his occupation of a builder might be mistaken for that of a cabinetmaker. And Chisholm says:—"On the right hand side of the passage, and opposite to Mr. Woodyer's room, was my own bed-room, and next to my bed-room, going towards the entrance door, was another bed-room occupied by a lodger, who, to the best of my recollection, was a person named Fraser, by trade a cabinetmaker. The next room to that was another bed-room, which was occupied by the pursuer and her mother; and next to that was the kitchen." Now, I should rather be disposed, in order to reconcile the evidence of all these parties, to hold that Fraser was spoken of, and believed to be a cabinetmaker, and was in the house at the time that Chisholm was, but in a different room, and after Chisholm went away he got his bed-room. But it is needless, according to my view of the case, to deal with that matter. It goes no further than this, that it is one of the considerations which prevent my being prepared to refuse absolute credence to Catherine Fraser any more than to the other parties whose testimony is equally full of discrepancies.

With regard to the discrepancies as to the time that she left service between terms, that must clearly have been towards the end of April, and not in May. I do not think I would impute anything to that, for she might attach no importance to that particular matter, and that was of no particular consequence at anyrate. We have that from a witness of the name of Douglas, whose evidence is not to be thrown out of sight. But he speaks throughout in a character in which he shows that he is not a friend of the pursuer, and very much a friend of the defender.

But when all this is stated, we have the fact, upon which I go, certain—that there is evidence of connection between the parties prior to 12th April, the date of the interchange of the letter, and that there is evidence, moreover, in regard to that fact of connection, that the parties were at that time acting on the mutual understanding stated by the defender himself, that the matter was to result in marriage.

[986] We have, further, that there had been a promise—a verbal promise no doubt—under which that subsequent relation of marriage was to take place, and if I could have taken a mere verbal promise, followed by connection, as a ground for declaring marriage, there is such evidence here as might have been made available to that effect, more especially when the verbal promise was ultimately not imported into the letter, but merely given such effect to in the letter as showed that what had been the mutual understanding of the parties all through, and made matter of verbal promise, was only carried into effect as a written promise, and, therefore, that the Lord Ordinary is not so wrong in connecting all these circumstances together in order to give effect to the document in question.

But the important part of the case is in regard to the written promise, because if it was not given, I am very decidedly of opinion with your Lordship that nothing that took place would have availed to constitute a ground for decerning in terms of the conclusions of the present action. But they are elements, as all the cases concur in saying, of importance in considering the after document, and, in so far as there might be ambiguity in it, of giving it a more precise and strong bearing on the circumstances of the case. But it is there that my difficulty begins. I do not know very well what to make of this matter of promise. It is all on one day. On the Saturday—it is in evidence by the mother, and I think it is concurred in by Catherine Fraser—the defender came into the house intoxicated. The pursuer's mother says,—"I desired him to go home; and he would not go home; and I was very angry at him for not going home. He stopped all night." And next there is a scene takes place when the mother is in church, the pursuer falling into a state of hysterics,—urging him for a letter, he very unwilling to give it, and he is a little thrown off his poise by the illness and excitement into which the pursuer has fallen, and, according to his own statement, her threats of committing suicide. And I do not very well see how a document given under such very extraordinary circumstances is to be looked upon as a sober and serious document having reference to the relation of marriage, and entitled to receive effect, unless the surrounding circumstances give it a construction of that more sober and serious kind.

Then there is another thing. The mother says, that when she was told that a previous document had been given and withdrawn, she asked the defender to give her daughter the writing that she asked, and that she so asked the document for the purpose of pacifying her daughter. "The defender said he had written a paper, and destroyed it again. It was not said what was on the paper. I said he might write a paper and give it to her, thinking it was because of the paper that she was not pleased. I then saw him write a paper." But that is not a promise of marriage. It may, on the face of it, be conceived in words which might imply a promise of marriage. But it is rather to be accounted for by the anxiety of the poor girl to have that illicit connection honourably put an end to. But it is given to pacify her, and not to form the groundwork of marriage; and there is not what the Court can give effect to, unless what takes place thereafter is of that specific and clear kind that it can receive no other construction. For an act of promise of marriage must be of a solemn, deliberate, and serious kind, in order to receive effect in a declarator of marriage.

Then, the pursuer's after use of the document does not encourage us to give much effect to what took place on the subject. Parties are from that moment downwards never on the same intimate and familiar terms they had been before. Instead of being drawn together, they are beginning to be estranged. The defender is offended with the pursuer's violence and the use made of the document against him. Not only so, but he pays various visits, in which all the witnesses and the parties themselves are agreed that he was anxious to get the letter back again. That is not following up the promise of marriage in a way that is to entitle it to the serious effects here demanded, more especially when we find that the defender gradually drew himself away from the intimacy, and ultimately deserted the pursuer; that when she brought her action for breach of promise she did not use that document as one on which marriage was to follow, and when asked by her companions about this marriage, she says she is perfectly clear of the defender—that she had purposely kept clear of intercourse with him,—that nothing followed upon the promise, but that he broke it, and therefore that [987] she brought her action of damages. That is quite inconsistent with this demand, and the statement of her mother, who also denied, at that period, what was afterwards stated by her and her daughter, and it shakes my faith in the evidence, in so far as it attaches to her, and more especially with regard to the mother, who is an important witness in regard to this. The mother says, whilst it is a claim of damage, that no intercourse took place. She has no reason to suspect it. She says they were only one evening in the house, and so forth. So says the daughter. Well, but the moment the tables are turned by the loss of that action, then all at once that which they had both been denying, they both assert. With regard to the mother, her evidence is got through the medium of persons who had heard her. I cannot take that. Whether am

I to take her first evidence or her second? Both cannot be true, and that shakes my confidence in it. And so with the daughter. It is there that the difficulty lies.

With regard to the pretended burning of the letter after it was got, I do not put any stress on that. That is not the operative turn that the thing ought to take, or does take. The defender, with regard to his being deceived, has very little to say on the subject; for, in the action of damages, he says that he saw that the daughter was intending to deceive him, but that he was not deceived. But in this action he says, not only did she pretend to deceive him, but he was deceived by her; and he makes it a point of the case against her now, that she made him believe that the letter was burned, and so deals with it as a renouncing of the obligation which was in the document. I do not think that. But, on the other hand, neither can the pursuer make much of the document with which she so dealt. It is proof to my mind, that if there was a promise at first, it was soon departed from. But neither am I prepared to throw out of view the allegation of the parties, that there was intercourse subsequent to granting the letter. Catherine Fraser speaks to six occasions on which they were in bed all night; some of them prior to granting the letter. They are not set forth in the order in which they occurred. But I do not wish to dwell upon that. I take her statement no farther than that there was one occasion on which they were in bed together. Then I think the mother also says—and Dickson the agent, who gives very cautious testimony, says she was careful in discriminating between what took place before and after the letter—that there were two occasions, at least, on which they were together all night. That is very conclusive; but it derives corroboration from Fraser's evidence only as to one occasion. Can I take that single occasion, so mixed up with these other matters, and take these testimonies, such as they are, as proof on which I can rely? I can hardly do so. I do not say it is false. But when asked to deal with the contract of marriage, on a promise given in the circumstances that I have pointed out, and when I see a single instance mixed up with things not compatible with the conclusion we are asked to give effect to, I do not think that the party who made such a statement as that she was free of the defender, is entitled to say that subsequent acts of connection took place to the effect of validating the letter which she founds on; and therefore, with reference to that part of the case, I am disposed to deal with the present action upon the footing that the pursuer has not satisfactorily proved the reception of a letter containing what the law desiderates when it proceeds upon a document as a promise of marriage, and that she has not made out satisfactorily in such a way as the Court could feel itself to be safe in going upon, the after connection which is necessary to make that promise available here, even if it had been granted in other circumstances.

In regard to the marriage by promise *subsequente copula*, where previous intercourse has taken place, where a document is granted in the course of the intimacy and connection, which appears of a doubtful character, to say the least it is not entitled to the same effect as if it had been granted when there had been no such previous intercourse.

Lord Curriehill.—One general proposition is undoubted—that there can be no marriage by the law of Scotland without exchange of consent *de presenti*. There are different modes in which that consent may be interchanged, and one of these is by promise *subsequente copula*. In the present case, it is said that the marriage we are asked to declare was constituted in that manner. The pursuer, in order to establish her case, therefore, must prove two things, by such evidence as the law requires. The first is, that there was a promise, and the second that [988] there was copula subsequent to that promise. The *onus* is upon her to prove both of these things; and the question we have to determine is, whether she has satisfied that *onus*?

In the first place, is there such evidence as the law requires of a promise of marriage? I think there is not. Here it is necessary to distinguish between courtship and promise. It is not sufficient that there be courtship. In one sense it might be held that a courtship always implies a promise. When a man is courting a woman, every advance to her is, to a certain extent, a promise, that if she will meet his advances it will end in marriage; and every love-letter that he writes is to that extent perhaps an implied promise. But that kind of intercourse may go on for a long time without there being such a promise as the law requires in a case of this sort. This may be the case even although in the course of such courtship one of the parties may have offered

to marry the other, and may have even pressed the acceptance of that offer, and although there may have been mutual avowals of affection between the parties, if notwithstanding all this there had still been no acceptance of it. In such cases it may have been ultimately found by the parties, after explaining their circumstances to each other, that the proposed match would not be suitable, and no engagement may have been entered into. In short, there are many courtships which do not result in betrothals. One party may not have the fortune which the other may have expected. It may turn out that the time proposed by the one party for the celebration of the marriage, is not suitable or agreeable to the other. We have an example of that in this very case. When the action of damages was brought, the defender offered to marry the pursuer at a time which he named, but declined to do so till then, but she stated that she would not wait till that time. Matters must have come into that situation that the parties have bound themselves to each other. In short, the promise which the law requires in such a case must be a promise made and accepted, or a betrothal. Were this not the case there could be no such thing as a legal claim for damages by a woman for seduction under promise of marriage, because the seduction would be the completion and consummation of marriage itself. The parties would be husband and wife. Hence the class of cases in which such claims for seduction have been sustained are authorities on this point. And accordingly in the case of Honeyman, the distinction was recognised between courtship with a view to marriage, and what the law holds to be such a promise. In the present case I do not see sufficient evidence of there having been more than courtship.

In the next place, and this is of still more importance, the law requires a proof not only that there has been copula, but that the copula was posterior to the promise in the order of time. We must know both the date of the promise and the date of the copula. We must at least know which was first in chronological order, because a promise after a copula has no effect as a constitution of marriage. I have gone over the evidence in order to find out whether the alleged promise or the alleged copula was prior in date, and I cannot find any evidence on that subject. I cannot see anything that leads me to know when this alleged promise took place. I can find no evidence to show me when the first alleged copula took place. The pursuer herself of course knew both of these things, if they really did take place. In particular, she could be at no loss about the date of the first copula; but it is impossible to find out from the evidence when this sexual intercourse is said to have commenced, and therefore it is impossible to ascertain whether, if there was promise at all, it was anterior to the alleged copula; and that is, in my opinion, a fatal defect in the pursuer's evidence.

But, farther, I think that such a promise as the law requires in a case of this kind is proveable only by the writ or oath of party. It is necessary, in my opinion, that it should be so, considering the very great nicety there must often be in distinguishing between that kind of promise which takes place in mere courtship and that which is interchanged on betrothal. At all events, I think it is established law that such a promise as, when followed by copula, is sufficient to constitute marriage, is proveable only by writ or oath of party. That has been the state of the law for more than a century. In the case of Howie, the abstract point came from the Commissary Court to this Court, whether any other evidence than writ or oath was competent? and it was decided that it was not. I am not aware that there has [989] been any subsequent decision to the contrary. Although there have been loose remarks in some cases, both in this Court and in the House of Lords, that might lead to some doubt on the subject, these were only *obiter dicta*, and there has been no decision to the contrary. In the case of Honeyman, the promise was proved *scripto* of the defender, as it was from letters between the parties that the proof of the promise was extracted. Therefore this decision is quite consistent with the law as it stood on former decisions. In the case of Harvey *v.* Inglis, in 1837, although some loose expressions of the kind I have referred to fell from some Judges, Lord Corehouse and others held that the law of Scotland admitted of no evidence on the subject but the writ or oath of party. After a consultation with the whole Court, a proof before answer was allowed, and that was quite right in that case, for two reasons:—In the first place, in proof before answer, written evidence might be adduced; and if written evidence had been adduced, it might be supported by facts and circumstances proved otherways, and still the proof would have been by written evidence. In the second

place, in that case there was an express allegation, that before intercourse took place, the man had said to the woman that he held themselves husband and wife. That being an allegation of constitution of marriage in a different mode, viz., by express and direct *de presenti* acknowledgment, therefore it was quite right to allow a proof before answer of the allegations in that libel. The result in that case was, that after proof was led, the defender was assoilzied, as the case was not established. In giving that judgment, it was unnecessary to enter into the question whether proof was limited to writ or oath of party, because there was not sufficient evidence of any kind. And again, two of the Judges stated that the old rule of the law of Scotland remained in force. That was followed by the case of Monteith in 1844, and there the Court became impressed, from the result of the case of Harvey *v.* Inglis, that it was proper to decide the case on the relevancy, and without proof; and, accordingly, the Lord Justice-Clerk and Lord Medwyn stated that, in point of law, they concurred with the opinion of Lord Corehouse; and Lord Medwyn and Lord Cockburn gave clear opinions that, according to the old law of Scotland, such promise is proveable by no means except by writ or oath of party. So far as I remember that is the last decision on the point.

Upon these grounds I think that the pursuer has not satisfied the *onus* incumbent on her to prove such promise as will sustain this action.

There is no doubt that the writing of 12th April, had there been clear proof of copula posterior to it, might have been sufficient; but it has no retrospective effect. It is clearly prospective, and the promise it contains did not become due till three months after date; and how, therefore, can it be founded on as proof of a previous promise? Had it been followed even once by copula, the question would have arisen, whether a promise given in the course of licentious intercourse has the effect which the law gives to a promise followed by copula? But it is unnecessary to go into that question, because, whatever I may think as to the intercourse prior to that date, I am of opinion that there is no legal evidence of subsequent intercourse. I think that Catherine Fraser speaks only of one occasion. I have given great attention to her evidence; but precision as to dates is here of great importance, because it is quite certain that all correspondence between the parties ceased very soon after the date of that letter. I cannot rely on the evidence of this girl as to anything; but as to dates she is proved to have been wrong in almost every particular, and an error of a few days might disconnect the intercourse she refers to from this document altogether. Even if she had been perfectly honest, I would have had hesitation in believing her, considering that she was only fourteen years of age at the occurrence she mentions, and she was not examined for three years afterwards; and how could she remember precise dates after that period? I would have had great hesitation in relying on her evidence in any case; but considering how she is contradicted in many things, and particularly as to dates, it is impossible, in so momentous a matter as this, to rely on what she says. Therefore I hold that there is a failure in the proof of copula after the date of the promise. It is of no consequence whether copula is proved prior to 12th April or not. But upon that subject I shall say nothing. It is difficult to resist an impression that there had been such intercourse, but that will not do; and I feel constrained to adopt the analysis of the evidence which your Lordship has made. It is ex- **[990]** -haustive; and I entirely agree with it. I put the question to myself in this way:—Suppose that the pursuer here had been a married woman, and this was an action of divorce brought against her on the ground of adultery committed with the defender, could I have held that there was sufficient evidence of that, so as to annul the marriage? I find it would be impossible to do so; and if not sufficient to annul marriage, it is equally insufficient to constitute marriage.

Lord Deas.—Upon the import of the proof, as regards many of the facts in this case, there is substantially no difference of opinion amongst us. The defender was a widower of the age of about forty-five, with two or three children, and his position in life was that of an agent or traveller for a bookselling establishment in Edinburgh, with a small salary, amounting, I think it was said, to L.80 or L.100 a-year. The pursuer, on the other hand, had been a domestic servant, and, at the time she became acquainted with the defender, she was living with her mother, assisting her as a lodging-house keeper in James' Square, Edinburgh. The pursuer seems to have been five or six years younger than the defender. In these circumstances, I cannot

say that there was anything so different or unsuitable in the position of the parties as to make a marriage between them at all improbable. They were introduced to each other about November 1855. They became very soon intimate, and I think there can be no doubt at all, that, although the defender's advances may have been readily enough received, there was a courtship by the defender, with a view to marriage. Nor do I suppose that any of your Lordships doubt that it was quite understood between these parties, as well as among their friends, that they were to be married. Then, about the 12th or 13th April 1856, this document, which is now founded on as a promise of marriage, was obtained by the pursuer from the defender. Although he gave that document, he was very considerably offended at its having been asked from him; and this appears either to have been the beginning of a misunderstanding, or to have brought some previous misunderstanding between the parties to a point. For, within a day or two after that, the intimacy between the parties substantially broke up, and, from that time forwards, any intention the defender may previously have had of marrying the pursuer was obviously abandoned. So far, I think, there is little or no difference in the views which the different members of the Court take of the proof. The material matter in dispute upon the proof, and upon which there is a difference of opinion upon the Bench, is, whether there was sexual intercourse between the parties in the course of that courtship? The question of sexual intercourse, however, is twofold. In the first place, was there such intercourse prior to the granting of the promise in April? And, in the second place, was there such intercourse after the date of that promise? Now, I confess I am very clearly of opinion, upon the proof, that prior to the date of that written promise, there had been sexual intercourse between these parties. The girl, Catherine Fraser, depones that the parties spent a night together in the dining-room, and that, upon two different occasions, she saw them in bed together; and I presume that, if your Lordships were to give implicit credence to what she says, the conclusion would be irresistible, that sexual intercourse had taken place. If we are not to hold that to be established, where two parties are seen in bed together (undressed, as is here plainly implied), and in such circumstances as occur here, I do not know how sexual intercourse is to be proved, unless you have a medical man to look on and tell you what happened. Therefore, if the girl is to be believed here, there can be no doubt of the fact of intercourse. The only way of getting over this is by holding that the girl is intentionally swearing what is not true. She could not be mistaken about what she says she saw. Now, I do not hold myself bound to believe a witness merely because that witness swears expressly to a particular thing. The longer we live, and the more we see of evidence, the less we will be inclined to take that course. But the question is, whether there be anything here to entitle us to hold that the witness is swearing falsely? I cannot find that there is. I agree with your Lordship in the chair that she does make great mistakes in point of time. Mistakes of that kind are made, less or more, every day. Doubtless, however, there are some other inaccuracies in her evidence. But I confess they are not such as to satisfy me that all she says about these parties spending the night together, and being in bed together, is utterly untrue. The question always is, what are we to believe? Where the evidence is, in some **[991]** respects, inconsistent with that of other witnesses, it may require more rigorous examination, but such discrepancies will not always entitle us to reject the evidence. This witness, however, is not without corroboration. She is corroborated in many particulars less or more important. She is more particularly corroborated by that statement of Chisholm, to which your Lordship has referred at p. 35, where he says that, wishing to breakfast one day about an hour and a-half earlier than usual, he went into the dining-room and found the pursuer and defender there, only partially dressed, and the rest of their apparel lying about the room. "They had evidently been sleeping on the sofa, from the appearance of the room and the sofa, on which there were bedclothes, which were in a state as if parties who had been lying on them had just turned out." I think Chisholm's belief, at the time, from what he saw, affords a safer test of the truth than critical remarks as to the apparent size of the sofa, or his answer, in cross-examination, that he observed nothing in the state of the sofa to show whether one or two persons had slept upon it. If he had said that he did, I should have thought his evidence less trustworthy. He says that the sofa was like a sofa upon which parties

had been sleeping, and nobody could with accuracy say more. Then, as to the size of the sofa, he says it was "a large sofa, about a couple of feet broad." He did not measure its size, however, and I see no physical impossibility whatever, and no improbability in two persons attached to each other as these parties were, spending the night on it, as Chisholm evidently believed them to have done. It is true Chisholm says he never complained of the pursuer and defender using the dining-room in that way. But he says he did not like it, and that he left the house on account of what he saw was going on, which plainly means that what he saw satisfied him that there was improper intimacy between these parties. This evidence is very material, because, as regards Chisholm, it is not even suggested that he was doing otherwise than telling the truth to the best of his belief. There are many other considerations of minor importance, which I shall not go into. I merely say that the result is to satisfy me that there is no ground for disbelieving the girl in the substantial part of her evidence. As Lord Ivory has said, if you are to throw aside the testimony of a witness, because you find discrepancies in it, or parts of it contradicted by the evidence of another witness, you may throw aside a great portion of every proof. The main contradictions to the girl's evidence are supposed to be found in the testimony of the witness Alexander Fraser. Now I confess that his testimony leads me to think that he is a person of less accurate observation and memory than the girl. There are discrepancies between his evidence and that of Chisholm, greater than between his evidence and that of the girl. But these discrepancies do not entitle you to throw aside altogether the evidence of any of them. For instance, Chisholm says (at p. 34, C, D,) that he was in the house till after the middle of April. Alexander Fraser says (at p. 41, F,) that he was a lodger there in March, April, and May. According to that testimony, they were both there in April. But yet Fraser says expressly (p. 41, G,) "there was no lodger of the name of Chisholm in the house during the time that I was there." That is an illustration that you may find such inconsistencies, and yet not be entitled to conclude that either witness is stating what he disbelieves. Fraser goes on to say, "to the best of my remembrance, I slept in my own bed-room every night during the whole three months that I occupied the lodgings. I never slept in any other room in the house except my own bed-room." Then he says, "it occurs to me that it is possible that I occupied another apartment for a short time both night and day to accommodate other lodgers." Afterwards again, he says, "if I left these rooms, of which I have now a faint recollection, it was only for a few days at the end of my stay, when I gave up both my parlour and bed-room, and moved in to a room where there was a concealed bed." The object of this examination was to contradict the girl Fraser, when she says (p. 9, C, D,) that the pursuer and defender passed a night together in Mr. Fraser's bed-room. But is the above the sort of testimony by which we are to hold it proved that Alexander Fraser never slept in another room? First, he says, "to the best of his remembrance," he did not. Then he is positive he never did. Then it occurs to him to be possible that he did. Then he has a faint recollection that he did, and is able to mention the very room he moved into. There is, indeed, throughout the whole of Fraser's testimony, what I confess leaves the impression upon my mind that he is a man of loose observation **[992]** and memory; and we know very well that there is the greatest possible difference between individuals in these respects. The only other material witness said to affect the credibility of the girl is Douglas, who says that Catherine Fraser said to him that the defender was only one night in the house. Here again, my impression decidedly is, that the memory of the girl is the more accurate of the two. The girl may very probably have said that the defender was only one night in the house after he gave the written promise, and Douglas, knowing the circumstances imperfectly, may honestly enough be under the impression that this statement referred to the whole period of their acquaintance. I cannot rely on a discrepancy so easily explained, when the question is, whether the girl is swearing falsely or not. As to her leaving between terms, the observations of Lord Ivory, I think, are satisfactory. There may be other matters upon which there may be inaccuracy, more or less, but we are not, therefore, to go the length of throwing aside the girl's testimony altogether, when the only alternative is to hold that she is swearing intentionally false. Taking the proof altogether, I can have no reasonable doubt that, upon frequent occasions, in the course of that courtship, this man remained in the house all night, and that sexual intercourse took place between the parties. If, therefore, I concurred with the Lord

Ordinary as to the law, I should be compelled to come to the conclusion that there was here enough to prove a marriage. But taking the facts to be as I have stated them (and leaving out of view, in the meantime, all consideration of the written promise), I am of opinion with, I rather think, all of your Lordships, that, according to the law of Scotland, these facts do not make a marriage.

There are, as Lord Curriehill has observed, various ways of constituting marriage by the law of Scotland,—consent *de presenti*, promise *subsequente copula*, and habit and repute. It is quite plain, however, that the two last modes of constituting marriage, viz., promise *subsequente copula*, and habit and repute, are not so definite and satisfactory as the first. There is much more room for misapprehension on the part not only of the public, but of the parties, who may be married without knowing that they are married. It is quite plain that when this man wrote the letter or promise of 12th April, he did not think he was married; and yet the Lord Ordinary, if I understand his view rightly, thinks that he was. The same observation applies to the pursuer who insisted for and obtained that written promise. In short, it is plain that these two last modes of marriage are attended with dangers and inconveniences which the other mode is not attended with. That observation leads me to this, that we are not to multiply such modes of marriage beyond what we find already clearly established. It appears to me that if this courtship, with copula in the course of it, were held to be sufficient to constitute marriage, this would be to add to those vague and unsatisfactory modes of constituting marriage another mode more vague and unsatisfactory than either of them. Proof by writ or oath of a specific promise, and proof (which may be *prout de jure*) of copula, are definite things, and it is easy to know whether you have them or not. But if you are to look to the whole circumstances of every courtship, where there is no written promise, and not even an allegation of a specific verbal promise, and to consider whether you ought or ought not to hold that there is something equivalent to a promise, which, along with copula, is to make a marriage, it appears to me that that will be a far more indefinite and unsatisfactory inquiry, with a view to the constitution of marriage, than any we are yet acquainted with. One result must be, that wherever there has been an honourable courtship with a view to marriage, and copula takes place in the course of the courtship, the parties will be married. Now that is rather startling. Parties may be betrayed into such familiarity without dreaming of the consequence, but the consequence will be marriage nevertheless. Or if the lady doubts whether the man will go through with the ceremony, then, instead of taking the uphill plan this lady took of exacting a written promise, she has only to hold out encouragement, which the man may not have virtue enough to resist, and then the marriage is completed at once. If that is to be held law, many more men even than at present may find themselves married who never meant it, and who would rather not have been so. But I do not think that is the law of Scotland. I do not mean to go over the cases on this subject in detail, but we are familiar with the doctrine laid down by Mr. Bell in his Principles, sect. 1518, that, in a question of marriage by promise *subsequente copula*, the promise can only be proved by writ or **[993]** oath. That was expressly decided so far back as the case of Harvie *v.* Crawford, 19th February 1732, M. 12,388. The pursuer in that case offered to prove promise and subsequent copulation, which the Commissaries sustained,—the promise relevant *scripto vel juramento*, and the copulation *prout de jure*. The pursuer advocated, insisting that she should be allowed to prove the promise by witnesses. But the Court refused the bill.

There are some cases undoubtedly which countenance a different doctrine. The case of Smith *v.* Grierson, 27th June 1735, M. 12,391 and 12,393 has always been referred to as one of the strongest of these. But, as Lord Curriehill has remarked, all that was done there was to allow a proof before answer. No doubt, the Faculty Report bears that the Judges thought the proof competent; and Lord Kames approves of that view. But still, all that was done was to allow the pursuer a proof before answer; and I need not say to your Lordships that proof before answer means that all questions as to the competency of the proof and other legal questions, are left open, and that it would not be in the least inconsistent for the Court afterwards to come to the conclusion that the proof so led was incompetent.

There is another case referred to in support of this doctrine—Stewart *v.* Lindsay, 6th March 1817, Hume's Dec., 380. No doubt the rubric which the editor who

prepared these decisions for publication, after Mr. Hume's death, has given to that decision, bears, "Marriage found to be contracted by promise *subsequente copula*, though the promise was not direct, but implied only, from the circumstances of the man's conduct." But if you look to Lord Cringletie's interlocutor, your Lordships will see that that case resulted in a question of construction of the man's oath, and is not therefore an authority to the effect supposed.

Then we have the case of Harvie *v.* Inglis, 20th May 1837, upon which the whole Court were much divided, but in which a proof before answer was allowed, which failed (1 D. 536). It may be that in these cases there was a leaning in favour of the competency; but the only thing that was done was to allow a proof before answer.

In the case of Lowrie *v.* Mercer, 28th May 1840, this passage occurs in Lord Moncreiff's note to his interlocutor:—"Legal proof of a promise of marriage, followed by that intercourse which generally attends marriage, is held to prove the mutual consent required, as a presumption arises that at the moment of consummation, that which was before a promise only became a present consent to marriage. Some lawyers have doubted whether this last mode of proving marriage does not differ from the others in this point, that it requires to be established by declarator in the lifetime of the parties. Without attempting to resolve this point, it is a settled rule of law that the promise must be proved either by the writing or by the oath of the party by whom it is said to have been given." No opinion can be more express.

Then there is the case of Monteith *v.* Robb, 5th March 1844, in which the Second Division, having before them all that had taken place in the other cases, both in this Court and in the House of Lords, held that marriage cannot be established in the mode now contended for, by courtship and copula, and that the promise must be proved by writ or oath. As to the case of Honeyman, the observations made plainly show that what the House of Lords were dealing with was the correspondence, which they thought imported a written promise of marriage. That may have been a right or a wrong inference, but it was the ground of judgment; and all that was decided in that case was, that the letters which had passed between the parties bore that construction, just as in the case of Stewart *v.* Lindsay it was held that the oath bore that construction. Therefore, and although I take the view I have stated to your Lordships of the evidence, I am of opinion that, in point of law, the facts I have mentioned do not import marriage.

There remains the other question as to the written promise, said to have been followed by copula, and which of itself, when so followed, is said to constitute marriage. Now, in the first place, I am not satisfied that copula after the date of that written promise is proved. I have stated already that I do not disbelieve the girl Fraser. I think she tells the truth according to her recollection. But it is perfectly plain that what she is most inaccurate about is dates; and, where the whole matter comes to depend upon a day or two,—although I dare say she thought that one of the occasions she speaks to was after the written promise,— I do not **[994]** feel that her accuracy in this respect can be relied upon, to rear up a marriage where otherwise there would be none.

It is plain enough that, if there was subsequent intercourse at all, it occurred only once, and it seems improbable that it occurred even once. The quarrel took place immediately after the writing of the promise. The pursuer was extremely unwell on the Sunday, and before she had time to get better the misunderstanding broke out. But it is enough that in a question so vital as whether copula followed the promise, we have not evidence on which we can satisfactorily rely. I am not moved by the same doubts as Lord Ivory about the promise itself. I think it is here sufficiently established. The letter was delivered to the pursuer, and bears expressly that he was to marry her. Now, although I am not for multiplying the modes of marriage, I am for dealing fairly with those now existing. And when a man, *sui juris*, gives a promise of marriage such as this, I would be slow to allow him to back out of it by saying he repented afterwards. If he gave this written promise, and copula followed, so as to make a marriage, repentance on his part, or on his and her part both, would be of no use. So far as proof of promise, therefore, goes, I think there is enough. And, although I do not think it proved that there was intercourse after the promise, I am not so confident in that view as to entitle me to withhold the opinion I entertain, that,

even if subsequent intercourse were held to be proved, this would not, in the circumstances, constitute marriage.

For, if there was an act of intercourse after the promise, it was, I think, a mere continuance of the prior intercourse which had been going on just about as habitually as if the parties,—while living in the same city, but without having taken up house together,—had been married. Now, I do not say that there never can be a marriage by promise *subsequente copula*, where there has been previous illicit intercourse. But I am humbly of opinion that a promise given in the course of an illicit connection does not *necessarily* make marriage. This is no newly formed opinion. I was so taught by Professor Hume, in my notes of whose lectures I find it laid down that the promise must precede the first occasion of intercourse, otherwise it will have no effect except to found a claim of damages.

These notes were taken in the last session in which that eminent lawyer was professor, and during the latter portion of which his lectures were read by Mr. Forbes (afterwards Lord Medwyn), in consequence of the Professor having been made a Baron of Exchequer. I gather that Mr. Hume had taught the same doctrine during the long previous period for which he occupied the chair. In Mr. Brodie's Notes upon Stair, p. 28, he refers, in support of this doctrine, to full notes of Mr. Hume's lectures lent to him by a friend. A reference was made to those lectures in the case of Sim *v.* Miles, 20th November 1829, which is one of the cases necessary to be looked at in this branch of the law. The Lord Justice-Clerk having remarked that he doubted the accuracy of the reference, Lord Pitmilly observed,—"The mention of Baron Hume's notes led me to look at my notes when I attended him in 1792, and I have then his opinion taken down, that marriage cannot be constituted by promise interjected in a course of illicit connection, and he confirms that opinion by a reported decision, White *v.* Hepburn, November 18, 1755, M. 12,686; and when I attended him again, he mentioned an intermediate decision which is not reported, Low *v.* Allardyce, June 5, 1794." It thus appears that the same doctrine which was laid down by Mr. Hume in the last year of his professorship had been laid down by him very many years before. Lord Pitmilly heard it, and took it down in 1792, and he gives his own opinion as well that such is the law; and Lord Glenlee, although not so strongly, indicates the same thing; while Lord Cringletie says,—"I think it very doubtful whether we can lay it down in the abstract that promise followed by copula, in all cases, makes marriage." And so the decision in that case affirmed the marriage, but did not affirm the abstract doctrine. That was a case of a young girl who had been seduced by a man when she was only 14 or 15. All intercourse had ceased for years. A promise was then given, and after six months the intercourse was renewed, and the question came to be, whether there was marriage. Even there the Court went more on the ground of an old promise than on the renewed intercourse. But I do not wish to exclude a special case of that kind, or a special case of any kind. I do not wish to be understood as saying, that although there has been previous intercourse, promise followed by copula may not make marriage, but only **[995]** that it does not necessarily make marriage; and that, assuming the fact of subsequent intercourse to be proved here, it would not make marriage in this case.

Professor More, I presume, teaches the same doctrine with his predecessor, Professor Hume. For, in his Notes upon Stair, p. 13, he says that a promise to a concubine affords no presumption of marriage. The case of a regular concubine is a strong illustration. Some Sunday morning she becomes hysterical, and to calm her excitement the man allows himself to be persuaded to give her a written promise to marry her at some future time. He sleeps with her that night as he had done the previous night, and for a long period before. Is that necessarily a marriage? In the present case, although marriage was contemplated, the sexual intercourse which had been going on, was neither more nor less than illicit intercourse. No cessation of that intercourse—no determined return to virtue—no announcement even of a determined resolution never to yield again unless a promise of marriage was given—can be pretended to have been proved here; and, upon the whole, I am of opinion, without saying what might have been the case in other circumstances, that the circumstances here are not such as would make a marriage by promise *subsequente copula*, even if the disputed act of intercourse relied on were held to be proved.

The Court pronounced the following interlocutor:—"Recal the interlocutor of the Lord Ordinary reclaimed against: Assoilzie the defender from the conclusions of the libel for declarator of marriage, adherence, and aliment, and decern: Remit to the Lord Ordinary to dispose of the conclusion for damages, and, in the meantime, reserve all question of expenses."

[Cf. *Longworth* v. *Yelverton*, 1 M. 167, 168.]

No. 148. XXIII. Dunlop 995. 7 June 1861. 2nd Div.—Lord Jerviswoode.

LAURENCE EDMONDSTON, Pursuer.—*Young—Badenach Nicolson.*

URSULA BRUCE or EDMONDSTON and HUSBAND, Defenders.—*Moir—Hector.*

Obligation—Rei interventus—Process—Reduction—Title to Sue.—A pursuer alleged a verbal agreement between himself and his deceased brother, whereby the latter was to leave his whole property to the pursuer, on condition of his settling as a medical practitioner in the deceased's neighbourhood;—*Held* (*aff.* judgment of Lord Ordinary), (1) that that was not such a contract as could be proved by parole, and that being so, it was impossible to prove *rei interventus* to validate it; and (2) that the pursuer had not libelled a relevant title to sue a reduction of the deceased's settlement.

Laurence Edmondston, doctor of medicine, residing at Halligarth, in the Island of Unst, in Zetland, raised this action against the natural daughter of his elder brother, the late Thomas Edmondston of Buness in the same island, and her husband. The pursuer concluded for declarator, that a disposition and settlement executed by Thomas Edmondston in the year 1819 in favour of the pursuer was the only valid and subsisting settlement of his affairs at his death, and that it was executed by him under an agreement with the pursuer, whereby the deceased engaged, that in the event (which happened) of the pursuer settling in Unst as a medical practitioner, and as the medical attendant of the deceased, the deceased would make him generally his heir and executor. The summons also concluded for reduction of a settlement executed by Thomas Edmondston in 1847 in favour of the female defender, of a deed or corroborative deed of settlement executed by him in 1850, and also of all other deeds of settlement or deeds of a testamentary nature executed by the deceased, subsequent to, and inconsistent with the deed of settlement executed in favour of the pursuer in 1819; or otherwise, in the event of the deeds not being reduced, that the defender, as general disponee, sole executrix, and universal legatory of the deceased, should be decerned to implement and fulfil to the pursuer the agreement above mentioned, and should be decerned to denude herself of the whole heritable and moveable means and estate of the deceased in favour of the pursuer; and failing implement and denuding, she should be decerned to pay to the pursuer the sum [996] of L.15,000, as the loss or damage sustained by him through the non-fulfilment of the said agreement.

The pursuer averred;—The late Mr. Edmondston died in 1858, in the eightieth year of his age, leaving heritable property worth about L.1200 per annum, and money to the amount of between L.11,000 and L.13,000. He had, besides, deposited large sums in bank in the name of his natural daughter, the defender, the deposit-receipts for which came into her possession while the deceased was on his deathbed. He was never married. The defender, the daughter of a female named Sinclair Bruce, was born in 1819. The deceased had four brothers; an elder brother, with whom he had no intercourse, who died unmarried in 1831; a younger brother, who emigrated to, and became a citizen of the United States; another, who died at an early age in 1831; and the pursuer, his youngest brother, who was nearly twenty years younger than the deceased. (Cond. 3.) "From the great disparity in their ages, the deceased Mr. Edmondston took almost a paternal interest in the pursuer; and his expressions of affection and regard for him were from the first most ardent, and continued such through life. At the close of 1819 the pursuer, who had been for some time absent from Zetland engaged in mercantile pursuits, visited Unst at the earnest solicitation of

the deceased, and staid some time with him, when the latter anxiously and repeatedly urged him to enter the medical profession, and to come and settle in Unst, and be near him, promising at the same time to make the most ample provision for him, both during his life and after his (the deceased's) death." (Cond. 4.) "In the same year (1819) the deceased executed a settlement of his affairs, conveying to the pursuer his whole property, heritable and moveable, under certain burdens, of no great amount. There was a burden of an annuity of L.100 to his natural daughter, the defender, and an annuity of L.6 to her mother. Of this settlement the deceased informed the pursuer at the time of his urging him to settle in Unst, as shewing the sincerity of his promises, and in evidence of what he would do for him if he came to settle there; and it was then agreed betwixt them that, on the one hand, the pursuer should give up his mercantile pursuits and objects, qualify himself as a medical man, and, having done so, take up his permanent residence with or near to his brother, the said now deceased Thomas Edmondston; and that, on the other hand, the said now deceased Thomas Edmondston should leave his property, heritable and moveable, in conformity with the said settlement." (Cond. 5.) In consequence of his brother's advice and earnest entreaty, and in pursuance of the agreement referred to in last article, the pursuer abandoned the mercantile profession, and attended medical classes at the Edinburgh University in the winter of 1820–21. While he was there, the deceased's letters to him recognised the said agreement, and show throughout the writer's desire that the pursuer and the lady, afterwards his wife, whom he was then engaged to marry, should settle permanently in Unst, and were full of expressions of his determination to share his wealth with the pursuer. The pursuer quoted in his condescendence extracts from letters addressed to him by the deceased, containing expressions of regard, and stating, as an additional reason for desiring that the pursuer should settle in Unst, that there was no medical practitioner in that island, or within many miles of it; that the deceased was, or considered himself to be, in very precarious health, and relied greatly on his brother's skill and kindness for relief. (Cond. 7.) "The pursuer obtained his degree of M.D., and in October 1824 he married, which latter step he took in reliance on the foresaid agreement, and on his brother, the said Thomas Edmondston's repeated promises, verbally and in writing, made by him, that he would share his last shilling with him, and make him his heir and executor, and on his settlement above mentioned. Farther, in reliance on these, and on the footing which was clearly understood by both parties that they were to be made good, notwithstanding that he was strongly ad- [997] -vised by many friends to prosecute his profession elsewhere, the pursuer in the same year agreed with the deceased to go to Unst, and there settle as a medical practitioner, and as the medical attendant of the deceased, which accordingly he did." The pursuer resided in the deceased's house till 1832, when he removed to a house upon the deceased's property; the pursuer still continued to attend upon the deceased till the close of his life. In 1846 the pursuer's eldest son died suddenly and accidentally while on a scientific expedition on the west coast of South America. After this event it appeared that the influence of the female defender's mother, who resided with the deceased in the capacity of his housekeeper, considerably increased. In 1847 the deceased executed the settlement under reduction, by which he bequeathed his whole property to his natural daughter, the defender, whom failing, to the defender Thomas Edmonston (who has subsequently married the female defender), and his heirs; and failing them, to the pursuer's eldest surviving son. He left the pursuer only the liferent of the house and farm the pursuer then occupied, and which was worth L.15 per annum, and an annuity of L.60, afterwards increased to L.80. The execution of the settlement was never mentioned to the pursuer. Subsequent to 1847 the deceased became more infirm; he continued to avail himself of the pursuer's assistance, and to express his affection for the pursuer and his family as warmly as ever. After deceased's death the deeds of settlement in favour of the defender were produced by her mother; but the defenders had refused to allow the pursuer to examine them.

The defenders lodged preliminary defences. They denied ever having seen the settlement alleged by the pursuer to have been executed in his favour in 1819, and denied that it ever existed; they also denied that any such agreement as was alleged by the pursuer in his condescendence (art. 4) ever existed. They pleaded;—The pursuer had no title to insist in any of the conclusions of this action, or to call for production of the writings challenged.

The pursuer craved a diligence for the recovery of (1.) The settlement executed in his favour by the deceased in 1819; (2.) All settlements or testamentary deeds executed by the deceased subsequent to 1819, and all scrolls or copies thereof; and (3.) All letters of instruction in reference to the testamentary writings of the deceased to his law-agent or others, in the year 1819 and subsequently, and the books, or excerpts therefrom, of the accounts of his law-agents in reference to such testamentary writings.

The Lord Ordinary, on 12th June 1860, pronounced an interlocutor finding that the pursuer had failed relevantly to set forth a title sufficient to warrant him in insisting in the present action, and dismissed the action.

The pursuer reclaimed, and the Court, on 4th July 1860, pronounced an interlocutor, by which, in respect the pursuer moved to be allowed to make up a record on the question of title, before that question was ultimately disposed of by the Court, the interlocutor of the Lord Ordinary was recalled, and the case remitted to his Lordship to proceed with the preparation of such record, and to close the same, and pronounce judgment of new on the question of title. The defenders were found entitled to their expenses since the date of the Lord Ordinary's interlocutor.

In his revised condescendence, made up under the remit in the above interlocutor, the pursuer averred that he was the deceased's next of kin. (Cond. 4.) "On the occasion of the" pursuer's "visit" to Zetland in 1819, "the deceased anxiously and repeatedly urged the pursuer to enter the medical profession, and settle in Unst, in order to be near him, although pursuer had then more than one advantageous offer of a settlement elsewhere. The result of their communings was, that on a day towards the end of December 1819, or on one or other of the days of that month, an agreement was entered into between the deceased and the pursuer, whereby the pursuer engaged to refuse the offers of settlement elsewhere which he had received, to abstain from entering into any other arrangement with that **[998]** object, and to enter the medical profession and settle in Unst, near the deceased, who, on the other hand, undertook and obliged himself to provide for the pursuer during his (the deceased's) life, and that at his death the pursuer should inherit his whole means and estate, with the exception of an annuity of L.100 to his natural daughter, the defender, and one of L.6 to her mother." (Cond. 5.) "Following up, and in pursuance of said agreement, the deceased, about the same time, made a deed, leaving his whole means and estate to the pursuer, under the exception above stated, and he informed the pursuer that he had done so. The said deed is in the defender's possession, but she has refused to exhibit it to the pursuer or his agents. Also, in pursuance of the said agreement, the pursuer refused the offers of settlement elsewhere which had been made to him, abandoned the mercantile profession, and went to Edinburgh, where he attended the University, and fitted himself for entering the medical profession." The other averments were repeated nearly *verbatim*. The pursuer pleaded;—(1.) The pursuer has relevantly and sufficiently set forth the agreement between him and the deceased founded on, and is entitled to establish the same *habili modo*. (2.) The deed executed in the year 1819 by the deceased, in favour of the pursuer, having been made and executed under the agreement condescended on, and the pursuer having acted on it as condescended on, it was *ultra vires* of the deceased to revoke the same, and it is now his only valid and subsisting settlement. (3.) At all events, in the circumstances condescended on, the defender, Ursula Bruce, as general disponee and sole executor of the deceased, is bound to implement to the pursuer the agreement condescended on, and to denude in his favour of the whole estate of the deceased under the burdens therein set forth. (4.) The dispositions and deeds of settlement, dated 16th September 1847 and 13th July 1850, having been executed in violation of the agreement between the pursuer and the deceased, are null and void, or *separatim*, are liable to be reduced as *ultra vires* of their granter. (5.) *Separatim*—The deceased having violated the agreement between him and the pursuer, to the injury of the pursuer, the defender, as representing him, is liable in reparation to the pursuer as concluded for.

The defender pleaded;—"The pursuer has no title to insist in any of the conclusions of this action, or to call for production of the writings challenged, in respect—1st. The constitution and import of the pretended agreement between the pursuer and the deceased Mr. Edmonston are not relevantly averred. 2d. The allegations regarding the deceased's pretended deed of settlement in favour of the pursuer are irrelevant; and,

3d. The pursuer's allegations, besides being unfounded in point of fact, are deficient in specification, and insufficient to be admitted to probation."

On 22d January 1861 the Lord Ordinary pronounced this interlocutor:—"Of new, finds that the pursuer has failed relevantly to set forth a title sufficient to warrant him in insisting in the conclusions of the present action; and therefore, to that effect, sustains the defences, dismisses the action, and decerns: Finds the pursuer liable to the defenders in the expenses of process, so far as not disposed of by the interlocutor of the Inner-House, of date 4th July 1860."[1]

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[1] "NOTE.—The Lord Ordinary has again considered this process, with the aid of the record which has now been made up, and of the debate which has followed thereon, but he has been unable to find grounds on which to change the opinion which he originally formed in regard to the want of title on the part of the pursuer.

"The Lord Ordinary stated formerly that, in his view, the agreement alleged to have been entered into between the pursuer and his deceased brother lay at the foundation of the pursuer's title; and it appears to him that the distinct and candid statements now made in the record on the part of the pursuer, tend to strengthen this conclusion. For on perusal, especially of the fourth and fifth statements for that party, it will be seen that the agreement was a distinct transaction between the parties, and that, whatever may be the effect now due to it, it was gone into, without reference to any disposition or deed of settlement, by the late Mr. Edmondston, as then existing. Accordingly, the fifth statement, treating the agreement as completed, sets forth that—'Following up, and in pursuance of said agreement, the deceased, about the same time, made a deed leaving his whole means and estate to the pursuer, under the exception above stated, and he informed the pursuer that he had done so.'

"It is thus all important to consider the character of the agreement, and the form in which it was made. As respects the latter point, there need be no difficulty, as it was fairly admitted, on the part of the pursuer, that the agreement was verbal only. As respects the former point, it appears to the Lord Ordinary that there may be some doubt as to the exact signification of the term 'inherit,' as descriptive of the right which the pursuer expected to obtain under the agreement. But it is probably apt enough to designate that the pursuer was to take no right, under the agreement, to the means and estate of his brother during his life (apart from the support which was promised), but that he was to succeed to his brother only as an heir does on the death of his ancestor. How this was to be done according to the understanding of the pursuer, is sufficiently shown by the fifth statement already quoted, where the pursuer describes the deed said to have been executed in pursuance of the agreement by his brother, as a deed 'leaving his whole means and estate to the pursuer;' that is, a deed usually described in law as a disposition and settlement *mortis causa*.

"Now, this settlement the pursuer seeks to set up, under the first declaratory conclusion of the summons, as the only valid and subsisting settlement of the deceased, and as having been made and executed under the foresaid agreement. But the Lord Ordinary has been unable to see any sufficient warrant for this conclusion; the agreement does not support it. There was no reference there to any particular deed. If the deceased had provided in any other form, that the pursuer should inherit his means and estate, it would have satisfied the agreement. Therefore a mere act of revocation of this deed was not an act of which, *per se*, the pursuer could have legally complained. Indeed the power of revocation, unless in some form absolutely renounced, must be held to be inherent in the very idea of a *mortis causa* deed. This power the late Mr. Edmondston never renounced, nor indeed did he renounce any power whatever. He (as the pursuer says) undertook and obliged himself, that the pursuer should inherit his means and estate. But to fulfil this undertaking itself, he had to exercise the full powers of a proprietor. As such he was not limited. He may have engaged verbally to the pursuer to exercise these powers in a particular way. But if he chose not to fulfil that engagement, on what can the pursuer rest? The whole power, both of revocation and of disposing, was in the deceased, and he exercised both, not in favour of the pursuer, but of the defender.

"It appears to the Lord Ordinary that this matter may be fairly tested by supposing Mr. Edmondston to have failed to have executed any deed whatever, and that thus

[999] The pursuer reclaimed, and argued;—The agreement on which the pursuer founded was set out on the record with sufficient clearness. There [1000] could be no

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his succession had opened to his heir, and to his executor at law. In such a case, could the pursuer have set forth the agreement on which he here founds against both or either of these parties?

"To the Lord Ordinary it appears, if the argument of the pursuer be sound at all, he must in the case supposed, have had right so to do. Yet would it be listened to, that the pursuer should be permitted to set up a verbal agreement so as to have the effect of a *mortis causa* deed, and thus, by force of the verbal agreement, make himself the universal disponee and executor of the deceased.

"The pursuer, sensible of these difficulties, endeavours to support the verbal agreement on which he founds by alleged *rei interventus*. He says, be it that the settlement of 1819 was *sua natura* revocable—be it that a verbal agreement as to heritage is, as such, unavailing—yet if acted on, it may be validated *rei interventu*.

"Authorities were quoted in support of this view from the law both of Scotland and England. The cases in the former mainly relied on were those of the Bargaddie Coal Company, as decided in the House of Lords, under date March 11-15, 1859, 3 Macqueen's Reports, p. 477; and Smith *v.* Marshall, ultimately decided in the First Division of the Court, and reported under date 7th June 1860. As respects the former of these cases, the Lord Ordinary is aware that the judgment of the Court of last resort has been more than once brought forward as if it had established a novel principle in the law of Scotland respecting the competency of parole proof, in a matter affecting heritable property. But he has himself been unable so to read the judgment. There the tenants of a coal field were by their lease restricted from working the coal within the space of fifteen feet from the boundaries of the land of the neighbouring proprietors. The tenants averred that the landlord had verbally consented to waive this restriction, and that they had acted on this permission. The House of Lords in substance found that these facts might competently be proved under an issue. The case, as respects the point now under consideration, goes no farther.

"The case of Smith *v.* Marshall is also altogether distinct from that now under consideration. It had regard to a specific contract of feu, verbal in the first instance, but followed by acts of complete possession, by considerable expenditure by the vassal on the property, the extent of which was fixed, and by the acceptance of a feu-duty, for which the superior granted written receipts. In these circumstances, the Lord Ordinary (Benholme), by an interlocutor which was allowed to become final, found that the superior could not resile, and a subsequent question arose as to the clauses to be inserted in the feu-contract, with which question the Inner-House had chiefly to deal.

"As respects the cases quoted from the law of England, the Lord Ordinary is jealous of his own capacity to apply them with safety here. The leading case referred to, if the Lord Ordinary has rightly noted it, was that of Prole *v.* Soady, decided by the Vice-Chancellor Stuart under date January 21, 1859, and reported 1 Law Times, p. 309. There it appears to have been held, where a marriage was contracted in the faith of representations by the father of the lady, that a certain estate and funds had been settled by him as a provision for his daughter and her children, that the children were entitled to have that representation made good against the assets of the lady's father. A strong equity existed in support of such a judgment, whereby weight was given to the high onerosity of a particular contract of marriage. But the alleged acts of *rei interventus* here are of a different character. The pursuer's case is, that on the faith of the agreement alleged he gave up pursuits and prospects which are not very specifically set forth, entered the medical profession, and took up his residence in the Isle of Unst. But granting that the whole subsequent life of the pursuer has been coloured and affected by the *spes successionis* held out to him by his brother, and that the things alleged were done in consequence of the pursuer's trust in the agreement, can they import into that agreement a character different from that which, apart from these alleged acts, it would have borne? Acts constituting *re interventus* may enable the Court to deal with an agreement, which, through informality or other similar impediment, could not, *per se*, have been recognised. But *rei interventus* will not make an agreement that which, in its origin, it was not. Thus, here, the *rei interventus* truly goes, in the opinion of the Lord Ordinary, little way towards supporting the case of

doubt that a verbal agreement was alleged; and though such an agreement made with reference to land might be resiled from, until it was [1001] reduced to writing *locus pœnitentiæ* was cut off by *rei interventus*,[1] and the *rei interventus* did not require to be in favour of the party founding on it, in order to validate a verbal agreement.[2] It was undoubtedly averred that *rei interventus* followed the agreement condescended on. It was stated that, on the faith of it, the pursuer betook himself to the study of medicine, and settled in Unst. This being a contract to endure during the life of the parties, was entitled to favour. The agreement between the pursuer and the deceased being irrevocable prior to the date of the deeds founded on by the defender, the pursuer had a clear title to insist in the reduction of the latter. The difficulties the pursuer might meet with in proving his case were not now to be considered as interfering with his right to insist in the action. The pleas of the defenders really were pleas on the merits; but the Court was dealing with a defence against satisfying production, which was a defence of an unusual and exceptional nature; and if the defenders in an action of reduction so far varied from the usual practice in such actions as stating a defence against production, the whole *onus* was on them of making out that defence,[3] and they had not certainly made out a good defence against production, in a reduction of a settlement at the instance of the deceased's next of kin, which settlement was alleged to have been procured from the deceased by undue influence.

It was agreed that parties should put in a joint minute craving the judgment of the Court on the question of title to sue, as a preliminary defence applicable to the whole case.

At advising the opinion of the Court was delivered by

Lord Benholme.—I am of opinion that the interlocutor of the Lord Ordinary ought to be adhered to.

By the law of Scotland a marked distinction is made as to the competent mode of constitution between nominate and innominate contracts; the reason of which is thus given by Erskine (iv. 2, 20):—"In contracts which lay mutual obligations on both parties, naturally flowing from the contracts themselves, their meaning can hardly be misapprehended by witnesses; whereas in verbal agreements, in which the articles to

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the pursuer. For, supposing it to be competent to prove the terms of that agreement, what was it, in truth, but an agreement between the brothers, in which this inherent vice existed, that its execution depended upon the *voluntas* of one of the parties. The pursuer says his brother was bound thereby to make him his heir. No *rei interventus* on that agreement could bind him to make the pursuer his disponee. Therefore, there was left in him the *plenum dominium* over his property,—the existence of this absolute right in him during his whole life, thus truly left nothing tangible to which the acts of *rei interventus* could attach or add force. Let it be supposed, for a moment, that the pursuer had been the eldest son and heir-at-law of the deceased Mr. Edmondston, and that the latter had verbally held out to him, that if he would enter a certain profession, and do those others acts which the pursuer sets forth, he would bind and oblige himself that his succession as heir should be left open to him; and suppose, on the death of his parent, he had found that he had been disinherited by means of a deed of conveyance, could he have regained his inheritance by such an action as this? Or must his case not rather have gone to swell the long list of disappointed expectations? The *spes successionis* in the case supposed is practically that which was held out to the pursuer here; and no mere use of such terms as one undertaking and obliging himself to make another his heir, can, in the opinion of the Lord Ordinary, alter the true character of that which is so undertaken.

"It appears then to the Lord Ordinary, if he be right at all in the view which he takes of this case, that the title of the pursuer to insist in any of the conclusions of this action must of necessity fall."

[1] Ersk. Inst. iii. 2, sect. 3 (Macallan's edit.); Moodie, 21st June 1745, Mor., p. 8439.

[2] Hamilton *v.* Wright, 22d June 1836, 14 Sh. & D., p. 323; Hamersley, 12 Clarke & Finnelly, p. 45.

[3] M'Millan *v.* Free Church, 23d Dec. 1859, Lord Deas' Op., *ante*, vol. xxii., p. 322.

be fulfilled by the parties do not necessarily arise from the nature of any known contract, but depend entirely on the import of the words uttered by the parties, inattentive hearers may either, by misplacing what was spoken, or by mistaking its true meaning, be apt to change the obligation into something quite different from what the debtor intended."

It is clearly the law of Scotland, not only in regard to heritage, but also in regard to moveables, that innominate contracts, especially such as are of an unusual character, cannot be constituted verbally, or proved by witnesses.

[1002] Nor does it alter the rule that *rei interventus* upon such verbal and innominate contracts is alleged. For the uncertainty as to the terms of an innominate verbal contract renders it impossible to determine what acts can be considered as constituting a partial performance, or *rei interventus* following upon it.

These observations are directly applicable to the present case.

The title of the pursuer to bring the present action of declarator, reduction, and damages, unquestionably depends exclusively upon the alleged agreement between him and his deceased brother, the late Thomas Edmondston, Esq. of Buness, whereby, in consideration of certain actings on the part of the pursuer, Mr. Edmondston became bound to provide for the pursuer during his (the deceased's) life, and also that at his death the pursuer should inherit his whole means and estate, with certain small exceptions or burdens.

That this is an innominate contract, and one of an unusual kind, cannot be denied. The precarious and fluctuating terms of such a contract is brought out by the change which its terms and conditions have undergone in the pursuer's statement of it. In the original condescendence attached to the summons it was very differently set out. The deceased Mr. Edmondston was therein, in one place (art. 3), said to have promised to make the most ample provision for the pursuer, both during his life and after his death. And, in another place (art. 4), it is said that his brother in 1819 executed a settlement of his whole estate, both heritable and moveable, under certain small burdens and exceptions; that he informed the pursuer of his having done so, and engaged to leave his property in conformity to that settlement.

In the revised condescendence, however, the agreement is distinctly set out as antecedent to the execution of the settlement, and not as referring to the settlement, which was not then in existence.

The revised condescendence also ascertains that the agreement was a verbal one, which raises directly the question of the pursuer's title. It has been suggested that the objection to which the Lord Ordinary has given effect is rather one to the mode of proof anticipated, than to the title of the pursuer; and it is true that these questions are apt to run into one another. The mode of constituting a contract has a close connection with the mode of proving it. In the present case, and under the present record, it appears to me that the want of a written title of the alleged agreement, upon which the action is founded, strikes at the pursuer's title. The death of the pursuer's brother, who is alleged to have been one of the parties to the contract, puts oath of party out of the question. The pursuer does not propose to prove his contract by any contemporaneous writing. He seemed rather inclined to rest the constitution of the contract, if not purely on parole evidence, on that only, with the aid of inference derived from subsequent correspondence and actings of the parties.

Such a course of procedure appears to me to be inconsistent with the rule of law mentioned at the outset of this opinion. It involves a hazardous confounding of the alleged *rei interventus* with the terms of the agreement which these actings are said to validate, whereas the former ought to stand, in point of constitution, clear and independent of the latter.

Having thus indicated the line of argument by which, I think, the title of the pursuer is invalidated, I shall not go into those details which have been well enlarged upon in the Lord Ordinary's note, but conclude by proposing to adhere to his Lordship's interlocutor.

The other Judges concurred.

The Court adhered to the interlocutor reclaimed against, and found the defender entitled to additional expenses.

[Cf. *Scotland* v. *Henry*, 3 M. 1128; *Thomson* v. *Fraser*, 7 M. 41.]

No. 149. **XXIII. Dunlop 1003.** 7 June 1861. 2nd Div.

Messrs. RENFREW and BROWN and MANDATORY, Pursuers.

The MAGISTRATES of GLASGOW and Others, Defenders.—*Millar.*

Process—Expenses—Mandatory.—A mandatory for a pursuer, sisted during the dependence of a process, *held* liable for the whole expenses in which the pursuer was found liable.

This action was raised in 1858 against the commissioners for raising the land-tax in Glasgow, concluding for reduction of certain warrants for recovery of trades-stent, and for declarator that the defenders had no right to levy trades-stent from the pursuers. Before the action was raised both of the pursuers had left Glasgow, and gone abroad. In the summons they were described as resident in Glasgow, and it was only during the dependence of the case before the Lord Ordinary that it became known to the defenders that the pursuers had left the country. In June 1859 the Lord Ordinary pronounced an interlocutor assoilzieing the defenders, and finding them entitled to expenses. The pursuers reclaimed, and the Court, on 29th June 1860, sisted a mandatory for the pursuers. The Court, after minutes of debate, adhered to the judgment of the Lord Ordinary, and found the defenders entitled to additional expenses.

On the defenders' application for an extract of the decree against the mandatory, as well as against the pursuers, the extractor expressed doubts whether the decree against the pursuers was a sufficient warrant for an extract against the mandatory. The defenders then boxed a note, praying the Court to decern anew for the expenses against the pursuers and their mandatory. This motion, so far as it regarded the expenses of process before the mandatory was sisted, was opposed on his behalf. The motion having come up for discussion on the last day of the session, and as it involved a general principle of some importance, the Court ordered minutes of debate.

The defenders argued;—It did not admit of doubt, that either a foreigner or a Scotsman, who has left the kingdom, is obliged, if he pursues an action, to sist a mandatory; one purpose for which a mandatory was required being, that the other party to the litigation may have some one who will represent the liability of the absent litigant for costs. One of the conditions of the contract of litiscontestation being that each party shall be present in person, or by another to whom the duty of representing him has been delegated, to answer for costs according to his ability. The mandatory was not in the position of a cautioner for expenses, and all that was necessary was, that the absent litigant should be represented by a mandatory in his own rank in life.[1] The mandatory was not the cautioner for, but the representative of, the absent pursuers, and the question now raised was, whether that representation was universal as regarded the costs of the suit,—there being no doubt that he was liable for costs incurred subsequent to the date at which he was sisted.

A mandatory for an absent litigant was required for very different reasons from those for which a cautioner for expenses was required from a bankrupt litigant. In the case of an absent pursuer, a mandatory present to answer, and sufficient to the extent of the absent litigant, was all the law required; but in the case of a bankrupt litigant, the want for which provision was to be made was very different. The litigant was himself present and answerable for past expenses, and by getting a cautioner for future expenses the opposing litigant got all he was entitled to claim. The difference between the cases of a litigant who has gone abroad and a bankrupt shewed, as had been **[1004]** held, that in questions as to a mandatory the authorities as to the necessity for cautioners were inapplicable.[2]

The point now raised had never been expressly decided, but it had been fully argued in a case in which the Court, by refusing to receive a mandatory who made it a condition that he should not be liable for past expenses,[3] implied an opinion that the view

[1] Scott *v.* Gillespie, 29th Jan. 1823, 2 Sh. & D. p. 165.

[2] Maxwell *v.* Maxwell, 3d March 1847, *ante*, vol. ix. p. 797, Lord President's opinion, p. 804.

[3] Pease, Wray, and Trigg *v.* Smith and Jameson, 4th June 1822, F.C. and 1 Sh. & D., p. 420 (N.E.)

now maintained by the defenders was correct. It had also been held that a mandatory was not entitled to stipulate any conditions as to the effect of his sisting himself, but must do so simply, leaving the consequences to follow according to law.[1] In another case, in which the matter was incidentally alluded to,[2] the judgment of the Court authorised the view that expenses were, as regarded the rights of the opposing litigant, one and undivided, and that there must be a party in process against whom decree could be given for the whole amount, which was the plea now maintained by the defenders. In the analogous case of creditors sisting themselves as parties to a process, in room of a party sequestrated, it had been held that they were liable for the whole expenses of the litigation,[3] the principle recognised being that the trustee for the creditors represented the litigant who had been sequestrated. There were many points of difference between the cases of a mandatory for an absent litigant and the trustee for the creditors of a bankrupt, but in this they were similar that in the one case the mandatory, and in the other the trustee, fully represented the interests of the litigant in whose room they were sisted, and the one as well as the other must be liable for the fulfilment of that obligation, the existence of which rendered his appointment necessary. The case might be more difficult had there been a mandatory previously sisted. The mandatory decerned against might have his right of relief against the previous mandatory or his representatives; but with that the opposite party had no concern; his clear legal right was to have a party in the suit at the end, representing the absent opponent, who should be answerable for the whole expenses.

The pursuers failed to obtemper the order for minutes of debate.

LORD JUSTICE-CLERK.—The question we have now to determine has been raised by a note, boxed on 19th March, calling attention to the circumstance that the decree for expenses being against the pursuers only, and not against the mandatory, there was a difficulty in obtaining extract of it as against the mandatory, and craving decree anew for the expenses against the mandatory. The mandatory and the parties whom he represented having resisted this motion, we appointed parties to give in minutes of debate, and we have now a minute of debate on one side, but not on the other. We are therefore deprived of the benefit of an argument on the part of the mandatory, and we must endeavour to suggest to ourselves those considerations which might have been urged on his behalf.

There are some cases referred to in the argument for the Magistrates of Glasgow, which, although always referred to in the discussion of questions of this kind, are of no value. They are not in point, nor are they cases regarding the liability of mandatories at all; they are analogous cases, and, like almost all analogies, are not only useless, but dangerous. One is the case, where an assignee or trustee for creditors is sisted in the room of a party to a litigation. There it has been held, when the decision on the merits was adverse to the assignee or trustee, that he was liable for the whole costs. That is obviously just, because the assignee **[1005]** or trustee comes in place of the original party, pursuer or defender; and as he would take the whole benefit of success in the suit, he must bear the corresponding burden consequent on the loss of the suit. There is, therefore, no light to be had from that case.

On the other hand, there is the case of a party, pursuer or defender, becoming bankrupt during the dependence of a process. If the creditors do not choose to take up the process, the bankrupt may carry it on for himself, on condition of finding caution for the expenses, and these are only the expenses after the date of the bankruptcy. That is also established on very obvious grounds of reason and justice. The bankrupt is not in the position of withdrawing himself from the liability for the expenses of the earlier part of the process; he has become unable to pay these expenses, but that is his misfortune, and not his fault; and it would be obviously unjust to require, as the condition of his continuing the suit, that he should find caution, not only for future, but also for past expenses, so as to give the opposing

[1] Robertson and Co. *v.* Exley, Dimsdale, and Co., 2d Jan. 1833, Sh. & D. vol. xi. p. 320.

[2] Maclachlan *v.* Robb, 14th May 1831, Sh. & D. vol. ix. p. 588.

[3] Torbet *v.* Borthwick, 23d Feb. 1849, *ante*, vol. xi. p. 694.

party a security for his expenses, which he would not have if the case then and there came to an end. That class of cases, therefore, throws no light upon the principle we have to apply here.

But to come to the case of a mandatory, the ordinary rule is quite well established. If a party, pursuer or defender in an action, be either a foreigner or, though a Scotchman, resident out of the country, without heritable estate in Scotland, he must appear by a mandatory; and when the party is absent at the commencement of the suit, of course the mandatory is responsible for the whole expense incurred during the continuance of the process while the principal continues to be absent. But in applying that rule to the present case, it is necessary to consider the office and position of a mandatory in that ordinary case. He is a party who represents the absent pursuer or defender, not to the effect of interposing his personal security *judicatum solvi;* so far as the merits of the case are concerned, he is a mere representative, and all the security he affords as to that is, that the judgment on the merits shall be binding on the principal whom he represents. As regards the merits, he is a mere representative, but he is personally answerable for all the other conditions of the contract of litiscontestation. He is liable to implement any order the Court may pronounce in regulating the conduct of the process; he is personally liable for fines and for expenses which may be found due in the course of the process, and he is personally liable for the whole expenses of the process.

The specialty of this case is, that the pursuer being resident in this country at the commencement of the suit, left the country during its dependence, and had no real estate within the country. He then became bound to leave a mandatory behind him, and accordingly a mandatory was sisted as a party to the process. But he was sisted for the same purposes as those for which a mandatory is sisted at the commencement of a process, namely, that the judgment on the merits may be binding on the principal, as having been represented in all these proceedings by his authorised mandatory, and that he may be personally answerable in all the conditions of the contract of litiscontestation, except the primary obligation *judicatum solvi.* Carrying out this principle to its legitimate results, it appears to me, that if in a process expenses have been incurred on one side or the other, with regard to which it is impossible at the time to determine which of the parties shall be found entitled to them, or liable for them, because that depends upon the decision on the merits, the rule that the mandatory undertakes the liabilities of the contract of litiscontestation, implies personal liability for these expenses. It does not matter at what stage of the process he comes into it; but if, while he is in it, decree for expenses is pronounced, the mandatory is liable, because he is there, to fulfil all the conditions of the contract of litiscontestation, except the obligation *judicatum solvi.*

LORD WOOD concurred.

LORD COWAN.—I have great difficulty in this case; but as I understand Lord Benholme concurs with your Lordships, I am unwilling to state any decided dissent. I am the less inclined to do so when I consider that the decision is against a party who has disappeared from the process, and has not thought fit to argue the question by lodging a minute of debate, as ordered by the Court. At the same time, I am bound to say that, with all the attention I have given to the argument, **[1006]** I cannot agree with the principles that have been stated. Suppose the mandatory retires during the dependence of a process, and a new mandatory enters appearance, will the new mandatory be liable for the expenses incurred while the case was conducted in name of the former mandatory, as well as for those incurred after his own appearance, when decree goes out against him and his principal? It rather appears to me that the legal exigency for the appearance of a mandatory does not require that any liability for expenses should attach to him, except for the period during which he is a party to the cause. The case of an assignee, whether judicial or extrajudicial, is quite different.

LORD BENHOLME.—I have no doubt that the mandatory is liable for all the expenses. When a party is asked to sist himself as a mandatory in the middle of a litigation, he is asked to encounter a certain amount of pecuniary liability, in case the party for whom he sists himself as mandatory should be found liable in expenses. When the cause comes to an end, and his principal is found liable in expenses, I do not see why the circumstance that some of the expenses were incurred before the

mandatory came into the process should prevent him from being liable for them, as well as for the subsequent expenses. When he was asked to allow himself to be sisted as a mandatory, he was bound to exercise his judgment as to the whole circumstances and prospects of the case—one of the most important circumstances being that the case had been for some time in dependence. I do not see the difficulty stated by Lord Cowan, for I am not aware that there would be any difference whether the previous part of the case had been conducted in the name of the party himself, or in the name of a previous mandatory. The opposite party is entitled to have the security of some one to look to for his expenses, and if a former mandatory has disappeared, he is entitled to have some one to take his place, and assume his responsibilities before the action goes further.

What relief the second mandatory found liable in the whole expenses of the process may have against the former I do not inqure.

The Court pronounced this interlocutor:—"Of new decern against the pursuers and Robert Proudfoot, their mandatory, for the sum of L.182, 12s. 3d. of taxed expenses, and allow the decreet to go out and be extracted *ad interim* in name of Messrs. Campbell and Smith, the agents disbursers: Find the pursuers and their mandatory liable in the expenses incurred by the defenders since the date of the interlocutor of 8th February last, and remit," &c.

No. 150. **XXIII. Dunlop 1006.** 7 June 1861. 2nd Div.—Lord Neaves.

DAVID GREENHILL, Pursuer.—*Gordon—Shand.*

JOHN NEILSON GLADSTONE and Others, Defenders.—*Young—Lancaster.*

Process—Expenses.—(1.) An agent who conducted a case for several defenders, in which separate defences were necessary, *held* entitled only to charge once for attendances and professional services applicable in common to the whole defenders, although entitled to charge for all the additional trouble and expense occasioned by the necessity for separate defences. (2.) Where a pursuer was successful in one branch of a case, and the defenders in others, the Court found each party entitled to a certain definite proportion of the expense applicable to the questions on which they had been successful.

This action was raised by David Greenhill, the proprietor in trust of certain property near Burntisland, against six persons as defenders. The summons concluded,—1st, As against all the six defenders generally, for declarator that they had no right to make use of a certain drain, alleged to belong to the pursuer, for the purpose of carrying off sewerage from their respective properties, and that they should be interdicted from so using it; 2d, As against the six defenders severally, that they should each be ordained to cut off the communications leading from their respective properties to the drain; 3d, That all the defenders should be ordained to free and relieve the **[1007]** pursuers from an action at the instance of one defender (Mackay), on the ground of alleged nuisance arising from the open part of the drain; 4th, That each of the defenders should be severally ordained to pay to the pursuer a sum of L.300, less or more, of damages for the illegal use of the drain; and (lastly), That all of them should be found conjunctly and severally liable in expenses.

The defenders, and their respective uses of the drain in question, were as follows:—

Captain Gladstone, Mrs. Kelloch, John Leitch, and David Bell, used the drain for the drainage of feus under the pursuer as superior. John Cullen, W.S., possessed a property, of which the pursuer was not superior, for the drainage of which he also used the drain. Mackay, as tenant of Captain Gladstone, occupied one of the feus held under the pursuer.

All of the defenders resisted the action. For Mackay, Leitch, Bell, and himself,

Cullen acted as agent; he lodged separate defences for himself and for Mackay, and a joint defence for Leitch and Bell. Another agent conducted the defence of Captain Gladstone and Mrs. Kelloch.

The record having been closed, the Lord Ordinary, on 14th December 1858, repelled the defences for Cullen, so far as directed against the conclusions for declarator and interdict, decerned in terms of the declaratory conclusions, interdicted Mr. Cullen in terms of the libel, and dismissed the action as regarded the conclusions for relief as against all of the defenders, reserving all questions of expenses. This interlocutor was allowed to become final.

After further procedure, issues were framed. In the course of adjusting them, the pursuer was allowed to make an addition to the record on payment of four guineas to each class of defenders. Issues were finally adjusted on 19th July 1859, the pursuer taking separate issues against the several defenders. Of the same date Cullen made a tender for himself, which was accepted on 28th September, and on 2d December the notice of trial against him was discharged, reserving all question of expenses.

On 21st December 1859, the pursuer, on paying expenses, was allowed to abandon the action against Leitch. There thus remained four defenders, for two of whom, Mackay and Bell, Mr. Cullen acted as agent; and they, as before mentioned, had separate defences.

The case was tried before a jury, who found for the defender; and, on the 23d May 1860, the Court found Captain Gladstone, Mrs. Kelloch, George Mackay, and David Bell, entitled to the expenses of the trial, assoilzied them from the conclusions of the action, and remitted to the Auditor to tax the several accounts of expenses, and to report.

On the question of expenses between the pursuer and Cullen, the Court, on 16th June 1860, pronounced an interlocutor, by which the pursuer was found entitled to the expenses applicable to the declaratory conclusions of the summons, the conclusion for interdict, and the conclusion for damages:—The defender was found entitled to the expenses applicable to the conclusions for relief, and to the expenses incurred by him in preparing for trial from the date of the defender's tender (19th July 1859) to the date when it was judicially accepted (28th September 1859). The accounts of expenses were remitted to the Auditor for taxation.

On 11th July 1860 the Court found the defenders, Bell and Mackay, entitled to the expenses of process, so far as not given by interlocutor of the 23d May, and remitted to the Auditor.

The accounts of expenses of Captain Gladstone and Mrs. Kelloch were taxed and reported on, and the report approved of without objection. But difficulties occurred in the taxation of the expenses of the defenders, Cullen, Mackay, Leitch, and Bell. Mr. Cullen, in his accounts, made separate charges for the separate defences of himself and Mackay, and for the joint defence of Leitch and Bell while Leitch remained in the action, and after- [1008] -wards for the separate defence of Bell; all the items of charge were stated in each account.

The Auditor appointed Mr. Cullen to remodel the accounts, and to state the common expenses in a separate account, or to state the accounts so that these common expenses should be charged only once in all. Mr. Cullen, however, contended that he was entitled to state all his professional charges separately in each account, and brought the question by note under the notice of the Court; and the Auditor lodged a special report, on which parties were heard.

The Auditor's report stated that he had branched the pursuer's accounts in accordance with what he considered to be the practice, and the true meaning and effect of the findings of the Court. After stating what has been shortly set forth as the leading facts of the case, the report proceeded to show,—

I. The expenses found due to the pursuer by interlocutor of 16th June 1860, by which the pursuer was found entitled to a portion of the expenses, against the defender, Cullen, as follows:—

(1.) Down to 14th December 1858 the whole expenses incurred by the pursuer in the whole cause (with a slight exception) amounted to L.54, 16s.; but, as these expenses were incurred in conducting the cause against the six defenders, the Auditor was of opinion that the pursuer, under the finding in question, was

	Mr. Cullen,
only entitled to charge one-sixth of the amount as applicable to viz., ...	L.9 2 8
To which add items specially applicable to Mr. Cullen's defences, .	0 14 0
	L.9 16 8
(2.) But these sums embraced not merely those applicable to the conclusions for declarator, interdict, and damages, as to which the pursuer had been found entitled to expenses against Mr. Cullen, but also those applicable to the conclusion for relief in reference to which the pursuer had been found liable in expenses to Mr. Cullen. The Auditor (taking as his guide the length of the record) proposed to deduct one-fourth of the whole as effeiring to the relief question, ...	2 9 2
	L.7 7 6
(3.) One-sixth of the pursuer's expenses in the adjustment of issues subsequent to 14th December 1858, the proportion chargeable against Cullen in respect he was found liable in expenses on the question of damages, ...	9 5 0½
	L.16 12 6½
Add the pursuer's expenses in obtaining decree for expenses, and taxation and approval of the account, ...	11 17 0
Sum of expenses for which the pursuer was entitled to decree for against Cullen, ...	L.28 9 6½

II. The expenses to which Cullen was entitled were stated as follows :—

1. Those applicable to the conclusions of relief disposed of by the interlocutor of 14th December 1858; and 2. the expenses of preparing for trial from 19th July to 29th September 1859.

(1.) The common expenses incurred to Cullen in behalf of himself and the three defenders for whom he acted as agent to 14th December 1858, . .	L.16 13 1
Three-fourths deducted as applicable to the defenders, Mackay, Leitch, and Bell, ...	12 9 9¾
Leaving as Cullen's proportion, ...	L.4 3 3¼
[1009] (2.) The special expenses separately incurred by Mr. Cullen down to the same date, in maintaining his separate defences, . .	22 18 4
	L.27 1 7¼
But these expenses being applicable as well to the conclusions for declarator, interdict, and damages, in which Cullen was unsuccessful, as to the conclusions for relief, deduct three-fourths, . . .	20 6 2¼
Leaving as Cullen's proportion applicable to the relief question, .	L.6 15 5
(3.) Mr. Cullen's expenses in preparing for trial, per interlocutor, including expense of audit, &c., ...	11 13 3
Sum of the expenses for which decree should go out in favour of Cullen, ...	L.18 7 8

The Auditor stated that in his opinion the expenses should be found due to the other defenders on the same principles.

Therefore Mackay was entitled to (1.) one-fourth of the common expenses incurred down to date of interlocutor of 14th December 1858. (2.) One-fourth of the common expenses from that date to the date of Mr. Cullen's tender. (3.) One-third of the common expenses applicable, after Cullen ceased to be a party to the process, to himself and the two remaining defenders, Leitch and Bell, down to the date of the abandonment of the action against Leitch. (4.) And from that date till the close of the action

one-half of the common expenses applicable to him and the only remaining defender, Bell. (5.) The special expenses incurred by Mackay himself in the conduct of his separate defence. In all, L.148, 14s. 11¾d.

And in like manner that the other defenders were entitled to the expense incurred by each in conducting their separate defences (only one charge being allowed to Leitch and Bell, down to the date of the abandonment of the action against Leitch), and to their respective proportions of the common expenses. Leitch being thus entitled to L.81, 16s. 10¼d., and Bell to L.160, 14s. 1¾d.

The report concluded with the following remarks:—"It is only further necessary for the Auditor, in reference to a question which has been raised in the course of the taxation by Mr. Cullen, who acted as agent in the cause, not only for himself, but for the three defenders, Mackay, Leitch, and Bell, to explain that the portions of the expenses found due to Mackay, under the title of 'common expenses,' consist of all those expenses,—such as charges for callings of the cause when papers were ordered, discussions on incidental points applicable to all the parties, and the like,—which had no special reference to the cases of the individual defenders, who had made separate appearance, but applied, on the contrary, equally to all the defenders for whom Mr. Cullen acted in the process. As to all such common expenses, the Auditor holds, and the universal practice in ordinary actions has always been, that an agent acting for a number of defenders in a case at the instance of a single pursuer, is only entitled to make the same charges as if he acted for one only, and that whether separate or joint defences (or, as in the present instance, partly separate and partly joint defences), have been lodged; though in the case of separate defences having been necessarily or justifiably stated, the agent is of course entitled to charge for all the additional expenses arising from the separate appearance made by the different defenders, as well as for the share or proportion applicable to each, of the common expenses incurred for the whole.

"This rule has always been applied equally in taxations between an agent and his clients, as in those between the parties in a suit where expenses have been found due to one or other of them, and the Auditor has accordingly given effect to it in the taxation of the accounts of expenses found due to the defenders in this case.

"It is maintained by Mr. Cullen, on the other hand, that, in respect he [1010] appeared for four different defenders (himself included), two of whom lodged a joint defence, and each of the other two a separate defence, he is entitled to charge for all the ordinary callings of the cause, and other procedure in the action, applicable in common to all the four, not once only, but four, or at least three times over. Such a claim is quite new to the Auditor, and contrary to the universal practice that has hitherto prevailed.

"It humbly appears to him that if an agent, acting for four several defenders, who happen to have lodged separate defences, were to be held entitled to state—when the condescendence and answers, for instance, were ordered to be revised—not 6s. 8d. merely for the five minutes of his attendance at the Lord Ordinary's bar, but (as here maintained) L.1, 6s. 8d. (or at least L.1), and that on the ground that he was so attending for four parties—it would be difficult to resist a claim by the pursuer's agent, *pari ratione*, for L.1, 6d. 8d., because he was appearing against four parties. The actual time and trouble expended is precisely the same in both instances.

"It is proper, however, to mention that a somewhat different practice, though not certainly to the extent maintained by the defenders' agent, has prevailed in processes of multiplepoinding. That form of process, as mentioned by Mr. Bell in his Commentaries, has been looked upon as equivalent to a *congeries* of actions, and on that account (the Auditor supposes) the practice has been to allow to an agent who acts for separate claimants, having separate and distinct grounds of claim on the fund *in medio*, separate fees for each, as if in a separate process; but even this rule of practice is not held to be applicable to questions or discussions on the same points arising between all or several of the claimants on the one hand, and the raiser on the other. In such circumstances, the usual practice is for the Lord Ordinary to appoint a common agent to act for all the claimants, who is only allowed to charge as if he acted for one party.

"The existing practice in multiplepoindings does not appear to the Auditor to be altogether correct in principle; but as he has found it had been universally recognised

to the extent now indicated, and in several instances confirmed by the findings of Lords Ordinary, he has not felt himself warranted to interfere with it.

"In actions like the present, the practice has uniformly been what the Auditor has explained above, and he may mention that it was adopted without objection in the recent cases (five in number) at the instance of the partners of the Western Bank against the directors, in each of which four or five of the defenders, who lodged separate defences, appeared by one agent, who was allowed only one set of charges for the common expenses incurred for all.

"The Auditor may perhaps be permitted, in conclusion, to explain some of the difficulties which occur in practice from the course that has recently been adopted by the Court in reference to awards of expenses to the several parties in suits which have resulted in partial success and partial defeat on both sides. These difficulties, he humbly thinks, may, in many cases, be altogether removed, and in others greatly reduced, without injury to any one, by a comparatively slight change in the mode of dealing with questions of expenses in cases of the kind alluded to.

"The course of procedure in such cases used, until a comparatively late period, to be either (1.) where the amount of success and defeat seemed to be nearly equal, that neither party was found entitled to expenses; or (2.) where there was an apparent preponderance on one side, the party most successful was found entitled to expenses, subject to modification, or to considerable modification, as the case might be—the extent of the modification being settled by the Court, on a discussion, after taxation of the account.

"A change of practice has, however, taken place in this respect within the **[1011]** last few years, the more usual course having come to be, that one party is found entitled to the expenses applicable to those portions of the litigation in which he has been successful, and his opponent to those of the branches in which he has prevailed. These findings are accompanied by general remits to the Auditor to tax the expenses so found due to and by the litigants respectively. It is, of course, expected under such remits that the Auditor is to endeavour to make a separation between those various branches of expense, and apportion them to the several parties according to their respective rights under the judgment of the Court. Whether so intended by the Court or not, the whole labour of at least attempting to do so is uniformly devolved on the Auditor, the ordinary practice being that each party just puts in his whole account, leaving the Auditor to deal with it as he best may, and even if any partial effort at separation is made by the agents, it is generally (as in the present case) of a kind which only makes confusion worse confounded.

"But indeed, such a separation can seldom, if ever, be effected with even an approximation to accuracy, in cases of any degree of complexity, and the Auditor, after expending many days in the attempt (in the present instance it has cost him several weeks, with what result it is not for him to judge), has often been obliged to give it up in despair, and either to rest content with a mere guess, if the stake seemed unworthy of further discussion, or to report the whole matter, with lengthened explanations, to the Court for their disposal. In several instances the balance or excess of the expenses to one party as against the other, under remits of this description, has been found, after a great deal of discussion and infinite divisions and sub-division, estimates and counter-estimates, to extend to no more than L.4 or L.5; while, to say nothing of the profitless expenditure of the Auditor's time, the cost of the attendances of the agents on both sides at the taxation must have amounted to more than double the sum.

"In the present instance the expenses found due to the pursuer against Mr. Cullen amount, as shown above, to L.28 9 6
And on the other hand, those found due to Mr. Cullen by the pursuer extended to 18 7 8

Difference, L.10 1 10

While the expenses incurred in discussing the questions of taxation and apportionment must have considerably exceeded L.10 to each party.

"Even in the simplest case—a case, for instance, where there are only two branches, which may be capable of being clearly enough distinguished throughout the

written proceedings in the litigation—there must often, or rather always, be portions of expense incurred in the expiscation of them, in reference to which it is impossible (at least, for any one but the judge) to say how much or how little ought to be apportioned to each of the leading branches. A single statement, or a single plea in the record, may occasion infinitely more expense (in the shape, for example, of fees to counsel and time occupied in attendance at discussions in Court), than all the other averments and pleas put together.

"In a few cases (see for instance Smith *v.* West of Scotland Investment Company, 4th December 1847), the Court seem to have allowed the element of value—the *quantum* at stake under different branches of a cause, to weigh with them in dealing with the expenses; but it is, of course, impossible to blend that element with the other and more relevant consideration of the actual amount of expense incurred in relation to each branch.

"In these circumstances, it humbly appears to the Auditor that the best modes of dealing with ordinary cases of mixed success and defeat would be, either (1) that the old practice of finding expenses due to the more successful party, subject to modification, should be reverted to; or, (2) that the **[1012]** Court or the Lord Ordinary should, on a general view of the relative position of the parties, at the close of a litigation, determine the several proportions of the whole expenses which ought to be awarded to each, and remit to the Auditor to ascertain the amounts of such proportions by taxation in the ordinary form. This last course would have the great advantage over the former of enabling the Court to dispose of questions of expenses while the case and the conduct of the parties are fresh in their Lordships' mind, and so to save the necessity of a discussion on questions of modification, after an interval of time has elapsed since judgment on the merits."

The report concluded with a remark that the difficulties referred to, and for which the reporter suggested a remedy, while they often impeded him in the performance of his duties, and so had caused loss and inconvenience to litigants, had, in very few instances, ever resulted in any corresponding advantage either to the Court or to the public.

It was argued for the defenders;—The agent who acted for the defenders was entitled to charge in full for all expenses incurred in conducting the separate defences. He did not claim, as might be understood from the report, to charge the expenses incurred by each individual. He only claimed those incurred in conducting each separate defence on separate grounds. Here there was one joint defence for Leitch and Bell, who were feuars direct from the pursuer. There was a separate defence for Mackay, who was a tenant of the defender Gladstone; and there was a separate defence for Cullen, who was an independent proprietor. These defences could not have been combined. Leitch and Cullen were dismissed from the action at different stages on various grounds. Bell and Mackay went to trial on separate defences, pleas, and issues. The Auditor disallowed what he called "common expenses," but it was impossible to tell precisely what these were, or when such charges represented distinct labour, and when they did not. That some steps of procedure in a cause might be conducted for several defenders, at no greater expenditure of the agent's time than for one, was of no importance, because an agent devoted to the cause not only his time but professional skill and responsibility, and he was responsible to each individual client. He might be chosen as agent by one defender because he had been employed in the cause by another, and therefore had special knowledge of the cause. He was entitled to be paid for this knowledge. Each defender might have employed a separate agent; and in that case the pursuer must have paid each agent's expenses in full; he should not save money on that ground. The case of multiplepoindings referred to by the Auditor was in point.[1]

The pursuers answered;—The claim set up, that one agent acting for several parties to a suit should be allowed to charge "common expenses," on behalf of every one of these parties, was quite new. The Auditor had reported against it, as contrary to universal practice, and in such a matter, practice was not to be lightly disturbed,—in the present instance, no cause had been shewn why it should be. What "common expenses" were was quite well known. They were very little more than charges for

[1] Leslie *v.* Davidson, 9th March 1858, *ante*, vol. xx. p. 787.

attendance in Court, when formal orders for defences, revisal, &c., were pronounced. There was no more trouble involved in such attendances on behalf of a dozen clients than on behalf of one. It would be very undesirable to increase the expense of litigation by allowing such charges as these, even if the practice were doubtful; but the practice having been uniformly against them, there was no reason to allow them now.[1]

LORD WOOD.—This question relates to the fees to be allowed to Mr. Cullen as agent in the cause against the pursuer, under the findings of expenses in favour of the defenders.

[1013] It appears that in this case Mr. Cullen acted for four of six defenders, he being one; and that for himself and another defender, George Mackay, he gave in separate defences; and for two others of the defenders who employed him, viz., John Leitch and David Bell, he gave in a joint defence. I assume—and it is not disputed—that the interests of these parties, as defenders in the suit, were so far different that they were entitled to separate their defence as they did, and to have employed, if they thought proper, separate agents, Mr. Cullen of course acting as agent for himself individually. But as a joint defence was *de facto* given in for Leitch and Bell, there might be some question whether, in any view, Mr. Cullen, as agent, could charge separate fees for each of them, while they were both parties to the action. But Leitch ceased to be so at 21st December 1859, when the pursuer was allowed to abandon the action as against him, the pursuer paying him the expenses he had incurred. Mr. Cullen, again, remained a party with a separate interest only till 2d December 1859, when upon a tender and payment thereof the notice of trial as regarded him was discharged; and for a portion of the expenses down to that date he has been found entitled by interlocutor of 16th June 1860, while he has by the same interlocutor been found liable in certain portions of expenses to the pursuer.

With regard again to Mackay and Bell, who had separate interests, and gave in separate defences, the case went to trial with them; and by the interlocutors pronounced on the 23d May 1860 and 16th July 1860 they have been found entitled to the expenses of process.

Now, granting that each of the defenders, Leitch, Mackay, and Bell, might have had such distinct interests, as defenders, as might have entitled them each to have his separate agent, while Mr. Cullen was for his interest entitled to act as his own agent—still that was not the state of the fact—for the case of these parties was not conducted by separate agents, but by Mr. Cullen, as agent for all the four, for the periods during which they were respectively parties to the action. And that being the state of the fact, the question is, what is the amount of the fees that Mr. Cullen, under the awards of expenses in favour of the defenders (himself included), is entitled to charge against the pursuer?

In taxing the accounts of expenses for the four, the Auditor has branched them out in the manner explained in his report; and with respect to charges by Mr. Cullen, as acting as agent for four defenders, he has prepared a special abstract, No. 2, subjoined to his report, under the title of "Common Expenses," in regard to which he holds that Mr. Cullen is entitled only to make the same charges he would have been entitled to had he been acting for one defender instead of four, and he accordingly proposes that the accounts should be taxed upon that footing.

I refer to the report at p. 14 for the Auditor's statement in reference to this matter, and for the grounds on which he has proceeded.

After analysing the accounts of expenses, the report goes on as follows:—(*Quoted, supra, p.* 1009.)

And then having stated what is maintained by Mr. Cullen, viz.,—"That he is entitled to charge for all the ordinary callings of the cause, and other procedure in the action, applicable in common to *all* the four, not once only, but four, or at least three times over," the Auditor adds,—"Such a claim is quite new to him, and contrary to the universal practice that has hitherto prevailed." And in a subsequent passage he

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[1] Borthwick *v.* Boyd, 23d Feb. 1850, *ante*, vol. xii. p. 781; Elmsly *v.* Duncan, 18th Dec. 1857, *ante*, vol. xx. p. 307.

informs the Court, that "in actions like the present the practice has uniformly been what he has explained above."

I think that the rule of taxation, thus reported by the Auditor, is most reasonable in itself, and thereby strongly recommended; and when I find that, as stated by the Auditor (and of that he is the person who of all others must have the most perfect knowledge) it is supported by a universal practice, so that it has now come to be recognised by the profession generally as the rule to be followed. I apprehend that a rule so established ought to be adhered to. To my mind, the long and universal practice affords a sufficient and safe ground for coming to that conclusion. I think it would be very inexpedient to disturb the practice. And it seems to me that, considering the continuance of that practice,—and with which it must be presumed that agents in the Court are familiar,—it is to be supposed that when an agent acts for more than one defender in a cause, even when the defenders have interests sufficiently distinct to authorise separate defences, and to [1014] entitle a charge to be made for all the additional expenses arising from the separate appearance made by the different defenders, he is to be held as acting with reference to the accustomed practice; and, therefore, upon the understanding that the charges in respect to those things in the course of the proceedings which the Auditor has held to be common expenses are to be regulated by that practice.

Taking this view of the matter, I do not care to inquire whether the rule of taxation in question can be put upon any positive clear principle that in this case, or other similar cases, might not be liable to observation. Even if that test could be supposed to fail, the considerations I have adverted to would be sufficient to lead me to be of the opinion I have stated, and consequently to adopt the rule in the present instance.

If I recollect rightly, it was said in the course of the discussion that Mr. Cullen, in the circumstances, would be entitled to charge each of his clients full fees. To that I cannot accede. I am of opinion that he will not be allowed to charge his clients any other amount of fees for the business in question than that allowed by the Court in the present taxation of his accounts.

I have only to add, that, in giving an opinion that the rule or practice of taxation reported by the Auditor ought to be acted upon, I do not mean to say that Mr. Cullen is not to be allowed to show, if he can, that there are charges which have been dealt with by the Auditor as of the class of common expenses, which are not of that description, but are charged for pieces of business which, although they may each in one sense be one act, carry with them additional trouble and responsibility, in respect of the separate interests of the clients, with the care of which he was entrusted. This may be still open to him.

Lord Cowan.—I concur in every sentence of Lord Wood's opinion; and, in the circumstances of this case, there is no specialty which should lead us to depart from the established rule of practice explained by the Auditor. Further, I only desire to add a single sentence to explain my conviction, that the latter part of the report of the Auditor deals with a matter which it was very fitting and right for him to bring under our notice, and concerning which his suggestions appear to me well worthy of the consideration of the Court.

Lord Benholme concurred.

Lord Justice-Clerk.—I entirely concur.

As to what is noticed in the latter part of the Auditor's report, I also concur in considering it well worth the attention of the Court, and I suppose the Court will be ready to act upon the Auditor's suggestion.

The Court pronounced this interlocutor:—"Approve of the (Auditor's special) report; decern against the defender, John Cullen, for payment to the pursuer of the sum of L.28, 9s. 6½d.; decern against the pursuer for payment to the defenders, as follows, viz.:—To John Cullen of the sum of L.18, 7s. 8d.; to George Mackay of the sum of L.148, 14s. 11¾d.; to John Leitch of L.81, 16s. 10¼d.; and to David Bell of L.160, 14s. 1¾d.: Find the pursuer entitled to the expenses of the discussion on the Auditor's report; modify the same to the sum of ten guineas; and decern against the said defenders for payment thereof to the pursuer."

No. 151. **XXIII. Dunlop 1014.** 12 June 1861. 1st Div.

Mrs. Louisa Georgina Ricketts, late Ritchie, Petitioner.—*Scott.*

Process—Petition to apply Judgment of House of Lords.—Where the House of Lords simply affirm the judgment of the Court of Session, the Court apply the judgment of the House of Lords on the mere production of the judgment. A petition is neither necessary nor competent.

The petitioner was pursuer in an action of divorce, in which the Court, on 27th May 1857, pronounced judgment in her favour. The defender appealed, and on 16th April 1861 the House of Lords pronounced this judgment:—"It is ordered and adjudged by the Lords Spiritual and Tempo- **[1015]** -ral in Parliament assembled, that the said interlocutors complained of in the said appeal be, and the same are hereby, affirmed, and that the said petition and appeal be, and the same is hereby, dismissed this House."

The present petition prayed the Court "to apply the said judgment of the House of Lords, and, in the event of the defender appearing and opposing the prayer of this petition, to find the petitioner entitled to the expenses thereby caused, and the expense of this application, and remit the account thereof to the auditor for taxation; or to do otherwise," &c.

The judgment of the House of Lords was not produced.

On 11th June the case was called.

Lord President.—This being a simple affirmance, is a petition competent or necessary?

Scott, for the petitioner, maintained that it was; and the case being continued to enable him to refer the Court to the authorities on the subject, he now of this date, the case being again called, referred to the case of Whitehead, 11th January 1861.[1]

Lord President.—That case is not in point. Our recent practice has not been in accordance with this procedure. We had a case before us lately as to taxing an account, and a question arose whether the petition was necessary; but we held it was not. Where there is any remit to this Court to do anything whatever, however small, of course a petition is necessary. But where there is a simple affirmance, and the appeal is dismissed, the mere production of the judgment is sufficient for enabling us to apply it.

The Court pronounced the following interlocutor:—"The Lords refuse the petition of Mrs. Louisa Ricketts, late Ritchie, No. 86 of process, as unnecessary."

No. 152. **XXIII. Dunlop 1015.** 12 June 1861. 1st Div.—Lord Ardmillan.

Thomas P. Sharpe, Complainer.—*Sol.-Gen. Maitland—Fraser.*

Mrs. Janet M'Leod or Miller, Respondent.—*Young—John Lorimer.*

Crown — Revenue — Public Officer — Exchequer — Process — Interdict — Prerogative —Statute 19 *&* 20 *Vict. cap.* 56, *sect.* 14 (*the Court of Exchequer Scotland Act*).—Upon the application of the collector of land and assessed taxes, a warrant was granted by a Sheriff, under which certain articles were poinded in a house occupied by a crown debtor, but which were claimed by a third party, who applied to the Sheriff for interdict against the sale. The collector pleaded that the proceedings were incompetent in the Sheriff-court. After a record had been made up, and judgment had been pronounced upon the merits, but before extract, the collector applied to the Court of Exchequer for interdict against the case proceeding farther

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[1] Whitehead and Morton *v.* Cullen, 11th January 1861, *ante*, p. 265.

in the Sheriff-court;—*Held* (by a majority of the whole Court) that, whenever the question was duly raised, as it was here, whether goods had been properly seized for a crown debt, the case became at once a matter of revenue, and any litigation on such a point before any other judicature ought immediately to be stopped by the Court of Exchequer when called upon to interfere, in order that the question may be determined in it—that the Court of Exchequer may competently be called on to interfere in any such litigation any time before extract—that a collector of revenue may apply for the same remedy as the Crown itself could resort to—and that he is not bound to bring up any proceedings originating in the Sheriff-court by any process of review or advocation, so as to make them depend or be discussed in the Court of Exchequer.

Thomas P. Sharpe, the complainer in this process of interdict, was the collector of land and assessed taxes for the county of Lanark, residing in Glasgow. The respondent, Mrs. Janet M'Leod or Miller, was a milliner and [1016] dressmaker in Glasgow. According to her own statement (art. 1) "she was tenant of a house, No. 24 Jamaica Street, which she furnished expensively many years ago. It had been let furnished to various tenants in succession. One of these tenants was Miss Jemima Johnston, who, after being in possession for a considerable time, left the premises largely indebted to the respondent." (Art. 2.) "Being a heavy loser in these transactions, the respondent had resolved to sell off her furniture and give up the tenancy. She had accordingly made arrangements for doing so, and the furniture was being cleaned and prepared for a sale, when a party of men, on or about March 20, 1858, alleging that they had a warrant against Miss Johnston for assessed taxes, amounting to nearly L.10, illegally and unwarrantably poinded and distrained the respondent's property. In these circumstances, the respondent, of date March 23, 1858, presented an application to the Sheriff against the complainer, Thomas P. Sharpe, collector of land and assessed taxes for the county of Lanark, for interdict against his removing or selling the furniture."

Of same date, 23d March 1858, the Sheriff-substitute (Steele) appointed service, and ordained the parties to appear and be heard two days thereafter, till which time he granted interim interdict.

Appearance was entered for Sharpe, who on 25th March 1858 lodged the following defence:—"No jurisdiction to entertain the action in this Court. The craving for interdict is incompetent. The assessment, for recovery of which the poinding is executed, being an assessment under the 14th and 15th Vict., cap. 36, and Assessed Tax Acts, 43d Geo. III., cap. 99, and 43d Geo. III., cap. 161, is final, and cannot be reviewed, unless by the mode of appeal prescribed by these Acts."

Of that date the record was closed. Parties were ordered to debate, and on 29th March 1858 the Sheriff-substitute pronounced the following interlocutor:—"Before further answer, appoints the pursuer, within two days, to consign in the hands of the clerk of Court the amount of the assessment in question, and of the statutory sum of expenses incurred thereon; and upon such consignation being made, allows the parties respectively a proof in support of their several averments, and to each a conjunct probation: Grants diligence," &c.

On 31st March 1858, Mrs. Miller consigned L.10, 6s. 3d., the sum claimed from Miss Johnston. On 9th April 1858 a diet of proof was assigned, and of same date Sharpe applied to the Lord Ordinary in Exchequer to interdict the "respondent from further proceeding with her petition," and in particular from acting on the interlocutor of 25th March, and "from making any farther motion in said petition before the said Sheriff or his substitutes."

A record was made up, in which the complainer Sharpe pleaded;—1. That the petition and all that followed thereon was incompetent and illegal. 2. That the Sheriff had no jurisdiction to entertain Mrs. Miller's application, and that the interlocutors pronounced by him were *ultra vires*.

The respondent Mrs. Miller pleaded that she was not chargeable with the debt claimed by the complainer, and so was not amenable to the enactments applicable to taxes in the Excise Acts. That the effects being her property, and not that of the debtor, she was entitled to redress from the Judge Ordinary; and that the complainer, having pleaded in the Sheriff-court, and allowed a number of interlocutors to be

pronounced which had now become final, was barred from objecting to the competency of the proceedings.

On 2d June 1858 the Lord Ordinary pronounced the following interlocutor:—"Finds that the proceedings at the respondent's instance in the Sheriff-court of Lanarkshire at Glasgow, of which interdict is sought by the complainer, relate to the legality and validity of diligence for recovery [1017] of a public tax, being part of Her Majesty's revenue: Finds that the said proceedings in the Sheriff-court were and are incompetent, the appropriate and only competent court for disposing of the questions therein raised, relating to the revenue of Her Majesty, being the Court of Session, as now the Court of Exchequer, or the Lord Ordinary in Exchequer causes, in terms of the recent statute 19th and 20th Victoria, cap. 56; therefore grants interdict as craved, and decerns: Finds the respondent liable to the complainer in expenses," &c.[1]

Mrs. Miller reclaimed, and on 24th June 1858 the Court pronounced the following interlocutor:—"Having advised the reclaiming note for Mrs. Janet M'Leod or Miller, No. 5 of process, and heard counsel for the parties thereon, and on the whole cause, of consent recal the interlocutor of the Lord Ordinary, and refuse the interdict asked *in hoc statu;* and as to the expenses of the proceedings in the present process, find the respondent, Mrs. Miller, entitled to expenses of process," &c.

The cause then proceeded before the Sheriff. A diet of proof was, with [1018]

[1] "NOTE.—It is the undoubted right and prerogative of the Crown, and of the officers of the Crown, to apply to the Lord Ordinary in Exchequer to interdict and stay proceedings in an action before a Sheriff-court, where the royal revenue is concerned, in order that the questions raised in such action may be tried in the competent and appropriate tribunal. In the present case, it cannot be disputed that the points raised by the respondent, Mrs. Miller, in the Sheriff-court, do directly involve the interests and revenue of the Crown. On these points, raised in order to defeat diligence for recovery of a public tax, the respondent seeks the judicial determination of the Sheriff of Lanarkshire, and maintains that she is entitled to force the officers of the revenue to enter into litigation with her in the Sheriff-court.

"Apart from the special plea urged in bar of this application, and to be immediately noticed, it appears to be quite settled, both on authority and in practice, that the interdict ought to be granted. Prior to the 19th and 20th of Victoria, the Court of Exchequer was the only court of competent jurisdiction for trial of such causes, and the Court of Exchequer could issue, and was in the practice of issuing, an injunction to stay procedure in any other court. The case of Brough *v.* Stewart, 20th December 1850 (13 D. 408), with the case of Laurie *v.* Hill, decided by Lord Moncreiff, 2d March 1832, reported in a note annexed to the report of Brough's case; the case of the Crown *v.* Beattie, 29th January 1856 (18 D. 378); the case of Young *v.* Townsend, in the Court of Justiciary, 24th November 1856 (2 Irvine 525); and the case of Mill, decided in Exchequer by Chief Baron Shepherd in December 1822, and very recently reported, leave no room for doubt on this point. (See also Manning's Exchequer Practice, pp. 187-8.) By the recent Act of 19th and 20th Victoria, cap. 56, proceeding by interdict comes in place of proceeding by injunction; but the principle of exclusive jurisdiction in the particular class of cases affecting the royal revenue, and the remedy of judicial interposition to prevent encroachment by staying procedure, remain unimpaired.

"But the respondent insisted strongly, that, in this case, the complainer, the collector of land and assessed taxes for Lanarkshire, having obtained the Sheriff's warrant to distrain, and having put that warrant into execution, was not entitled to withdraw the case from the Court of the Sheriff, but was bound to abide by his decision. The Lord Ordinary does not think that this plea is well founded. The warrant to poind and distrain the goods was issued by the Sheriff as a matter of course, and in conformity with statutory enactment. To the judicial determination of the Sheriff the complainer had not presented any question affecting the revenue. The goods were distrained in the usual manner for recovery of a public tax, in the same position as an assessed tax. The Sheriff could not have withheld his warrant. The proper court for disposing of the question of the validity of the assessment, or the legality of the proceeding for recovery of the tax, is the Court of Session, as now the Court of Exchequer; and the complainer has done nothing to bar him from applying for the interdict which he now craves."

consent of both parties, assigned for 6th December 1858, and of that date a motion having been made by the defender for the dismissal of the cause, the Sheriff-substitute "supersedes the same *hoc statu*, but reserving the effect thereof, as made at this stage: Circumduces against both parties," &c.

On 15th April 1859, the Sheriff-substitute pronounced the following interlocutor:—"Finds, in point of fact, that on 18th March 1858, a warrant was granted on the certificate and application of the defender Mr. Sharpe, who is collector of land and assessed taxes for the county of Lanark, *inter alia*, against Jemima Johnston, described in the said warrant as 'Miss Johnston, 24 Jamaica Street,' Glasgow, to poind and distrain the goods and effects belonging to her, and authorising the officer's executors to keep and detain the said goods and effects for the space of four days, and thereafter to value and appraise, and to sell the same, in payment of an arrear of inhabited house-duty of L.9, 7s. 6d. due to the Crown by Johnston, for the year from 24th May 1857 to 25th May 1858, and which was payable on or before 1st January 1858; and also in payment to the officers, for their trouble, at the rate of two shillings per pound on the amount of the said duty: Finds, that on or about the 20th day of the said month of March, Simon Fraser, sheriff-officer in Glasgow, by virtue of the said warrant, poinded and distrained a French bedstead, a chest of drawers, and an easy-chair, which were by him found in the premises No. 24 Jamaica Street, Glasgow, and that in payment of said duty: Finds that the debtor Johnston occupied said premises, in respect of which she was so assessed, as tenant at and prior to 24th May 1857, and for some months afterwards, with the furniture therein, under agreement with the pursuer: Finds that the pursuer did not herself occupy said premises during any part of the year for which the said house-duty is due: Finds it proved that the French bedstead, easy-chair, and chest of drawers, which were so poinded and distrained, were purchased by the pursuer from Alexander Currie, auctioneer in Glasgow, on 11th and 12th June 1857, and were placed in the said premises, and were used by Johnston in common with the other furniture therein under her agreement with the pursuer: Finds, that at the date when these said articles were so poinded and distrained, they were the property of the pursuer, and were not, and never were the property of the tax debtor Johnston: Finds, that in this action, the validity of the assessment against Johnston, or its amount, or the regularity of the warrant, or the form of proceeding taken, or the legality of the act of poinding and distraining as proceeding without warrant, are not challenged, but that in all these respects the pursuer expressly admitted that she had no objection to offer, even if they were within her right and privilege to object to: Finds that the sole question raised in this action is, whether the effects belonging to the pursuer can be attached and sold for the duty justly due by and regularly imposed on Johnston, under the formal warrant granted against her? Finds, in point of law, that the solution of this question does not affect the Queen's revenue, nor the formality and regularity of the proceedings to recover it from the goods of its debtor, and that a question of this limited nature may competently be entertained, heard, and determined in the Sheriff-court: Therefore, and for the farther reasons expressed in the following note, repels the defences to the competency of the action; sustains the action, and grants interdict as craved: Finds the defender liable in expenses," &c.[1]

[1019] This interlocutor was appealed to the Sheriff-depute (Alison), who, on 25th May 1859, pronounced the following interlocutor:—"In respect when the cause was called in the Sheriff's appeal-roll, to hear parties under the appeal, the defender's agent stated that he had withdrawn and abandoned his appeal, as noted on the copy interlocutor sheets, holds the same as dismissed, and adheres to the interlocutor appealed from."

In the meantime, on 16th May 1859, the complainer Sharpe had applied of new

[1] In his note the Sheriff-substitute stated that "the defender abstained from offering any defence on the merits; and, in particular, he declined to join issue with the pursuer on the question, whether the effects distrained for Johnston's tax belonged to the pursuer or not. He also forbore stating any ground of liability for the tax by which the pursuer, or her goods, could be attached for payment, and simply and exclusively limited the defence to the incompetency of this Court to entertain and determine the question of interdict which the pursuer has sought to raise."

to the Lord Ordinary in Exchequer "to interdict the respondent from the proceeding with a petition at her instance against the complainer, presented by her to the Sheriff of the county of Lanark on or about the 23d day of March 1858; and to interdict, prohibit, and discharge the said respondent from acting on, or enforcing, or otherwise obtempering an interlocutor pronounced by Alexander Strathern, Esquire, Sheriff-substitute of the said county, on 15th April 1859; and further, to interdict, prohibit, and discharge the said respondent from making any further motion in said petition, or under said interlocutor, before said Sheriff or his substitutes."

A record was made up, in which, after narrating the various procedure, the complainer stated (art. 12) "The house duty is, by the foresaid statutes, and particularly 48 Geo. III., cap. 55, directed to be assessed and levied on the occupiers. Miss Johnston occupied the house in Jamaica Street in question for the year prior to July 1857; at least she did so for the period from March to July 1857. The furniture in the house was in the possession of Miss Johnston. The complainer does not admit that the furniture in Miss Johnston's possession belonged to the respondent; but whether it did so or not, the Crown has a right to poind the articles in the house in the possession of the occupier, and the complainer asserts that right as against the respondent. But the complainer declines to discuss that question in the Sheriff-court, which Court has no power or right to decide such a question; at all events, it cannot do so against the complainer's objection. The complainer, however, hereby states his willingness to maintain the Crown's right in the only competent Court, viz., the Court of Exchequer, when the point shall be there competently raised. (Ans. 12.) The statute here cited is referred to for its terms. Admitted that Miss Johnston was in possession of the house in question, and explained that the furniture belonged to the respondent. *Quoad ultra*, the statements of fact in this article are denied." She also stated that, at the date of the Court of Exchequer Scotland Act,[1] the respondent would have been liable to have been stayed by injunction furth of the Court of Exchequer from proceeding under said petition; it was accordingly now lawful to proceed by interdict.

[1020] The complainer's pleas were—"1. The said petition, and all that followed thereon, were incompetent, illegal, and inept, and interdict ought to be granted against the respondent, as craved. 2. The said Sheriff had no jurisdiction to entertain the said petition; and the interlocutors pronounced by him being *ultra vires*, the respondent ought to be interdicted from carrying out or enforcing said interlocutors. 3. The whole proceedings complained of, having been incompetent, illegal, and inept, interdict ought to be granted, as craved."

The respondent stated (stat. 7.) that she had "no interest to dispute the question of assessment, or the amount due as between the complainer, Sharpe, and the debtor, Miss Johnston. Mrs. Miller was no party to the assessment, and it is not pretended that either she or her property was liable to be distrained, or her person to be

[1] By the Act 19 and 20 Vict., cap. 56, sec. 14, it is enacted, that "in all cases in which, if occurring at the date of the passing of this Act, any person or persons would be liable to be stayed by injunction furth of the Court of Exchequer, whether in respect of such person or persons prosecuting or threatening to prosecute before any Court other than the Court of Exchequer, in any matters connected with the revenue, or with the proceedings of officers of the revenue, or in any other matters as to which exclusive jurisdiction is at present possessed by the Court of Exchequer, or otherwise, it shall be competent to apply to the Lord Ordinary in Exchequer causes to restrain such person or persons by interdict from following out such prosecution in another Court, or otherwise, according to the circumstances of the case; and such application may be made by a note of interdict, having a statement of facts and note of pleas in law appended thereto, all as nearly as may be in the form at present in use in the Court of Session; and such note of interdict shall be lodged in the office of the clerk of Court attached to the said Lord Ordinary, and shall be forthwith submitted by such clerk to the said Lord Ordinary, who may thereupon at once grant interdict, or at once refuse to grant it, or appoint such note of interdict in the first place to be served, and, if need be, to be answered, or parties to be heard thereon with or without answers; and may thereupon give decree granting or refusing interdict, or may take such other course in regard to such application for interdict as to him may seem proper."

imprisoned therefor, under the Revenue Acts. The statutes founded on provide only for appeal or redress as between the assessor and the assessed; they provide no special remedy for a third party whose goods have been erroneously attached for the assessment of another, but leave such a case to be dealt with by the ordinary tribunals." (Stat. 10.) "In the present instance, the complainer, Mr. Sharpe, having been competently brought into Court by the respondent as a third party, not amenable directly in the matter at issue under the Revenue Acts, he pleaded thereto by a defence, and, on the interdict being continued, pleaded subsequently on repeated occasions, on the merits, down to the date of the interlocutor assigning a diet of proof, fixed on the 9th of April by consent of both parties. Instead of advocating any of the interlocutors preceding, or bringing them under appeal in any form provided by revenue statutes, he acquiesced first in the interlocutor continuing the interdict, after hearing parties on the 25th March, and allowed it to become final. He again acquiesced in the subsequent interlocutor of 29th March, appointing consignation of the amount of debt claimed, which proceeded on his own motion, and allowing a proof to the parties of their respective averments, and allowed that interlocutor also to become final; and the required consignation having been made, allowed that matter likewise to become final. And, subsequently, on a diet of proof being fixed, the complainer had at length recourse, as already stated, to the note of interdict previously before the Court." (Stat. 11.) "Instead of adopting the ordinary course required by law, of calling on the judge in the supreme judicatory to review, or recal, or alter, in competent form, the judgments of the inferior judge, and having the question on the merits, which he professes to be anxious to have determined, finally decided, the complainer has a second time had recourse to the anomalous and unnecessary procedure of applying for interdict."

She pleaded;—1. The judgment of the Court, of 24th June 1858, being *res judicata* as to the competency of the application to the Sheriff, and as to his jurisdiction, the present application should be dismissed. 2. The complainer, having pleaded before the Sheriff and acquiesced in several interlocutors pronounced in the Sheriff-court, is barred from maintaining the present application. 3. The present application ought to be dismissed, in respect it is not a competent or legal mode of bringing the judgment complained of under review. 4. The application should be dismissed, in respect the whole proceedings before the Sheriff were regular and competent, and within his powers.

[1021] On 12th January 1860 the Lord Ordinary pronounced an interlocutor reporting the cause to the Lords of the First Division.[1]

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[1] "NOTE.—This is a second note of interdict at the instance of the collector of assessed taxes for Lanarkshire.

"The previous note of interdict was disposed of by the Court on 24th June 1858, by a judgment recalling the interlocutor of the Lord Ordinary, and refusing interdict *in hoc statu*. The cause proceeded before the Sheriff, the facts have been ascertained, and judgment in favour of the respondent, Mrs. Miller, has been pronounced by the Sheriff-substitute.

"The complainer has presented a second note of interdict, on the ground that the Sheriff has no jurisdiction, and that the procedure before him was incompetent. The respondent pleads that the judgment of the Court on 24th June 1858 is *res judicata* in regard to the jurisdiction of the Sheriff, and the competency of the procedure before him.

"The parties differ widely in point of fact as to what passed in Court when the judgment refusing interdict *in hoc statu* was pronounced on 24th June 1858, and as to the footing on which the cause went back to the Sheriff.

"In these circumstances the Lord Ordinary has thought it best to report the case to the Court in its more advanced stage.

"Not only the effect of the respondent's plea of *res judicata*, but the Lord Ordinary's disposal of the plea of incompetency of procedure and want of jurisdiction, must depend very much on what was the real meaning and intention of the judgment of the Court in the previous note of interdict, presented by the complainer with reference to the same matter at an earlier stage of the proceedings. Even though, in form, there should be no *res judicata*, the Lord Ordinary would be guided by the authority of the Court on the point, if an opinion has been expressed, but on that subject the parties differ in their averments of fact."

On 17th May 1860 the Court, having heard parties, "supersede proceeding farther in this cause for fourteen days, to allow the complainer, if so advised, to bring before this Court the whole proceedings before the Sheriff." But the complainer lodged a minute, stating "that he had not deemed it advisable to bring up to this Court by suspension the whole proceedings before the Sheriff; and he now concurs with the respondent in asking the judgment of the Court upon the case as it stands."

In these circumstances the Court, on 22d June 1860, "appointed the parties to give in cases upon the whole points and questions involved in the cause, which originated by the process of interdict before the Sheriff-court of Lanarkshire, at the instance of the respondent, Mrs. Janet M'Leod or Miller."

For Sharpe it was argued;—That sect. 14 of the Act 19 & 20 Vict. cap. 56 (quoted *supra*, p. 1019), brought the matter to a precise issue. Would the respondent, before the passing of the Exchequer Act, have been liable to be stayed by injunction of that Court from presenting her petition before the Sheriff? The complainer maintained the affirmative of that question, relying on the Acts 1663, cap. 18; 1669, cap. 12; Clark & Scrope's Treatise on the Scottish Court of Exchequer, p. 131; Treaty of Union, article 19; 6 Anne, cap. 26. It constituted a prominent part of the Treaty of Union, that the revenue jurisdiction should be kept separate altogether from the ordinary common law of Scotland. Now, it cannot be doubted that the present case is one relating to the revenue. A warrant has been granted for the recovery of a public tax. The Crown seeks to enforce that warrant by selling goods found in the house on which the assessment was laid—furniture which was in the house at the time when the assessment was laid. The occupant, at the time of the assessment, happens to be different from the occupant at the time when the warrant is sought to be enforced, but not a single article of furniture has been removed. It is not said to have been acquired from the occupant assessed, either before or **[1022]** subsequent to the assessment. A person, pretending to be the proprietor, takes possession of the furniture, and maintains that, although it might have been liable to be sold in the forenoon, when the previous occupant was in the house, yet in the afternoon, by her merely entering into possession upon an alleged antecedent title, it is no longer available for payment of the tax. The questions raised are of the character indicated in the Act of Anne as questions relating to the "revenues, debts, and duties" appertaining to the Queen; to the "remedies and means for recovering the same, or the possession thereof;" to "prosecutions for or concerning the same." Unless, indeed, the statute had in specific language described the action before the Sheriff on the warrant issued for recovery of the tax, it could not have used words more calculated to embrace it. The practice of the English Exchequer Court is stated by Serjeant Manning in the following terms:—"The Court of Exchequer, possessing an original, and, in many cases, an exclusive jurisdiction in fiscal matters, will not in general permit questions, the decision of which may affect the King's revenue, to be discussed before any other tribunal. On such occasions, this Court interferes upon motion, by directing the proceedings to be removed into the Exchequer. The part of the Court into which proceedings of this nature are removed, is the office of pleas, originally instituted for the purpose of deciding controversies between parties, in respect of one or both of whom the Crown was, directly or indirectly, interested."[1] If, therefore, this matter were to be determined according to the practice of "the Court of Exchequer in England, or the barons or officers thereof," it is submitted that interdict must be granted in the present case as prayed for by the complainer. It is quite true that the action sought to be interdicted is not, in the present case, an action of tresspass after the alleged illegal seizure has been done, but an action to prevent the alleged illegal seizure, on the footing that, according to a just construction of the statute founded on, the respondent's goods cannot be poinded. But if there be either, first, an absolute disability in a Sheriff entertaining a suit in regard to the legality of an Exchequer warrant, or the legality of its execution, or, 2dly, if it be the prerogative of the Crown to get an action in which these questions are raised removed into the Exchequer, then it is of no consequence by what form of action the

[1] Cawthorne *v.* Campbell, Feb. 12, 1790, Court of Exchequer, 1 Anstruther, p. 207–8; Bemingfield *v.* Stratford, 1820, 8 Price, p. 584; Attorney-General *v.* Kingston, 24th April 1841, 8 Meeson & Welsby, p. 163; Adams *v.* Freemantle, 1848; Siddons *v.* East, 1 Crompton & Jervis, p. 12.

point is raised in the Sheriff-court. If an injunction had been issued by an English non-revenue Court against carrying out Exchequer process, the Exchequer would interfere, as the presiding authorities indicate, by an order to remove the case into the Exchequer; and this they will do at any stage of the cause in the non-revenue Court, as shown by the case of the Attorney-General *v.* Kingston, where the pleas had gone on a certain length in the Common Law Court before it was removed; and the objection founded upon that circumstance was disregarded by the Court of Exchequer. The practice in Scotland in the Court of Exchequer has been, in like manner, uniformly to the same effect since the Union. The right of the Scottish Court of Exchequer to insist upon all these cases being determined by it, seems indeed (looking to the imperative language of the statute of Anne) to be more absolute than that of the English Exchequer Court. The Courts of Queen's Bench and Common Pleas are supreme courts; and they appear to have the right to entertain suits which do not fall within the first class of proper revenue causes mentioned by Chief Baron Eyre. No doubt, when the Crown's privilege is asserted, they must yield; but until then they may competently entertain the suit. But in Scotland the case is somewhat dif- **[1023]** -ferent. This matter was brought out very clearly in the important case of the Duke of Queensberry against the Officers of State,[1] from the decision in which the result would follow that no court of common law in Scotland could have any jurisdiction whatever in a revenue case, even with consent of the Crown, and a judgment in such a case by a Sheriff or the Court of Session would be null. The effect of the statute of Anne does not seem to have been brought before the Scottish Court of Exchequer in the case of Mill *v.* Steven, 17th December 1822.[2]

But even supposing that a supreme court like the Court of Session had jurisdiction to entertain such actions, and to pronounce judgment in them, until stopped by the assertion of the Crown's privilege, it does not follow that every inferior court throughout the country has a similar jurisdiction. If the Court of Session stands in the same position, notwithstanding the statute of Anne, to the Court of Exchequer, as the Queen's Bench does to the English Exchequer, upon what principle is it that the same extensive powers shall be given to a Sheriff, before whom the Sovereign is never obliged to plead? This is one of the points of jurisdiction that was earliest settled.[3] So far from Sheriffs having any jurisdiction in properly revenue matters, it has been the law of Scotland, for three centuries at least, that they have no power whatever to entertain a suit against the Crown. Whatever doubt, therefore, may exist as to the Court of Session having jurisdiction, there can be reasonably suggested no ground for doubt as to the Sheriff having none. Indeed, to give that officer any authority in the matter would be somewhat anomalous, looking to the position he holds with reference to the Court of Exchequer. He is a ministerial officer of that Court. He was formerly bound to attend in the Court of Exchequer yearly to give an account of the feu-duties and casualties due to the King, which he was bound to uplift. He is bound at this day to execute all writs issuing from the Court of Exchequer.[4] And, in the very case now before the Court, he was bound to grant the warrant, the enforcement of which is now sought to be interdicted by himself, "under the penalty of L.10 sterling." Thus he was bound, in the first place, to grant a warrant under a penalty, without any power whatever of judging whether it was legal or not, and the next moment he is asked to grant interdict against the execution of his own warrant. To say that the Sheriff can sit as judge in cases where he acts as the officer, is to confer upon one person somewhat inconsistent duties. It is not to be presumed that such an anomaly as this is sanctioned by the law, and there is neither authority nor practice to support it. With regard to the Sheriff, a judgment by him in a case like the present would be an absolute nullity; and the case is freed from any of the difficulties that would arise if the application for interdict by the respondent had been made in the Bill-Chamber. But whether the present case be one of absolute want of jurisdiction on the part of the Sheriff, or one where he has no jurisdiction to proceed when the

[1] 15th December 1807, Mor. App. *voce* Jurisdiction, No. 19.

[2] Reported, *ante*, vol. xx. p. 455.

[3] A. *v.* B. 16th July 1534, Mor. 7321; A. *v.* B. 1st February 1549, Mor. 7323.

[4] Ersk. i. 4, 6; Baron Clark's History of Court of Exchequer in Scotland, p. 254; Court of Exchequer (Scotland) Act, 1860, sect. 29, *et seq.*

Royal prerogative is asserted, is immaterial in the practical result of the present discussion. The Crown has asserted its privilege by asking an injunction from this Court against further proceeding with the cause before the Sheriff. The Crown has declined to litigate on the merits in the inferior Court. It maintains that the present is a case which falls within the 14th section of the Exchequer Act, as one that would have been liable to have been staid by injunction before that Act passed. The English cases show the kind of cases in which injunction will be granted; and ad- **[1024]** -mittedly the Scottish Court of Exchequer granted such injunctions in every case in which this was done by the English Court. The plea of hardship is one of the most evanescent description. It is one that seems to have never occurred in England, where there are no local courts to grant interdicts, and where no suggestion has ever been made on this ground for destroying the jurisdiction of the Court of Exchequer. The question in the present case is not what the Court of Session has done in prior cases, but what is the law and practice of the Exchequer. Even supposing the Court of Session had decided differently, the Court of Exchequer are not authorised to give effect to these decisions, but are bound by the statutes, under which the Court of Exchequer now exists, to enforce the Exchequer practice.[1] It is, however, maintained by the respondent, that the interdict must be applied for to the Court of Exchequer at the earliest stage of the cause; and if not so applied for, it cannot be demanded afterwards. This is erroneous. But at the first oral debate the complainer was told that his application was premature; that he ought to have proved, in the first place, that it was a Crown tax, and then taken the Sheriff's judgment upon the plea that he had stated against that Judge proceeding farther with the cause. *Quomodo constat* it was said that the Sheriff would not, upon the nature of the case being explained to him, dismiss the application. The effect of interdicting the respondent as now craved would simply be to prevent the using the interdict which the respondent has received from the Sheriff against the poinding being carried out by sale. It would prevent the whole proceeding of the Sheriff from having any practical effect. But she is not deprived of her remedy,—the Court of Exchequer is still open to her by way of a new petition for interdict, to be submitted to the Lord Ordinary in Exchequer.[2]

The respondent argued;—That the complainer was not entitled to follow the course which he had adopted. He was now asking judgment on precisely the same question as that upon which he asked judgment for before. There was now a final judgment of the Sheriff standing against him, exhausting the cause, the execution of which he seeks to prevent by interdict. This remedy is incompetent, and quite inapplicable to the case of a final judgment. The general rule in cases of conflict of jurisdiction is, that each court determines for itself the limits of its own jurisdiction. In England it has been the practice for a court which has thought that its privileges were being interfered with by another court of co-ordinate jurisdiction, to appear before that other court, and plead the privilege, and submit it to the judgment of that other court.[3] The Court of Exchequer, however, may assert its jurisdiction by injunction. This remedy has for its foundation the privilege which that court has of determining all suits relating to the revenues of the Crown, and of preventing such questions being heard and determined in any other court; but it does not in any degree proceed on the ground of there being a want of jurisdiction in any other court in which such a suit may be raised. It is entirely different from the remedy of review. The proper time for the interference is whenever the cause is brought in another court, and before appearing in that cause and pleading to it. But certainly the interference must occur before there is judgment in the cause. To allow such interference after a judgment exhausting the cause, would be virtually to allow the Court of Exchequer to review the judgment of a court over **[1025]** which it has no power of review. The object of the interference is

[1] Martin *v.* Watt, 5 Supplt., p. 495, 1766; Ramsay *v.* Adderton, 17th July 1747, Mor. 7590; Brough *v.* Stewart, 20th December 1850, *ante*, vol. xiii. p. 408; Young *v.* Townsend (Court of Justiciary), 24th November 1856, 2 Irvine, p. 525; Adv.-General *v.* Beattie (Court of Exchequer), 29th January 1856, *ante*, vol. xviii. p. 378; Farrell *v.* Barclay, 27th May 1846, *ante*, vol. viii. p. 774.

[2] See Pennel *v.* Roy, 22 Law Journal, Chan., p. 409; Carr and Co. *v.* M'Laren, 11th July 1855, Weekly Reporter, p. 597.

[3] Cawthorne *v.* Campbell, 1 Anstruther, p. 208.

to prevent the cause from being heard and determined in that other court; but after the cause is heard and determined, and judgment given, it would amount to a review of that judgment. Such a course of procedure would be anomalous under any circumstances. It would be anomalous so to deal with the judgment of a court which, in the opinion of the Court of Exchequer, had no jurisdiction; but it would be monstrous so to deal with the final judgment of a supreme court, which, in the opinion of the Court of Exchequer, had jurisdiction. And yet this must be the result, if it be so that the remedy of injunction can be applied in any case whatever to a cause after judgment has been pronounced. This is a fair way to test the proper application of the remedy, and shews conclusively that its application must be at a stage prior to judgment, or not at all. What the respondent, therefore, now maintains is that, whether the Sheriff had or had not jurisdiction to grant the interdict complained of, the complainer has mistaken his remedy. The cause has been exhausted by a judgment, final in the Sheriff-court, whereby the interdict asked for was granted with expenses. If the complainer felt aggrieved, he ought to have proceeded by proper process of review, whether by advocation in the Court of Session, or by *certiorari*, or suspension in this Court, does not matter to the present argument. On the complainer's assumption, that the Sheriff had no jurisdiction, and that the Court of Exchequer had, two courses were open to him in dealing with the original application to the Sheriff,—he might have interfered at the threshold of the cause, or at least before judgment, and compelled the party to proceed in Exchequer; or, he might have pleaded to the application, and taken the Sheriff's judgment, and, if he thought it erroneous on the point of jurisdiction, he might have brought it under review of the proper tribunal. He has done neither the one thing nor the other, but has attempted to combine them both in such a way that the matter becomes quite inextricable. After pleading before the Sheriff to the length of a final adverse judgment, he ought to have brought up that judgment in a form in which the interdict might competently have been set aside if erroneous. But the form he has adopted is one in which it is not possible to set it aside.[1]

Assuming that the present application is not incompetent, the record is insufficient in law or substance to support the prayer of the present note of interdict. In conclusion, the complainer pleads that the Sheriff had no jurisdiction to entertain and determine the original complaint, and that the whole proceedings before the Sheriff are void. It seems startling at first sight to say that a party's goods may be distrained under a warrant directed against an entirely different party, and without any previous warning to the owner of the goods, either of the existence of a debt, or the issuing of a warrant, and that the owner should not have redress from the ordinary tribunals of the country. Is it to be maintained that a collector of taxes may make any use he pleases of an Exchequer warrant, by poinding or by imprisonment, and that no court can interfere to prevent him but the Court of Exchequer? That is virtually the proposition which the Court are asked to sanction. Common sense and authority are alike inconsistent with it. It is undoubted that in England there is at least a large class of cases in which jurisdiction is possessed by other courts, both of law and equity, in common with the Court of Exchequer; and there can be no reason to doubt that, in Scotland also, there are many cases in which both the ordinary civil courts and the Court of Exchequer have jurisdiction.[2] But this is not one of those [1026] privileged cases in which the Court of Exchequer have jurisdiction at all, which it could assert by injunction. This is a matter of privilege under the statute, and the privilege must end somewhere. There is hardly a suit in any court which may not indirectly affect the amount of the revenue,—an action, for instance, in which the amount or character of a succession is determined,—a dispute as to whether a stamp is required on a certain deed,—an action by a foreigner, or a party living abroad, depriving a subject of the realm, liable to be taxed, of his whole means and estate. The enumeration of the class of matters to fall within the jurisdiction of the Court of Exchequer is contained in sec. 6 of the statute. It commences, with the "revenues, debts, duties, and profits" belonging to the Queen, and "remedies and means for recovering" the same. Now, in the present case, there is no dispute about the revenues, debts, duties, or profits of the Crown. There is no question

[1] Banks *v.* Bennet, Hardie, p. 193; Beningfield *v.* Stratford, 27th November 1820.

[2] M'Ara *v.* Carrick, 15th December 1821, 1 Sh., 235; Campbell *v.* Mill, 28th June 1823, 2 Sh., 440; M'Loughlan *v.* Evans, 18th February 1859, *ante*, vol. xxi., 532.

as to the validity of the assessment, or as to its amount, or as to the liability of the party assessed. Nor is there any question as to the remedy and means of recovery. The validity of the warrant is conceded, and there is no objection to its being executed against the proper party. There is no interference whatever between the Crown and the crown debtor. As to fines "forfeitures," &c., there can be no question here. There remain "informations," "actions," "suits," or "demands" relating to the above matters, and "prosecutions and remedies" for or concerning the same. Now, there must be two parties to a suit—a demand, a prosecution, or a remedy. The parties to the suit or prosecution here, in the question relative to assessed taxes, were the complainer and Miss Johnston, and any question arising betwixt these parties to the suit were within the jurisdiction of the Court of Exchequer. But there was never any suit with the respondent, or prosecution against or demand upon her for these assessed taxes. There was only the blunder of the officer in attempting to execute a warrant obtained in the suit against the goods of a person who had never been a party to the suit, nor known of its existence. A charge or other diligence against Miss Johnston would have been within the proper "suit," "prosecution," "demand," or "remedy," contemplated by the statute "touching or concerning" the matters of revenue specified; but it would be a most unwarranted stretch in the construction of the statute to hold that such an extraneous and gratuitous proceeding as an attachment of the goods of a third party, upon whom no demand had been made, and whose name did not appear in the proceedings, should be within the same category. There has been no interference betwixt the Crown and its debtor, and no question at all as to revenue or remedies relative thereto. The only question that could possibly have arisen is the question, to whom did the goods belong? But that is not a revenue question; and the Court of Exchequer would have been in no different position in regard to it than if it had arisen betwixt Miss Johnston and the respondent, and the revenue officer had been watching the result with a view to secure his taxes. It is maintained by the complainer that it is clear at least that the Sheriff had no jurisdiction. It is said that no inferior judge has jurisdiction in an action against the Crown, and two very old cases are cited. This, as a general rule, might be conceded in reference to actions directed against the great officers of state, such as the Lord-Advocate. But there is no reason for applying any such rule to a petty officer, such as a revenue officer, who has constantly to plead before Justices of the Peace and Sheriffs. It is also said that for the Sheriff to adjudicate in such a case as the present would be inconsistent with his ministerial duties in reference to the collecting of the revenue. But there are many matters as to which Sheriffs have judicial as well as ministerial duties to perform, such as in what relates to elections of members of Parliament, striking of fiars, inspection of madhouses, and the administration of criminal justice. It is not necessary, however, to go beyond this very matter of poindings. In all poindings, whether **[1027]** under his own warrant or that of another court, he has the ministerial duty of superintending the execution of the diligence, and the proceeds of the poinded effects are placed by statute under his determination; while, at the same time, he has the power and the duty of deciding *prima instantia* "all questions both as to the application of the diligence to the property poinded, and in regard to the distribution of the proceeds of the poinded effects."[1] It is quite fixed that the Sheriff may also interfere by interdict. The Sheriff has similar ministerial duties to perform in reference to poindings on revenue warrants, and if there arises a dispute as to the property of poinded goods, surely it is not more anomalous that he should determine it in the one case as that he should do so in the other.

But apart from all this, this is not a case in which the complainer can plead any of the privileges of a crown officer. When he acts entirely without warrant, or under colour of a warrant *ex facie* directed to quite a different purpose, he ceases to be entitled to the privileges of a revenue officer. In such a case, were there a claim of damages to arise, it would not be necessary to prove malice or want of probable cause in order to obtain a verdict. The present is a case of that nature.

On 13th January 1861 the Court, "in respect of the importance of the questions involved in this cause, appoint copies of the printed papers in the cause, and a printed copy of this interlocutor, to be boxed to the Judges of the Second Division, and to

[1] M'Glashan's Sheriff Court Practice, Barclay's Ed., p. 32; Scotland *v.* Lawrie, 12th June 1828, 6 Sh. 961; Kincaid *v.* Love, 19th December 1835, 14 Sh. 188.

the permanent Lords Ordinary, in order to obtain the written opinions of the consulted Judges, with their earliest convenience, on the following question:—Whether, under the present application for interdict, any interdict should be granted; and, if so, in what terms?"

The consulted Judges returned a joint opinion as follows:—

LORD JUSTICE-CLERK, and LORDS WOOD, COWAN, BENHOLME, NEAVES, ARDMILLAN, MACKENZIE, KINLOCH, and JERVISWOODE.—We are of opinion that, under the present application for interdict, an interdict should be granted in the terms to be afterwards mentioned.

These proceedings arose out of a warrant of the Sheriff-substitute of Glasgow, obtained upon the application and certificate of the suspender, Mr. Sharpe, as collector of land and assessed taxes for the county of Lanark, and directed against certain persons as in arrear of their assessed taxes. In the list of persons so in arrear was the name of Miss Johnston, 26 Jamaica Street, for the sum of L.9, 7s. 6d. Warrant was granted by the Sheriff-substitute to sheriff-officers and constables, for poinding and distraining the goods belonging to the said several persons, and at the expiration of four days without payment, then for selling and disposing of the same.

This deliverance was a good warrant for poinding and distraining the goods of the crown debtor, Miss Johnston. But, practically speaking, it was a warrant that might be used *periculo utentis*, to poind and distrain such goods as the collector or officer might deem to be the goods of Miss Johnston, subject to any question that might be raised as to that matter of fact. It was a warrant which, in its own nature, needed to be applied to individual things, and the user could only use it by taking under it, for the Crown's debt, the goods which he believed to fall under the warrant.

The warrant was used to seize certain goods which seem to have been in the premises, in respect of which the taxes were due, but which goods are alleged by the respondent, Mrs. Miller, to belong to her, and not to Miss Johnston, the crown debtor. That allegation, if true, might be sufficient to defeat the warrant, or rather, to render it inapplicable to these goods. Mrs. Miller, accordingly, was entitled to adopt proceedings for the protection of her alleged property, and among other remedies, to resort to an interdict against the sale of the goods.

We do not think it necessary to determine whether it was or was not competent for Mrs. Miller to apply to the Sheriff for an interdict against the sale of the goods. **[1028]** We think that the question here raised is not as to the jurisdiction of the Sheriff-court, but as to the right or prerogative of the Crown.

As the seizure was made under a tax warrant, and upon the application of the collector of taxes as such, and was thus truly a proceeding in the Queen's name, and for her behoof, as vested with the sole right to the public revenue; and as the object of Mrs. Miller was not merely to recover damages from the collector or officer, as having abused the warrant, but to recover or lay an embargo on the goods themselves thus seized, her application ought perhaps to have been presented in the Court of Exchequer, unless, at least, she was prepared to dispute that there was any such warrant. But assuming it to be competent for her to apply to the Sheriff, we are of opinion that the Queen had an undoubted right at once to put a stop to the procedure in the Sheriff-courts, and to remove the question, in the sense afterwards explained, into her own Court of Exchequer, where alone Her Majesty is bound to suffer any litigation to proceed in any matter directly or indirectly relating to the revenue.

Whenever the question was duly raised, whether these goods had been properly seized for a Crown debt, the case became at once a matter of revenue, and the claim of the respondent resolved into an attempt to take the goods out of the Queen's hands, and thereby to prevent the recovery of the revenue from that source. Any litigation on such a point, before any other judicature, ought immediately to be stopped by this Court when called upon to interfere, so that the question may be determined in Exchequer,—the proper tribunal appointed for the determination of revenue causes. By this course there is no exclusion of redress to the respondent. If she has suffered wrong, she will have her remedy in this Court as amply and effectually as anywhere else. But the law holds it to be necessary for the public interest, both with a view to dispatch and to deliberation, as well as to uniformity of decision, that such causes should be removeable into Exchequer; and when the respondent instituted her pro-

ceedings before the Sheriff, she must be held to have known that this was a possible result.

It has always, accordingly, been the practice of the Court of Exchequer to interfere in such cases.

Even where the interest of the revenue or the Crown is only indirectly affected, the Court of Exchequer has, upon a proper motion, been in use to stop the proceedings of any other Court, whether inferior or supreme, so as to compel a trial of that question in Exchequer. Thus, where an action of damages is raised against a revenue officer, as for a wrongful seizure, the interest of the Crown is not thereby directly affected, as a decree against the officer would only reach his person or private funds, and would not touch the Crown patrimony. But, even there, if the validity of the seizure is made a question, and its validity is to be maintained on the part of the Crown, the party bringing such action has been repeatedly restrained by the Court of Exchequer, both in England and in Scotland, from going on with it in any other Court. Of this exercise of jurisdiction there are many examples quoted in the pleadings, and the principle applicable to such cases is well explained in the leading authorities. Much more clearly must this interference be competent and proper where the proceedings, as in this case, were calculated not merely to obtain a pecuniary decree of damages against the officer, but actually to prevent a sale of the goods themselves, and thereby to intercept from the Queen's Exchequer the money that is in the course of being recovered from the sale of goods seized for the payment of a public tax.

While these principles seem to admit of no doubt, there remain only three subordinate points to be noticed:—

1. It is said that the proceedings in the inferior Court in this case under the respondent's process of interdict are too far advanced for this Court to interfere as now proposed. We think it would have been better if the suspender's original application to this Court had been insisted in and granted; but it is to be observed that the Crown officer all along objected to the case being proceeded with in the Sheriff-court; and at all events, the Crown and the revenue are not to suffer from any mismanagement or miscarriage in this respect, if it be at all competent to interfere now. We think it competent so to interfere, as the respondent's process of interdict was not terminated by an extract, or even by a final decree, at the time when the present application was presented.

[1029] 2. As to the proper party to insist in the application for interdict now made, we should consider that in the case of a subordinate officer sued merely for damages for an alleged wrongful act, the more regular course would be that the Advocate-General should apply to this Court for the exercise of its jurisdiction. But in the case of a collector of the revenue who is sought to be impeded in making his collection, the practice, we conceive, is fixed, that he may apply, in Exchequer, for the same remedy that the Crown itself could resort to, he being truly responsible for the collection, and entitled to every facility for making it; and it being also presumed that, in this matter, he has the authority of his superiors where they do not interfere to stop his proceedings. This, accordingly, was the view taken by the former Court of Exchequer in the case of Mill, and other cases referred to in the pleadings.

3. We do not think that the Crown, or collector as in place of the Crown, is bound to bring up the proceedings in the Sheriff-court by any process of review or advocation, so as to make them depend or be discussed in this Court. The remedy, according to the practice, is to stop the proceedings in the ordinary Court, but, at the same time, to give all reasonable facilities to the private party in bringing and proceeding with the proper remedy in this Court.

To that part of the question put to us, which asks in what terms the interdict should be granted,—we answer that, in our opinion, it ought to be in the following terms:—"That the respondent be interdicted from farther proceeding in her application for interdict before the Sheriff, or from extracting or taking out in any way, any deliverance there pronounced, but without prejudice to her applying to the Sheriff for repayment of the money consigned by her, it being declared that this interdict is granted on the footing that the suspender shall abide and answer to any application that may be presented in this Court at the respondent's instance, in reference to the goods in question, and that, in the meantime, the said goods shall not be brought to

sale for the space of one month, to allow the respondent an opportunity to institute proceedings in the matter in this Court, for the determination of which all facility and despatch, so far as reasonable and requisite, will be given, when the same are so instituted."

Of this date the case was advised.

LORD PRESIDENT.—In this case we remitted for the opinion of our brethren, and we have got the unanimous opinion of the consulted Judges. We remitted to them to know whether the interdict should be granted, and, if so, in what terms. And they have given us the opinion which they entertain in the case, and the form in which the interdict is proposed to be granted.

When this case was before us, some questions of very considerable importance were raised, as to which I for one entertained doubts that have not yet been removed; and they were upon points which I see the opinion does not deal with, although they were argued to us very fully. I mean, in the first place, whether the original application to the Sheriff was competent by Mrs. Miller; and, secondly, whether the Sheriff had jurisdiction to entertain such an application. The opinion given here by the consulted Judges proceeds upon the footing that it is not necessary to dispose of these questions,—that they are not before us. They were questions that formed two of the pleas that were submitted to us in support of the application for interdict, and on which we had an argument, and which I think were questions very deserving of consideration. However, it is now unnecessary to deal with these.

The question which has been disposed of is this, that *esto*, that the application was competent; *esto*, that the Sheriff had jurisdiction, still that the Crown were entitled, the moment the Crown officer claimed these goods, whether belonging to Mrs. Miller or anybody else; the moment he asserted the right of the Crown in reference to them, the Crown was entitled not to have the matter dealt with by the Sheriff, but was entitled to have the question dealt with in the Court of Exchequer. That was a point on which I certainly had very little doubt; but the difficulty which I entertained was in regard to the two questions which I have alluded to, and in regard to the mode in which the question should be brought into the Court of Exchequer, or into this Court. The Crown declined to bring it. They had the power to bring it. They did not dispute their power to bring it, but they had declined to bring it.

[1030] Our brethren are of opinion, that "under the present application for interdict, an interdict should be granted in the terms to be afterwards mentioned." If an interdict had been granted in the exact terms of the prayer, this difficulty would have arisen, that the poinding or the attachment of the goods might have been carried through by sale before the party would have had any redress. But a remedy for that has been suggested in the interlocutor proposed by our brethren, in terms of which we shall now pronounce judgment.

LORD IVORY.—I am somewhat in the situation of your Lordship, that the grounds of hesitation that I had on certain points of the case have not been entirely removed. They are not points of the case within the judgment which has now been settled by the opinion of the majority of the Court, but they seemed to me to be essential points, and they were so argued to us. However, it is needless to go back on these. I yield a hesitating and reluctant assent to the opinion of the majority of the Court; and we have not only the substance, but the very words of the interlocutor which we are to pronounce. I have no wish to withhold acquiescence in a judgment so authoritatively given, or to express any sentiments of my own, to throw doubt upon the validity of any portion of the judgment which is so to be pronounced. I entertain the same doubts that your Lordship does in regard to some of these other matters, and perhaps as to others which I should have thought, if we had been free here, ought to have been further elucidated. But it is not so; and therefore I just acquiesce in the judgment which I am ordered to pronounce.

LORD CURRIEHILL.—The judgment the Court is to pronounce, of course, is settled by the opinion of the consulted Judges. I shall merely announce, in a few sentences, the views that I take of this matter. I am of opinion, in the first place, that the pleas which were stated on the part of the Crown in the closed record, were not well founded. I am not satisfied that any one of these pleas is well founded. Although the

Crown was entitled, in the exercise of its prerogative, to have the question tried in this Court, and to have proceedings stayed in the Sheriff-Court, yet, in my opinion, there was no want of jurisdiction in the Sheriff, and the question might have been competently decided by him, if the Crown had not thought proper to exercise its prerogative. But the grounds on which interdict was originally applied for, as set forth in the pleas in the record, were only that the original petition was incompetent in the Sheriff-Court.

But after this action came into Court, and after the record was closed, the Crown resorted to the other plea, that even although the original proceeding was well founded, and the Sheriff had jurisdiction, and although it was originally competent, yet it was part of the prerogative of the Crown to have the question tried in the Court of Exchequer, and also to have the proceedings in that process, however competent, stayed in the meanwhile, leaving the party to raise the proper proceeding, whatever that might be, in the Court of Exchequer. On the pleas originally stated, my opinion was against the Crown; but on the new plea, my opinion is in favour of the Crown. I think it is part of the privilege or prerogative of the Crown to have a case of this kind brought into the Court of Exchequer, although it is quite competently brought originally in some other Court. If, therefore, the Crown had made the application at once, in the exercise of its prerogative, I would have no doubt at all. But I have some doubt whether it was not too late in doing so. In the Sheriff-Court the Crown appeared and pleaded in the action. No doubt its plea was that the Sheriff had no jurisdiction. But not only did the Crown persist in that plea, but it called upon the Sheriff-Court itself to pronounce judgment upon that defence. It moreover allowed an order to be pronounced against the other party to consign the sum in dispute—an order for consignation within two days—and it allowed the consignation to be actually made out, and placed in *manibus curiæ;* and it was only when the parties went to proof the Crown took even the objection to the jurisdiction. It did not use the prerogative process of coming to this Court. Then it came to this Court with a formal application for interdict, and even then they have put it, not on the exercise of its prerogative, but on the erroneous ground of want of jurisdiction in the Sheriff-Court. They applied to this Court for interdict, and when it consented to that application for interdict being refused, it still continued to go on with the process in the inferior Court, and to plead this ground of incompetency. And it is not till the case was **[1031]** finally decided in the inferior Court, and nothing remained to be done but to tax the account of expenses, that they proceeded with this petition for interdict, in order to prevent matters from going further in the inferior Court. I think there is considerable difficulty in sustaining an application for interdict at that stage of the proceedings. Our brethren, the consulted Judges, have felt that difficulty, because they think that something must still take place. The money must be got back that was consigned in the original process, and I think there is considerable difficulty in the mode in which they propose to extricate that matter. However, I merely indicate these as doubts which I have in the case, though, of course, they are unavailing; and we have nothing to do but pronounce the judgment in the terms furnished to us.

LORD DEAS.—The way in which this question arose was this:—The collector of assessed taxes in Glasgow, Mr. Sharpe, on 18th March 1858, presented to the Sheriff a certificate, bearing "that the several persons whose names are underwritten, stand duly assessed in the amount of duties of assessed taxes placed opposite to their respective names;" "that such duties are resting and not duly paid by the said several persons," and, therefore, requesting warrant for recovery thereof, in terms of the statutes. In the list of persons thus referred to was "Miss Johnston, 26 Jamaica Street, L.9, 7s. 6d." The name of Mrs. Miller was not in the list. The warrant was accordingly granted, bearing "whereas it appears from the certificate hereto prefixed, that the several persons therein named and designed, have been duly assessed to the amount of duties of assessed taxes placed opposite to their respective names," &c., "grant warrant for poinding and distraining the goods and effects belonging to the said several persons," and for detaining the same for four days, "unless the owner shall redeem the same within the said space by payment of the said duties in arrear by him, and costs;" and thereafter for valuing and selling the same, to be applied, in the first place, in "payment of the said duties owing by the persons whose goods are so poinded," and, in the next place, of the costs.

Now, upon the face of that warrant, it is a warrant to distrain the goods of Miss Johnston, for taxes due by Miss Johnston. It is not a warrant to distrain the goods of Mrs. Miller, either for her own taxes or for Miss Johnston's taxes. The poinding, which was actually executed, however, is said to have been a poinding of goods which had never been either the property or in the possession of Miss Johnston, but which had been all along the property and in the possession of Mrs. Miller. Mrs. Miller accordingly applied to the Sheriff for an interdict, upon the ground that the goods which were poinded and distrained were her goods, and not the goods of Miss Johnston, and therefore that they were not within the warrant. Now, there is no doubt at all that, in defence against that application, the Crown at once pleaded what your Lordships have at the foot of p. 25 of the print,—"No jurisdiction to entertain the action in this Court. The craving for interdict is incompetent." They pleaded that at the outset undoubtedly. But the question then arose, whether, if an inferior officer of the Crown poinds the goods of A for a debt of B, under a warrant which authorises nothing but the poinding of the goods of A for the debt of A, there is or is not jurisdiction in the Sheriff to entertain an application for interdict? Now, I have no doubt of the jurisdiction in one sense. But the true question is, whether the Crown had not the privilege of removing, even such a question as that, into the Court of Exchequer? And although that question is novel and difficult, I am not prepared to say that the Crown had not the privilege. I am very clear, however, with your Lordship in the chair, that if, in place of using the privilege of removing the case into Exchequer, the Crown chose to allow it to go on, and judgment to be pronounced, there would be no want of jurisdiction in the Sheriff to pronounce that judgment. And that raises another nice question, whether, considering the course which the Crown took, and the length to which the proceedings were allowed to go on—though the plea of want of jurisdiction still stood on the record—the Crown did not so join issue as to preclude the exercise of the privilege which might have been exercised at first? When the Crown came here with the first application for interdict, there was an interlocutor pronounced, which your Lordships have on p. 30 of the print—"Of consent recal the interlocutor of the Lord Ordinary, and refuse the interdict asked in *hoc statu*." That interlocutor admittedly put an end to that first application for interdict; and the application we have now before us is a new and independent appli- **[1032]** -cation. The Crown went back to the Sheriff under the above interlocutor, which, of consent, refused the interdict; and that certainly increases the difficulty of the course of procedure which the Crown is now persisting in. Still, even that difficulty might not prevent me from holding that the Crown may use its privilege or prerogative of bringing the proceedings into the Court of Exchequer. My greater difficulty is whether the Crown has taken the right way of exercising that privilege. The clause of the statute 19 & 20 Vict., c. 56, upon which this application for interdict is based, is sec. 14, which bears,—"In all cases in which, if occurring at the date of the passing of this Act, any person or persons would be liable to be stayed by injunction furth of the Court of Exchequer, whether in respect of such person or persons prosecuting or threatening to prosecute before any court other than the Court of Exchequer, in any matters connected with the revenue, or with the proceedings of officers of the revenue, or in any other matters as to which exclusive jurisdiction is at present possessed by the Court of Exchequer, or otherwise, it shall be competent to apply to the Lord Ordinary in Exchequer causes to restrain such person or persons by interdict," &c. The import of this enactment is, that in place of injunction, interdict shall be competent. The effect of the injunction in the one case, and of the interdict in the other, is avowedly to quash the Sheriff-court proceedings, and, consequently, to place the private party in a much more disadvantageous position than if the proceedings were simply removed into this Court of Exchequer. Plainly the Crown is not entitled to the remedy sought, unless this be a case in which the Crown could formerly have proceeded by way of injunction. Now, if your Lordships look at all, or nearly all, the cases which are said to have occurred in the Court of Exchequer in England, you will find that the procedure was not by injunction, but by motion to remove the proceedings into the Court of Exchequer. If the effect of the application of the Crown here had been to remove the proceedings into this Court of Exchequer, I should not have been opposed to that being done. But that is not what is proposed. There is another section of this statute—the 17th—to which we have more than once called the attention of the Crown, but as to the applicability

or inapplicability of which nothing has been said. That section provides that "in all cases where, at the date of the passing of this Act, a writ of *habeas* or a writ of *certiorari* might have competently issued from the Court of Exchequer, to the effect of removing any proceedings before, or warrant granted or issued by any inferior court, or magistrate, or public officer, to the said Court of Exchequer, in order to examination, it shall be competent to either of the parties to bring up such warrant or proceedings to the Court of Session, sitting as the Court of Exchequer, by a note of appeal." The Crown, however, has not come here under that section, but entirely under the section which substitutes interdict for injunction. I am not satisfied that the Crown could have got an injunction formerly, and I am, therefore, not satisfied that the Crown can now get interdict. The opinion returned to us by the consulted Judges takes no notice of this question, and, in that respect, it is not satisfactory to my mind. But, of course, what we have now to do is, to pronounce the judgment which that opinion prescribes, and by which any difficulties we might otherwise individually have had are superseded.

The Crown did not ask for expenses.

Young, for the respondent, moved for expenses against the Crown. The Crown had been held entitled to exercise a prerogative right; but the record had been made up on the pleas of incompetency and want of jurisdiction. The Crown had been wrong in that. The character of the application had thus been totally changed, and the respondent put to great and unnecessary expense in regard to it.

Replied.—The Court have given a remedy under the application made by the Crown, without finding it necessary to make the Crown alter the pleas on which they founded. Admitting that these pleas did somewhat inaccurately express the views of the Crown, it only came to this, that in the inferior court the Crown argued the matter on the theory that it went on jurisdiction, and the Court has held that the sound way of putting it was prerogative.

[1033] LORD PRESIDENT.—I think the Crown have done quite right in not asking expenses in this case, because they have had a trial of the general question. They avowed from the first that it was a general question, and it would be very hard to impose on an individual party, with so small an interest, the burden of trying a question of that kind. They have acted on what has been in other courts the custom of the Crown; and if the Crown in its generosity choose to pay the costs of both sides, which is done in other courts, to try general questions, they are at full liberty to do so. But I do not think there are grounds on which we can give expenses against the Crown in this discussion. No doubt the Crown maintained pleas which have not been sustained by the majority of the consulted Judges, and which, in the opinion of the Judges of this Court, who have given expression to an opinion on the subject, are not well founded. On the other hand, the respondent maintained pleas that were not tenable also. Both parties maintained untenable pleas, and I do not think that is a reason for giving expenses against the Crown. I think the proper condition of the matter is, that there should be no expenses given to either party.

The Court pronounced the following interlocutor:—"The Lords of the First Division having resumed consideration of this cause, which was reported to them by Lord Ardmillan, Recal the interim interdict granted by Lord Ardmillan on 16th May 1859: Further, in conformity with the opinions of the majority of the whole Judges, they interdict the respondent from farther proceeding in her application for interdict before the Sheriff, or from extracting or taking out in any way any deliverance there pronounced, but without prejudice to her applying to the Sheriff for repayment of the money consigned by her, it being declared that this interdict is granted on the footing that the suspender shall abide and answer to any application that may be presented in this Court at the respondent's instance, in reference to the goods in question, and that, in the meantime, the said goods shall not be brought to sale for the space of one month, to allow the respondent an opportunity to institute proceedings in the matter in this Court, for the determination of which all facility and despatch, so far as reasonable and requisite, will be given when the same are so instituted: Further, find no expenses due by or to either party, and the Lords decern."

No. 153. **XXIII. Dunlop 1033.** 12 June 1861. 1st Div.—Lord Jerviswoode.

WILLIAM HAMILTON, Pursuer.—*Sol.-Gen. Maitland—Watson.*

The WESTERN BANK of SCOTLAND, Defenders.—*Young—Home.*

Sale—Essential Error—Reduction.—A purchaser at a public sale bought from the Western Bank a piece of ground "with the whole buildings and houses erected thereon." It turned out, after possession and the titles were completed, that the buildings sold were built to a considerable extent on the *solum* of an adjoining feu, and that, to that extent, although possessed for a few years by the bank, they, in point of fact, did not belong to it. *Held* (*aff.* judgment of Lord Jerviswoode) that there was here such essential error as to the identity of the subject of sale as to entitle the purchaser to be restored against it, and that he was not barred by the terms of the articles of roup,—which stipulated that the warrandice should be from fact and deed of the exposers, and that the purchaser should be understood to have satisfied himself as to the title-deeds and extent of the subjects, and that it should not be competent for him, after the sale, to object to the title, or withhold payment of the price on any pretext whatever.

William Hamilton, of Glasgow, purchased from the Western Bank, at a public roup, on 29th October 1856, a certain piece of ground, to which the bank had acquired right from John Walker as a security for cash advances. The ground was described in the advertisement as "situated in Susan **[1034]** Murray Place, Maryhill, having a frontage to the Garscube Road of 55 feet or thereby, and containing in all 16 falls and 35 ells Scots measure or thereby, with the whole houses and buildings thereon. The subjects belonged to the late Mr. John Walker, baker, Maryhill, and are presently occupied by Alexander M'Farlane, Charles Macdonald, and others. The rental of the property is L.91, 10s." The pursuer paid therefor the price of L.900, and obtained a disposition of the ground, of which the extent and frontage along the Garscube Road were described as in the advertisement, "together with the whole houses and buildings erected on the said piece of ground," dated February and March 1857; in which disposition he was infeft. He thereafter completed his title by charter of confirmation, followed by infeftment. He now brought an action concluding for (1.) Reduction of these deeds; (2.) Repayment of the price; (3.) Damages;—alleging that he had entered into possession, drawn the rents, and expended money in repairing and improving the tenement, and that thereafter, (Art. 13) "in the course of the year 1858, the right of the pursuer to maintain possession of the whole tenement was challenged by John Dunlop Imrie, farmer, residing at Garroch, near Maryhill, who disputed the right both of the pursuer and of his authors, the trustees of the Western Bank, to a considerable portion of the tenement which had been successively possessed by them, and which had been sold to the pursuer by the said trustees. Mr. Imrie claimed as his exclusive property the whole of the southern gable of the tenement as possessed by the pursuer, and also the shop and dwelling-house occupied by Alexander M'Farlane; together with the dwelling-houses situated above them, and forming part of said tenement. This demand was formally intimated to the pursuer, upon the 27th October 1858, and the pursuer was required to cede possession to Mr. Imrie of that part of the tenement to which he laid claim." Imrie also derived his title through John Walker, who had acquired two adjoining feu stances, one of which he had conveyed to the Western Bank, while the other was conveyed to the British Linen Company, from which Imrie had purchased his right.

The pursuer farther stated, that (Cond. 17) "after his right to part of the tenement acquired by him was challenged by Mr. Imrie, the pursuer discovered that the claims advanced by that gentleman were well founded. It appeared that the deceased John Walker, their common author, after the acquisition by him of both feus, erected two tenements of houses, one for each feu. These tenements were designed and erected as separate subjects, and were divided from each other by a mutual gable-wall. However, the tenement erected on the northmost or 'Lyons' feu was extended at its south end beyond the limits of the feu, so as to cover about twelve feet or thereby of the adjoining feu now belonging to Mr. Imrie. But both Mr. Walker and his several

disponees understood, and all along acted on the footing and understanding, that the larger tenement formed an integral part of the northmost feu. Accordingly, the Western Bank possessed and drew the rents of the whole of the said tenement; and the British Linen Company, who possessed the subjects conveyed to them from and after the date of the disposition in their favour, only had possession of the smaller tenement of houses to the south of the gable separating said tenement from that part of the larger tenement possessed by Alexander M'Farlane and others, as aforesaid." The defenders "admitted that the Western Bank drew the rents of the tenement in question." (Cond. 18.) "That part of the said northmost tenement which has now been ascertained to be built upon the *solum* of Mr. Imrie's feu, includes the whole of the shop and dwelling-house occupied by Alexander M'Farlane, together with the two dwelling-houses situated one in each of the upper storeys of the building, and immediately above said shop and dwelling-house. The rental of the part, including such shop and dwelling-houses, amounted, as at the date of the pursuer's purchase, [1035] to L.21 or thereby; and had these rents been deducted from the advertised rental, the whole annual rent of the subjects would have amounted only to L.70, 10s., instead of L.91, 10s., as represented. Moreover, the result of taking away the foresaid part of the tenement is to leave the building on the northmost feu without a gable-wall to the south." (Cond. 20.) "The subjects purchased by the pursuer from the Western Bank were understood by both parties to include the whole of the foresaid northmost block of buildings or tenement, including that part of it to the south occupied by M'Farlane and others, and the mutual gable at the south end, between said part of the building and the tenement erected upon the southmost feu. The pursuer did not agree to purchase that part only of said tenement to which it now appears that the right of the bank was restricted; nor would the pursuer have offered or agreed to pay to the bank the sum of L.900 as the price of such part only. Both the pursuer and the said defenders were under essential error as to the subject-matter of the transaction of sale and purchase between them." The defenders' answer to this statement was — "Admitted that the sellers understood that the whole of the northmost block of buildings was included in the subject sold. *Quoad ultra* not known, and not admitted."

The defenders founded upon the articles of roup as excluding all recourse. They averred,—(Stat. 2.) "Mr. Walker (who had disponed the subjects to the bank) having died insolvent, and his estates having been sequestrated, the bank proceeded, with consent of the trustee and commissioners on the sequestrated estate, to sell the property by public roup; but as the sellers did not intend to warrant, nor did they warrant, the sufficiency of the title, or the precise extent of the property, it was stipulated, *inter alia*, by the articles and conditions of roup, that the warrandice to be given to the purchaser should be 'from fact and deed by the exposers;' and it was also stipulated that 'the purchaser should be understood to have satisfied himself with the regularity and sufficiency of the said title-deeds, as forming in every respect a complete and ample progress, and with the whole real burdens, reservations, restrictions, provisions, and obligations therein contained, and with the extent and rental of the said subjects, and the burdens affecting the same, and of the regularity and legality of the proceedings relative to the sale in every respect; and it shall not be competent for the purchaser, after the sale, to object to the sufficiency or regularity of the title, which he shall be bound to take as it stands; nor shall he be at liberty, nor have it in his power, to withhold payment of the price, in respect of any alleged defect in the said titles, or any error in the advertisements of the sale, or upon any account or pretext whatever; nor shall he have right to see to the application of the price of the said subjects, or to question the regularity of the sale in any manner of way.'" They stated that "neither the articles of roup nor the disposition to the pursuer specified the rental of the subjects, or contained any statement that the shop occupied by Alexander M'Farlane, and the houses above it, formed part of the subjects sold to the pursuer;" and pleaded;—While both parties were under the impression that the tenement was on the stance which formed the subject of sale, and no *mala fides* being alleged against the sellers, the question was, whether the purchaser's erroneous belief that the houses were on the stance entitled him to get quit of the contract on the ground of essential error. But the bank only proposed to put the purchaser in the same position as they themselves were in. That was a legitimate bargain. The purchaser had an opportunity of satisfying himself as to what the right of the seller covered; and the articles of roup barred him

from now challenging the completed contract, on grounds as to which he ought to have satisfied himself before entering into it. The degree of his alleged error was also not immaterial.

[1036] The respondent referred to the cases of Hepburn *v.* Campbell, Dict. 14,168, and Loyd, 13th Feb. 1782, Dict. 897.

On 20th March 1861 the Lord Ordinary pronounced the following interlocutor:—"Finds that the pursuer has set forth on record facts relevant to infer reduction of the disposition, and other writs to which the first or reductive conclusion of the summons relates, on the ground of essential error in the contract of sale; and finds that the terms of the articles of roup and of the said disposition and other writs, are insufficient in law to bar the pursuer from insisting in the conclusion for reduction as aforesaid, and in the further conclusion for repetition of the price of the subjects to which the said contract related: And with these findings, appoints the case to be enrolled, that parties may be heard on the application thereof, and as to further procedure in the cause, reserving *in hoc statu* all questions of expenses."[1]

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[1] "NOTE.—In the course of the debate which took place before the Lord Ordinary, it did not appear to him that there was truly any serious dispute between the parties as to those facts which, in the Lord Ordinary's view, are essential and sufficient for the decision of the cause. But looking to the terms of the record, and seeing that there is no formal renunciation of probation, and that all the facts which are material cannot be said to be fully admitted on record, the Lord Ordinary has thought it necessary to limit this interlocutor to the findings which he has now made.

"If, however, he rightly apprehended the substance of the contention of parties, these findings do truly, so far as the judgment of the Lord Ordinary goes, dispose of the question raised under the first two conclusions of the summons.

"The ground on which he has proceeded is, that the contract of sale on which the deeds here challenged followed is tainted by essential error, and that being subject to this inherent nullity, the terms of the articles of roup and consequent disposition on which the defenders rest their case, are insufficient to bar the pursuer from pleading that nullity.

"The error which the pursuer alleges is this, that in making the purchase he acted on the understanding that he was purchasing the piece of ground as described in the disposition in his favour,—'together with the whole houses and buildings erected on the said piece of ground above disponed.' And he states (Art. 20) that the subjects purchased by him from the bank, were understood by both parties to include the whole of the northmost block of buildings or tenement, including that part of it to the south occupied by Mr. M'Farlane and others, and the mutual gable at the south end between said part of the building and the tenement erected upon the southmost feu. The answer to this averment is in these terms—'Admitted that the sellers understood that the whole of the northmost block of buildings was included in the subject sold.'

"Such being the admitted understanding of parties as to the subject of the contract of sale, it will be seen from the 17th and 18th articles of the condescendence, that the pursuer distinctly sets forth that the tenement which he was thus purchasing is not entirely within his title, but that it has been erected, in part, upon the ground of an adjoining feu belonging to a Mr. Imrie, who now asserts a right to the portion of the subjects (purchased by the pursuer) which are thus erected on his property. The extent of the subjects bought by the pursuer, which is thus claimed by Mr. Imrie, is set forth in the 18th article of the condescendence as consisting of 'the whole of the shops and dwelling-house occupied by Alexander M'Farlane, together with the two dwelling-houses situated one in each of the upper storeys of the building, and immediately above said shop and dwelling-house.'

"It will be seen that on the record this statement is denied, and, as the Lord Ordinary has said, he must proceed here on the footing that it is so. But the true question which was discussed before the Lord Ordinary was the relevancy of these statements. The defenders met the pursuer by the plea that he took the subjects under conditions which bar altogether the remedy which he here seeks.

"This defence is rested on the provisions of the articles of roup under which the subjects purchased by the pursuer were exposed."—See the 2d article of the defenders' statement.

The defenders reclaimed.

[1037] LORD PRESIDENT.—I think the pursuer was in error as to the identity of

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"The defenders also referred to the terms of the disposition which followed on the articles of roup, and which, as there provided, contained warrandice from fact and deed only.

"A question is thus raised of considerable nicety, because the Lord Ordinary is ready to grant to the defenders, that the terms of the articles of roup are such as to foreclose the pursuer from many pleas which might in the case of a sale in ordinary terms have been open to him,—as for instance, that it is not competent to the pursuer to go back to the advertisements and to other previous procedure, as explaining or any way controlling the effect of the articles of roup.

"But it still remains to be considered whether or not the articles of roup and subsequent disposition are, in their own terms, so framed as to exclude the leading plea of the pursuer founded on essential error.

"That error exists in the substance of the contract, if the statements of the pursuer be taken as correct, seems abundantly plain. He bought the piece of ground 'with the whole houses and buildings erected thereon.' Could any man suppose that in purchasing such a subject he was not purchasing the whole houses which entered from and in fact stood on the ground, or that he was to be prepared to find that even the southern gable wall of the tenement was excluded from his title?

"The Lord Ordinary did not understand the defenders to contend for this, and he believes he only does the defenders justice when he proceeds on the assumption of an admission on their part of a mutual misunderstanding and mutual error as to the extent of the subjects sold.

"The Lord Ordinary thinks the articles of roup insufficient to cover such a case, and he comes to this conclusion on the ground that where there is a flaw which strikes at the contract itself, and which would suffice to annul it, nothing short of a positive declaration that the purchaser shall be held to have no remedy in such a case can bar his right to restoration against it. It is not, in the view which the Lord Ordinary takes of the matter, material to consider whether the whole or only a part of the subject be affected by the flaw, if the part so affected be truly a substantial part of the subject which forms the object of the contract of sale. Thus, in the present case, would it be any satisfaction to the pursuer to be told that he has truly got the half of a house, when he bargained for and expected to receive the whole house? Certainly not, as in such a case he might only be burdened with that which he could not use, and be deprived of that which he intended to purchase.

"Where then is the provision in the articles of roup which suffices to bar this challenge? It is not within that portion of the articles which provides that the purchaser shall satisfy himself with the progress; because as such the progress is complete. Neither can it be in the provision that he is to satisfy himself with the 'extent and rental of the subjects,' because the extent and rental of the subjects, as they appeared on examination, embraced the whole which he now states he was purchasing. He purchased nothing which the defenders were not professing to sell. The fact as it now turns out is, that they were selling subjects of an extent and rental which was not theirs to sell, and to which they had no right whatever.

"Again, as respects the provision that the purchaser shall not, after the sale, object to the sufficiency of the title, or withhold the price in respect of any alleged defect in the titles, it appears to the Lord Ordinary that it is in like manner insufficient to cover the present ground of challenge. But it is true that general terms follow, which are founded on as reaching this case, and these terms are wide and comprehensive. But it appears to the Lord Ordinary that it would be dangerous and against the rules of construction to stretch such general phrases, so as to cover grounds of challenge of a character more grave than those which are specially set forth in the previous portions of the clause; and that in any view, as already stated, such general expressions cannot be interpreted so as to exclude a challenge on grounds which go to the root of the contract itself. For it cannot, it is thought, be disputed that if the terms of the

the subjects which were the matter of this transaction. I cannot hold that an error [1038] as to one-fourth or one-fifth part of the whole building was not a material error, particularly considering the nature of the subject. As to the purchaser satisfying himself as to the extent of the subject, I think that if the measurement had turned out to be thirty-four ells, instead of thirty-five ells, as he may have supposed it to be, or if there had been some such difference between the actual and supposed extent, the articles of roup would have covered a case of that kind. But the question before us is not as to an error in mensuration, but as to the identity of the subject. I am therefore of opinion that the interlocutor of the Lord Ordinary is right.

Lords Ivory and Curriehill concurred.

Lord Deas.—This is the clearest case of essential error I have ever seen. The clause in the articles of roup was never intended to cover a case of this kind.

The Court pronounced the following interlocutor:—"Refuse the desire of the said reclaiming note, and adhere to the interlocutor reclaimed against: Find the reclaimers liable in the expenses of process incurred by him since the date of the Lord Ordinary's interlocutor: Allow an account thereof to be given in, and remit," &c.

No. 154. **XXIII. Dunlop 1038.** 12 June 1861. 2nd Div.—Lord Neaves.

The Earl of Leven and Melville and Others, Pursuers.—*Graham Bell—Hector—W. M. Thomson.*

Lady Elizabeth Jane Leslie Melville or Cartwright and Others, Defenders.—*Dundas—Gordon—Shand.*

Res Judicata—Entail—Stats. 1685, *c.* 22, *and* 11 *&* 12 *Vict., c.* 36, *sec.* 43—*Process—Defences.*—By marriage-contract the husband and his father became bound to entail an estate in favour of the eldest son, and other sons of the marriage, and the heirs whomsoever of the bodies of such eldest and other sons; whom failing, the husband's sons by any subsequent marriage, and the heirs of their bodies; whom failing, the heirs whatsoever of the body of the husband by the intended marriage; whom failing, certain other heirs. The husband and his father afterwards conveyed the estate to a trustee for behoof of their creditors. The marriage-contract trustees raised an action, concluding for declarator that the estate was entailed, and for reduction of the trust-deed. The parties called as defenders were, the husband (in whose favour the father had propelled the fee of the estate), the father, and their trustee. Decree of reduction was pronounced. An action was afterwards brought at the instance of the eldest son of the marriage, after his succession, against the succeeding heirs of entail, for declarator that the entail was ineffectual, and that he was entitled to hold and dispose the estate in fee-simple, the same grounds being urged for holding the entail invalid as were urged by the defenders in the former action. The defenders pleaded *res judicata;*—*Held* (unanimously by the whole Court), that the defenders' plea ought to be sustained, and the action dismissed.

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articles now in question be sufficient to bar the present challenge, they must have been equally effectual so to do had it turned out that the whole subject was embraced in Imrie's title, and that the pursuer had truly bought nothing whatever, excepting a progress of titles.

"The question here, as the Lord Ordinary thinks, turns upon the matter of fact as to whether or not the pursuer has got the subject for which he contracted? If he has, there is an end of the case. If he has got only a portion of it, he has got something different from that for which he contracted, and he is therefore entitled to be free.

"In this view of the case it is not one to which the clause of warrandice is applicable. If there be a sale, then the defenders may plead the limitation of their liability under that clause. If there be no sale, there is nothing to which the clause can apply."

The defenders reclaimed.

[1037] LORD PRESIDENT.—I think the pursuer was in error as to the identity of

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"The defenders also referred to the terms of the disposition which followed on the articles of roup, and which, as there provided, contained warrandice from fact and deed only.

"A question is thus raised of considerable nicety, because the Lord Ordinary is ready to grant to the defenders, that the terms of the articles of roup are such as to foreclose the pursuer from many pleas which might in the case of a sale in ordinary terms have been open to him,—as for instance, that it is not competent to the pursuer to go back to the advertisements and to other previous procedure, as explaining or any way controlling the effect of the articles of roup.

"But it still remains to be considered whether or not the articles of roup and subsequent disposition are, in their own terms, so framed as to exclude the leading plea of the pursuer founded on essential error.

"That error exists in the substance of the contract, if the statements of the pursuer be taken as correct, seems abundantly plain. He bought the piece of ground 'with the whole houses and buildings erected thereon.' Could any man suppose that in purchasing such a subject he was not purchasing the whole houses which entered from and in fact stood on the ground, or that he was to be prepared to find that even the southern gable wall of the tenement was excluded from his title?

"The Lord Ordinary did not understand the defenders to contend for this, and he believes he only does the defenders justice when he proceeds on the assumption of an admission on their part of a mutual misunderstanding and mutual error as to the extent of the subjects sold.

"The Lord Ordinary thinks the articles of roup insufficient to cover such a case, and he comes to this conclusion on the ground that where there is a flaw which strikes at the contract itself, and which would suffice to annul it, nothing short of a positive declaration that the purchaser shall be held to have no remedy in such a case can bar his right to restoration against it. It is not, in the view which the Lord Ordinary takes of the matter, material to consider whether the whole or only a part of the subject be affected by the flaw, if the part so affected be truly a substantial part of the subject which forms the object of the contract of sale. Thus, in the present case, would it be any satisfaction to the pursuer to be told that he has truly got the half of a house, when he bargained for and expected to receive the whole house? Certainly not, as in such a case he might only be burdened with that which he could not use, and be deprived of that which he intended to purchase.

"Where then is the provision in the articles of roup which suffices to bar this challenge? It is not within that portion of the articles which provides that the purchaser shall satisfy himself with the progress; because as such the progress is complete. Neither can it be in the provision that he is to satisfy himself with the 'extent and rental of the subjects,' because the extent and rental of the subjects, as they appeared on examination, embraced the whole which he now states he was purchasing. He purchased nothing which the defenders were not professing to sell. The fact as it now turns out is, that they were selling subjects of an extent and rental which was not theirs to sell, and to which they had no right whatever.

"Again, as respects the provision that the purchaser shall not, after the sale, object to the sufficiency of the title, or withhold the price in respect of any alleged defect in the titles, it appears to the Lord Ordinary that it is in like manner insufficient to cover the present ground of challenge. But it is true that general terms follow, which are founded on as reaching this case, and these terms are wide and comprehensive. But it appears to the Lord Ordinary that it would be dangerous and against the rules of construction to stretch such general phrases, so as to cover grounds of challenge of a character more grave than those which are specially set forth in the previous portions of the clause; and that in any view, as already stated, such general expressions cannot be interpreted so as to exclude a challenge on grounds which go to the root of the contract itself. For it cannot, it is thought, be disputed that if the terms of the

the subjects which were the matter of this transaction. I cannot hold that an error [1038] as to one-fourth or one-fifth part of the whole building was not a material error, particularly considering the nature of the subject. As to the purchaser satisfying himself as to the extent of the subject, I think that if the measurement had turned out to be thirty-four ells, instead of thirty-five ells, as he may have supposed it to be, or if there had been some such difference between the actual and supposed extent, the articles of roup would have covered a case of that kind. But the question before us is not as to an error in mensuration, but as to the identity of the subject. I am therefore of opinion that the interlocutor of the Lord Ordinary is right.

LORDS IVORY and CURRIEHILL concurred.

LORD DEAS.—This is the clearest case of essential error I have ever seen. The clause in the articles of roup was never intended to cover a case of this kind.

The Court pronounced the following interlocutor:—"Refuse the desire of the said reclaiming note, and adhere to the interlocutor reclaimed against: Find the reclaimers liable in the expenses of process incurred by him since the date of the Lord Ordinary's interlocutor: Allow an account thereof to be given in, and remit," &c.

No. 154. **XXIII. Dunlop 1038.** 12 June 1861. 2nd Div.—Lord Neaves.

The EARL OF LEVEN AND MELVILLE and Others, Pursuers.—*Graham Bell—Hector—W. M. Thomson.*

Lady ELIZABETH JANE LESLIE MELVILLE or CARTWRIGHT and Others, Defenders.—*Dundas—Gordon—Shand.*

Res Judicata—Entail—Stats. 1685, *c.* 22, *and* 11 *&* 12 *Vict., c.* 36, *sec.* 43—*Process—Defences.*—By marriage-contract the husband and his father became bound to entail an estate in favour of the eldest son, and other sons of the marriage, and the heirs whomsoever of the bodies of such eldest and other sons; whom failing, the husband's sons by any subsequent marriage, and the heirs of their bodies; whom failing, the heirs whatsoever of the body of the husband by the intended marriage; whom failing, certain other heirs. The husband and his father afterwards conveyed the estate to a trustee for behoof of their creditors. The marriage-contract trustees raised an action, concluding for declarator that the estate was entailed, and for reduction of the trust-deed. The parties called as defenders were, the husband (in whose favour the father had propelled the fee of the estate), the father, and their trustee. Decree of reduction was pronounced. An action was afterwards brought at the instance of the eldest son of the marriage, after his succession, against the succeeding heirs of entail, for declarator that the entail was ineffectual, and that he was entitled to hold and dispone the estate in fee-simple, the same grounds being urged for holding the entail invalid as were urged by the defenders in the former action. The defenders pleaded *res judicata;*—*Held* (unanimously by the whole Court), that the defenders' plea ought to be sustained, and the action dismissed.

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articles now in question be sufficient to bar the present challenge, they must have been equally effectual so to do had it turned out that the whole subject was embraced in Imrie's title, and that the pursuer had truly bought nothing whatever, excepting a progress of titles.

"The question here, as the Lord Ordinary thinks, turns upon the matter of fact as to whether or not the pursuer has got the subject for which he contracted? If he has, there is an end of the case. If he has got only a portion of it, he has got something different from that for which he contracted, and he is therefore entitled to be free.

"In this view of the case it is not one to which the clause of warrandice is applicable. If there be a sale, then the defenders may plead the limitation of their liability under that clause. If there be no sale, there is nothing to which the clause can apply."

Res Judicata—Process—Defence—Entail.—The plea of *res judicata* bars action not only at the instance of the parties to a suit, and their representatives, but also their successors in a particular estate, held under entail, in actions relative to the entailed estate.

Entail—Fetters—Proof—Writ.—Question, 1st, Is it competent, in order to de- [1039] -termine what lands are subjected to the fetters of an entail, to resort to evidence beyond the deed of entail, for the purpose of explaining what lands are *de facto* comprehended under a general description, by which the lands bear to be in the deed of entail subjected to fetters? and, 2d, if so, is there any limit to the kind of evidence or mode of proof admissible?

The Earl of Leven and Melville, after the death of Lord Balgonie, his only son, raised this action, in 1858, in order to have it found that he was fee-simple proprietor of a portion of his estates, which he held under an entail executed by his grandfather and father. The pursuer's daughter, the next heir under the entail, and the other substitutes, were called as defenders. After the case came into the Inner-House the pursuer died. He left a trust-deed, by which the estates sought to be declared free from the fetters of the entail were, on the assumption that they were unentailed, directed to be held for behoof of a party who should take either the honours of Leven or Melville. John Thornton, Earl of Leven and Melville, and the trustees of the late Earl, were sisted as pursuers. The facts, as brought out in the record, were as follows:—

The first Lord Melville, in the peerage of Scotland, was raised to a peerage by the title of Lord Melville of Monymail, in 1616; and in 1690, George Lord Melville was created Earl of Melville, having, as one of his minor honours, the title of Lord Monymail. In 1643 the then Lord Melville obtained a charter under the Great Seal, afterwards ratified by Parliament, of the barony of Monymail, and sundry other lands, erecting them into the lordship and barony of Melville of Monymail, and in 1669 a new charter was granted by Charles II., under the Great Seal, of these and some additional lands, and of new erecting them into the lordship of Melville and Monymail. The same George Earl of Melville married the daughter of Lord Balgonie, eldest son of General Alexander Leslie, created Earl of Leven and Lord Balgonie. In 1681 David, the second son of this marriage, succeeded, during his father's lifetime, to the Leven titles, and to the estate of Balgonie and others, forming the earldom of Leven, and on his father's death in 1707 he also succeeded to the estates and titles of the family of Melville. From him the united estates and titles of both families descended to David Earl of Leven, who held them in 1784. In that year his son, Alexander Lord Balgonie, married Miss Jane Thornton, daughter of John Thornton, Esq. of Clapham, London. The spouses entered into an antenuptial contract of marriage, to which the Earl of Leven and Melville was a party. In prospect of the marriage, it was arranged that Miss Thornton's father should advance to Lord Leven a sum of L.10,000, to be applied towards payment of his Lordship's debts, and Lord Leven became bound to execute a disposition and deed of entail of certain property in favour of Lord Balgonie and the eldest son, whom failing, the other sons of the marriage between Lord Balgonie and Miss Thornton. This arrangement was given effect to by the contract of marriage, and a deed of entail executed of even date therewith by Lord Leven, with consent of Lord Balgonie.

The contract of marriage was subscribed on 23d July and 11th August 1784. Lord Leven bound himself to make certain annual provisions by way of annuity, during his life, to his son, Lord Balgonie, and in the event of Lord Balgonie's predecease, to Miss Thornton and the children of the intended marriage. In security of these provisions, Lord Leven bound himself to infeft Lord Balgonie and Miss Thornton, and certain trustees, for behoof of the children of the marriage, in lands therein described. After providing that Lord Balgonie's intended spouse should, in the event of her survivance, enjoy the liferent of his furniture, the deed proceeded:—"And whereas, by a disposition, signed and executed by the said David Earl of Leven, with consent of his said son, of the date of their subscriptions hereto, and relative to this contract, the lands, lordships, and estates [1040] of Balgonie and Melville and others, belonging to the said Earl of Leven, are settled and provided to the said Lord Balgonie, and the eldest and other sons to be procreate of his body by this intended marriage, in their order,

and the heirs whatsoever of the bodies of such eldest and other sons; whom failing," &c.—(the series of heirs was specified)—"but with and under certain provisions, reservations, and irritancies mentioned in the said disposition: Therefore, the said David Earl of Leven, and Alexander Lord Balgonie, bind and oblige them and their foresaids neither to do any act, nor grant any deed, which may anywise prejudge or disappoint the succession of the issue of this marriage to the said lands and others, according as the same is settled by the destination contained in the disposition above mentioned." On the other part Mr. Thornton paid to Lord Leven L.10,000, and Mr. Thornton bound himself, on the death of the last survivor of him and his wife, to pay a further sum of L.10,000 to the marriage-contract trustees. After certain provisions for the disposal of this second sum of L.10,000, principally as a provision for Miss Thornton, in the event of her surviving her husband, and for the younger children of the marriage, the deed contained this clause:—"And it is also hereby agreed, that during the subsistence of the marriage, all execution shall pass hereupon for implement of the several obligations conceived in favour of the said Miss Jane Thornton, and the issue of the said marriage, at the instance of Samuel Thornton, Robert Thornton, and Henry Thornton, Esquires, or either of them, or either of their apparent heirs. And the said parties consent to the registration hereof in the books of Council and Session," &c.

The disposition and deed of tailzie executed by Lord Leven proceeded on the narrative that at the time of his Lordship entering into the contract of marriage between Lord Balgonie and Miss Thornton, Mr. Thornton had paid to Lord Leven L.10,000 of Miss Thornton's portion, to be applied towards payment of part of Lord Leven's debts; and that, in consideration thereof, and of the said marriage, it was covenanted and agreed that Lord Leven should execute the said disposition and entail, and that such deed should be held as part of the marriage-contract. Therefore, "and for the better preservation of my family, and the continuation of my lands and estates after-mentioned with my children and other relations after-mentioned, and for certain other causes and considerations moving" him, he, with consent of Lord Balgonie, disponed to Lord Balgonie, and the eldest, and other sons to be procreated of the marriage between him and Miss Thornton, and the heirs whatsoever of the bodies of such sons; whom failing, to the eldest and other sons of Lord Balgonie in any subsequent marriage, and the heirs whatsoever of their bodies; whom failing, to the heirs whatsoever of the body of Lord Balgonie of the said marriage with Miss Thornton; whom failing, to the heirs whatsoever of Lord Balgonie by any subsequent marriage; whom failing, to the heirs of the granter's body, &c., "all and singular the earldom, lordship, barony, lands, and others underwritten, with the pertinents, viz., All and whole the earldom of Leven, and lordship and barony of Balgonie, comprehending therein the particular towns, lands," &c.—(here follows an enumeration of the particular lands composing the earldom of Leven and lordship of Balgonie)—"which whole lands, &c., were united, erected, and incorporated into one whole and free lordship, earldom, and barony, called the earldom of Leven, lordship and barony of Balgonie, conform to charter under the Great Seal in favour of Margaret Countess of Leven, upon the resignation of the deceased Alexander Earl of Leven, her father, dated the 7th day of September 1664: And, in like manner, all and whole the manor-place of Monymail, and mansion-house of Melville, with the pertinents of the same, &c.; together with the greens before the upper gate of the manor-place of Monymail, with all and singular **[1041]** parks and ruinous places round the said manor-place of Monymail, &c.; together with all and whole the Mill of Monymail, mill-lands, &c.: And, in like manner, all and whole the town and lands of Lethem, &c.: And, in like manner, all and whole the lands of Monksmyre, &c.: And all and whole the church-lands of the vicar of Monymail, called Montaggart, &c.: And further, all and whole the lands of Pitlair, &c.: all erected, united, and incorporated into one whole and free lordship and barony, called, and to be called in all time coming, the lordship and barony of Monymail, conform to a charter under the Great Seal granted by Charles II., of blessed memory, to the deceased George, Lord Melville, in liferent, and Alexander, Master of Melville, in fee, dated the 1st day of October 1669: And, in like manner, all and whole the lands of Pitcontie and Muirfield, &c., lying within the lordship of Monymail: And, in like manner, all and whole the town and lands of Markinch; all and whole the lands and town of Over and Easter Markinch, called Kirk-Markinch; the lands of Wester Markinch, and acres belonging thereto;

with the lands of Nether Markinch, and the outfield and ward thereof, with the mill of the same, called Markinch Mill, &c.; the lands of Bighty, Pittenchaggel and Inchinnie; the lands of Treaton, &c.; these three portions of Brunton, called the Three Lochs, &c.; together with those acres of Brunton land, lying upon the common highway which leads from the village of Markinch, &c.; And, in like manner, the town and lands of Newton of Markinch, &c.: And also, all and whole these three-eight parts of the town and lands of Stenton, called Nether Stenton, &c.: And, in like manner, all and whole one-fourth part and two-sixth parts of the town and lands of Utherogill, &c., with all right, title, and interest," &c.

Then follows a reservation of the Earl's liferent of the whole lands and others disponed, with a declaration, that the disposition is granted under the burden of an annuity of L.300 sterling to the then Countess of Leven, and a reserved power to grant the like annuity to any after wife: "And also with and under the burden of the payment of all my just and lawful debts and provisions to my younger children, amounting in whole, after payment and application of the said sum of L.10,000 sterling, received by me from the said John Thornton, to the sum of L.11,000 sterling: And I bind and oblige me, my heirs, executors, and successors whatsoever, not only to pay the interest that shall become due on the said debts, during the subsistence of my said liferent, but also that the said debts and provisions do not, in the whole, exceed the sum of L.11,000 sterling, and shall not exceed that sum at my death." The disposition is further declared to be granted "with and under the several restrictions, provisions, clauses irritant and resolutive, with respect to the lands and lordship of Melville, and lands of Utherogill, contained in the procuratory of resignation hereinafter engrossed." And there is reserved to the Earl and Lord Balgonie "full power and liberty to execute a strict entail, in so far as not hereby entailed, in favour of the same series of heirs, and with and under the same conditions, clauses irritant and resolutive, as are contained in the entail of the lordship of Melville, and lands of Utherogill, engrossed in the procuratory of resignation afterwritten; and with and under such other conditions as I, or the said Alexander Lord Balgonie, may think proper to add thereto; but in such manner as not to disappoint the issue of the said intended marriage, or their succession to the said lands and others in their due course, and to be nowise inconsistent with any of the clauses contained in the said contract of marriage."

The procuratory of resignation, which contains the entailing clauses, is conceived in the following terms:—"And for accomplishing the said infeftment by resignation, I hereby make, constitute, and appoint

and each of them, jointly and severally, my lawful and irrevocable procurators, to resign, as I hereby resign and surrender, all and whole the said earldom, lordship, baronies, and others, **[1042]** with the pertinents," viz.—(here follows a particular description and enumeration of the lands, precisely in the same terms as in the dispositive clause)—"in the hands of my immediate lawful superiors thereof, in favour and for new infeftment of the said lands, and others, to be made and granted to the said Alexander Lord Balgonie, and the eldest and other sons to be procreated of his body, in the said marriage with the said Jane Thornton, in their order, and the heirs whatsoever of the bodies of such sons respectively; whom failing," &c.—(then follow the substitutions)—"but always with and under the several reservations, burdens, and conditions before mentioned; and with and under the further condition, viz., that the said Alexander Lord Balgonie, and whole other heirs of tailzie succeeding to the said lands and estate, shall be obliged to assume the sirname of Leslie, and to use and bear the arms armorial and honours of the house and family of Leven, in all time coming after their succession; and with and under the provisions, conditions, and clauses irritant and resolutive underwritten, which are hereby declared to affect the lands, lordship, and estate of Melville, and lands of Utherogill only, and not to be extended to the lands, lordship, and estate of Balgonie; that is to say, with and under the conditions, limitations, and restrictions following." Then followed the usual conditions and prohibitions of an entail, with corresponding irritant and resolutive clauses.

Besides various other clauses, unnecessary to be noticed, the deed contained a clause of absolute warrandice.

This entail was recorded in the Register of Tailzies on the 4th December 1784, and feudal titles were completed upon it in the person of Lord Balgonie, by charter of resignation under the Great Seal, proceeding upon the procuratory in the entail, upon

which infeftment followed on 23d April 1785, and the seisin was duly recorded. This charter and infeftment comprehend the whole subjects contained in the said disposition and deed of entail, excepting the lands of Utherogill, which hold of the town of Edinburgh; but no infeftment was taken upon the entail.

In 1799 the Earl of Leven and Lord Balgonie granted a trust-disposition for behoof of creditors, in favour of Mr. Murray of Ayton and other persons, as trustees, whereby the Earl and Lord Balgonie alienated, disponed, and conveyed from them, their heirs and successors, to and in favour of the trustees, the lands and others therein described, and, *inter alia*, the lands and estate of Melville, and the lands of Utherogill, heritably and irredeemably, with power to sell certain parts of the said lands, and to borrow money upon the security of the said estates. Upon this deed the parties named as trustees were infeft. Lord Leven and Lord Balgonie executed another trust-disposition for behoof of their creditors, dated in 1800, whereby they conveyed to William Keith, as trustee, the lands and others particularly therein described, and, *inter alia*, the said Melville estates, and the lands of Utherogill; with power to sell to the full extent of the debts of Lord Leven and Melville and Lord Balgonie, or to borrow money on the security of the lands.

Most of the creditors signed a deed of accession to the trust in favour of Mr. Keith. He having assumed the management of the property, it was considered necessary that a part of the property should be sold, but as it appeared to be for the advantage of all concerned that the Balgonie estate should be retained by the family, it was proposed to sell part of the estate of Melville, which was accordingly advertised for sale.

An action of reduction was raised at the instance of the Messrs. Thornton, the trustees appointed in the contract of marriage between Lord and Lady Balgonie, being the trustees at whose instance it was appointed by the contract, that, during the subsistence of the marriage, execution should pass for implement of the obligations contained in it in favour of Lady Balgonie and the issue of the marriage. The Earl of Leven and **[1043]** Melville, Lord Balgonie, Mr. Murray, and the other trustees under the first trust-deed, and William Keith, the trustee under the second trust-deed, were called as defenders. The summons, after narrating the contract of marriage and deed of entail, concluded for declarator—"First, That the foresaid lands and others contained in the said deed of tailzie, under the name of the lordship and barony of Monymail, and which are described and enumerated from that part of the description and enumeration of the lands disponed and resigned, which begins with the words 'And, in like manner, All and Whole the mannor-place of Monymail, and mansion-house of Melville,' and ends with the words, 'all erected and incorporated into one whole and free lordship and barony, called, in all time coming, the lordship and barony of Monymail, conform to charter under the Great Seal, granted by Charles II. of blessed memory, to George Lord Melville, in liferent, and Alexander, Master of Melville, in fee, dated the 1st day of October 1669, together with all the other lands contained in the said deed of tailzie, which lie within the said lordship and barony,'" are effectually entailed by the said deed of tailzie. 2dly, That the foresaid lands of Utherogill, to which the provisions, &c., contained in the said deed of tailzie are declared expressly to apply, are thereby effectually entailed; and, therefore, that Lord Balgonie was bound, and ought and should be decerned, &c., to complete the said entail thereof, by infeftment in his person. "3dly, That it being expressly declared by the said deed of tailzie, that the prohibitory, irritant, and resolutive clauses therein contained shall affect the lands, lordship, and estate of Melville, and lands of Utherogill only, and are not to be extended to the lands, lordship, and estate of Balgonie, the whole other lands and estate contained in the said deed of tailzie, excepting only the said lands, lordship, and estate of Balgonie, are thereby effectually entailed." And, 4thly, That the said deed of tailzie, being for the causes therein and before specified, executed by the Earl of Leven and Melville, as relative to the foresaid contract of marriage betwixt Lord Balgonie and Miss Thornton, of which contract of marriage the said deed of tailzie is expressly declared to be a part, the said deed of tailzie is a truly onerous deed; and, therefore, if any new deed should be necessary for rendering the said deed of tailzie more explicit and effectual, the Earl of Leven and Lord Balgonie should be decerned to execute the same, in further corroboration of the said deed of entail. The summons farther concluded for reduction of both the foresaid trust-deeds, and the infeftment

The defenders reclaimed.

[1037] LORD PRESIDENT.—I think the pursuer was in error as to the identity of

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"The defenders also referred to the terms of the disposition which followed on the articles of roup, and which, as there provided, contained warrandice from fact and deed only.

"A question is thus raised of considerable nicety, because the Lord Ordinary is ready to grant to the defenders, that the terms of the articles of roup are such as to foreclose the pursuer from many pleas which might in the case of a sale in ordinary terms have been open to him,—as for instance, that it is not competent to the pursuer to go back to the advertisements and to other previous procedure, as explaining or any way controlling the effect of the articles of roup.

"But it still remains to be considered whether or not the articles of roup and subsequent disposition are, in their own terms, so framed as to exclude the leading plea of the pursuer founded on essential error.

"That error exists in the substance of the contract, if the statements of the pursuer be taken as correct, seems abundantly plain. He bought the piece of ground 'with the whole houses and buildings erected thereon.' Could any man suppose that in purchasing such a subject he was not purchasing the whole houses which entered from and in fact stood on the ground, or that he was to be prepared to find that even the southern gable wall of the tenement was excluded from his title?

"The Lord Ordinary did not understand the defenders to contend for this, and he believes he only does the defenders justice when he proceeds on the assumption of an admission on their part of a mutual misunderstanding and mutual error as to the extent of the subjects sold.

"The Lord Ordinary thinks the articles of roup insufficient to cover such a case, and he comes to this conclusion on the ground that where there is a flaw which strikes at the contract itself, and which would suffice to annul it, nothing short of a positive declaration that the purchaser shall be held to have no remedy in such a case can bar his right to restoration against it. It is not, in the view which the Lord Ordinary takes of the matter, material to consider whether the whole or only a part of the subject be affected by the flaw, if the part so affected be truly a substantial part of the subject which forms the object of the contract of sale. Thus, in the present case, would it be any satisfaction to the pursuer to be told that he has truly got the half of a house, when he bargained for and expected to receive the whole house? Certainly not, as in such a case he might only be burdened with that which he could not use, and be deprived of that which he intended to purchase.

"Where then is the provision in the articles of roup which suffices to bar this challenge? It is not within that portion of the articles which provides that the purchaser shall satisfy himself with the progress; because as such the progress is complete. Neither can it be in the provision that he is to satisfy himself with the 'extent and rental of the subjects,' because the extent and rental of the subjects, as they appeared on examination, embraced the whole which he now states he was purchasing. He purchased nothing which the defenders were not professing to sell. The fact as it now turns out is, that they were selling subjects of an extent and rental which was not theirs to sell, and to which they had no right whatever.

"Again, as respects the provision that the purchaser shall not, after the sale, object to the sufficiency of the title, or withhold the price in respect of any alleged defect in the titles, it appears to the Lord Ordinary that it is in like manner insufficient to cover the present ground of challenge. But it is true that general terms follow, which are founded on as reaching this case, and these terms are wide and comprehensive. But it appears to the Lord Ordinary that it would be dangerous and against the rules of construction to stretch such general phrases, so as to cover grounds of challenge of a character more grave than those which are specially set forth in the previous portions of the clause; and that in any view, as already stated, such general expressions cannot be interpreted so as to exclude a challenge on grounds which go to the root of the contract itself. For it cannot, it is thought, be disputed that if the terms of the

the subjects which were the matter of this transaction. I cannot hold that an error [1038] as to one-fourth or one-fifth part of the whole building was not a material error, particularly considering the nature of the subject. As to the purchaser satisfying himself as to the extent of the subject, I think that if the measurement had turned out to be thirty-four ells, instead of thirty-five ells, as he may have supposed it to be, or if there had been some such difference between the actual and supposed extent, the articles of roup would have covered a case of that kind. But the question before us is not as to an error in mensuration, but as to the identity of the subject. I am therefore of opinion that the interlocutor of the Lord Ordinary is right.

LORDS IVORY and CURRIEHILL concurred.

LORD DEAS.—This is the clearest case of essential error I have ever seen. The clause in the articles of roup was never intended to cover a case of this kind.

The Court pronounced the following interlocutor:—"Refuse the desire of the said reclaiming note, and adhere to the interlocutor reclaimed against: Find the reclaimers liable in the expenses of process incurred by him since the date of the Lord Ordinary's interlocutor: Allow an account thereof to be given in, and remit," &c.

No. 154. **XXIII. Dunlop 1038.** 12 June 1861. 2nd Div.—Lord Neaves.

The EARL OF LEVEN AND MELVILLE and Others, Pursuers.—*Graham Bell—Hector—W. M. Thomson.*

Lady ELIZABETH JANE LESLIE MELVILLE or CARTWRIGHT and Others, Defenders.—*Dundas—Gordon—Shand.*

Res Judicata—Entail—Stats. 1685, *c.* 22, *and* 11 *&* 12 *Vict., c.* 36, *sec.* 43—*Process—Defences.*—By marriage-contract the husband and his father became bound to entail an estate in favour of the eldest son, and other sons of the marriage, and the heirs whomsoever of the bodies of such eldest and other sons; whom failing, the husband's sons by any subsequent marriage, and the heirs of their bodies; whom failing, the heirs whatsoever of the body of the husband by the intended marriage; whom failing, certain other heirs. The husband and his father afterwards conveyed the estate to a trustee for behoof of their creditors. The marriage-contract trustees raised an action, concluding for declarator that the estate was entailed, and for reduction of the trust-deed. The parties called as defenders were, the husband (in whose favour the father had propelled the fee of the estate), the father, and their trustee. Decree of reduction was pronounced. An action was afterwards brought at the instance of the eldest son of the marriage, after his succession, against the succeeding heirs of entail, for declarator that the entail was ineffectual, and that he was entitled to hold and dispone the estate in fee-simple, the same grounds being urged for holding the entail invalid as were urged by the defenders in the former action. The defenders pleaded *res judicata*;—*Held* (unanimously by the whole Court), that the defenders' plea ought to be sustained, and the action dismissed.

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articles now in question be sufficient to bar the present challenge, they must have been equally effectual so to do had it turned out that the whole subject was embraced in Imrie's title, and that the pursuer had truly bought nothing whatever, excepting a progress of titles.

"The question here, as the Lord Ordinary thinks, turns upon the matter of fact as to whether or not the pursuer has got the subject for which he contracted? If he has, there is an end of the case. If he has got only a portion of it, he has got something different from that for which he contracted, and he is therefore entitled to be free.

"In this view of the case it is not one to which the clause of warrandice is applicable. If there be a sale, then the defenders may plead the limitation of their liability under that clause. If there be no sale, there is nothing to which the clause can apply."

Res Judicata—Process—Defence—Entail.—The plea of *res judicata* bars action not only at the instance of the parties to a suit, and their representatives, but also their successors in a particular estate, held under entail, in actions relative to the entailed estate.

Entail—Fetters—Proof—Writ.—Question, 1st, Is it competent, in order to de- **[1039]** -termine what lands are subjected to the fetters of an entail, to resort to evidence beyond the deed of entail, for the purpose of explaining what lands are *de facto* comprehended under a general description, by which the lands bear to be in the deed of entail subjected to fetters? and, 2d, if so, is there any limit to the kind of evidence or mode of proof admissible?

The Earl of Leven and Melville, after the death of Lord Balgonie, his only son, raised this action, in 1858, in order to have it found that he was fee-simple proprietor of a portion of his estates, which he held under an entail executed by his grandfather and father. The pursuer's daughter, the next heir under the entail, and the other substitutes, were called as defenders. After the case came into the Inner-House the pursuer died. He left a trust-deed, by which the estates sought to be declared free from the fetters of the entail were, on the assumption that they were unentailed, directed to be held for behoof of a party who should take either the honours of Leven or Melville. John Thornton, Earl of Leven and Melville, and the trustees of the late Earl, were sisted as pursuers. The facts, as brought out in the record, were as follows:—

The first Lord Melville, in the peerage of Scotland, was raised to a peerage by the title of Lord Melville of Monymail, in 1616; and in 1690, George Lord Melville was created Earl of Melville, having, as one of his minor honours, the title of Lord Monymail. In 1643 the then Lord Melville obtained a charter under the Great Seal, afterwards ratified by Parliament, of the barony of Monymail, and sundry other lands, erecting them into the lordship and barony of Melville of Monymail, and in 1669 a new charter was granted by Charles II., under the Great Seal, of these and some additional lands, and of new erecting them into the lordship of Melville and Monymail. The same George Earl of Melville married the daughter of Lord Balgonie, eldest son of General Alexander Leslie, created Earl of Leven and Lord Balgonie. In 1681 David, the second son of this marriage, succeeded, during his father's lifetime, to the Leven titles, and to the estate of Balgonie and others, forming the earldom of Leven, and on his father's death in 1707 he also succeeded to the estates and titles of the family of Melville. From him the united estates and titles of both families descended to David Earl of Leven, who held them in 1784. In that year his son, Alexander Lord Balgonie, married Miss Jane Thornton, daughter of John Thornton, Esq. of Clapham, London. The spouses entered into an antenuptial contract of marriage, to which the Earl of Leven and Melville was a party. In prospect of the marriage, it was arranged that Miss Thornton's father should advance to Lord Leven a sum of L.10,000, to be applied towards payment of his Lordship's debts, and Lord Leven became bound to execute a disposition and deed of entail of certain property in favour of Lord Balgonie and the eldest son, whom failing, the other sons of the marriage between Lord Balgonie and Miss Thornton. This arrangement was given effect to by the contract of marriage, and a deed of entail executed of even date therewith by Lord Leven, with consent of Lord Balgonie.

The contract of marriage was subscribed on 23d July and 11th August 1784. Lord Leven bound himself to make certain annual provisions by way of annuity, during his life, to his son, Lord Balgonie, and in the event of Lord Balgonie's predecease, to Miss Thornton and the children of the intended marriage. In security of these provisions, Lord Leven bound himself to infeft Lord Balgonie and Miss Thornton, and certain trustees, for behoof of the children of the marriage, in lands therein described. After providing that Lord Balgonie's intended spouse should, in the event of her survivance, enjoy the liferent of his furniture, the deed proceeded:—"And whereas, by a disposition, signed and executed by the said David Earl of Leven, with consent of his said son, of the date of their subscriptions hereto, and relative to this contract, the lands, lordships, and estates **[1040]** of Balgonie and Melville and others, belonging to the said Earl of Leven, are settled and provided to the said Lord Balgonie, and the eldest and other sons to be procreate of his body by this intended marriage, in their order,

and the heirs whatsoever of the bodies of such eldest and other sons; whom failing," &c.—(the series of heirs was specified)—"but with and under certain provisions, reservations, and irritancies mentioned in the said disposition: Therefore, the said David Earl of Leven, and Alexander Lord Balgonie, bind and oblige them and their foresaids neither to do any act, nor grant any deed, which may anywise prejudge or disappoint the succession of the issue of this marriage to the said lands and others, according as the same is settled by the destination contained in the disposition above mentioned." On the other part Mr. Thornton paid to Lord Leven L.10,000, and Mr. Thornton bound himself, on the death of the last survivor of him and his wife, to pay a further sum of L.10,000 to the marriage-contract trustees. After certain provisions for the disposal of this second sum of L.10,000, principally as a provision for Miss Thornton, in the event of her surviving her husband, and for the younger children of the marriage, the deed contained this clause:—"And it is also hereby agreed, that during the subsistence of the marriage, all execution shall pass hereupon for implement of the several obligations conceived in favour of the said Miss Jane Thornton, and the issue of the said marriage, at the instance of Samuel Thornton, Robert Thornton, and Henry Thornton, Esquires, or either of them, or either of their apparent heirs. And the said parties consent to the registration hereof in the books of Council and Session," &c.

The disposition and deed of tailzie executed by Lord Leven proceeded on the narrative that at the time of his Lordship entering into the contract of marriage between Lord Balgonie and Miss Thornton, Mr. Thornton had paid to Lord Leven L.10,000 of Miss Thornton's portion, to be applied towards payment of part of Lord Leven's debts; and that, in consideration thereof, and of the said marriage, it was covenanted and agreed that Lord Leven should execute the said disposition and entail, and that such deed should be held as part of the marriage-contract. Therefore, "and for the better preservation of my family, and the continuation of my lands and estates after-mentioned with my children and other relations after-mentioned, and for certain other causes and considerations moving" him, he, with consent of Lord Balgonie, disponed to Lord Balgonie, and the eldest, and other sons to be procreated of the marriage between him and Miss Thornton, and the heirs whatsoever of the bodies of such sons; whom failing, to the eldest and other sons of Lord Balgonie in any subsequent marriage, and the heirs whatsoever of their bodies; whom failing, to the heirs whatsoever of the body of Lord Balgonie of the said marriage with Miss Thornton; whom failing, to the heirs whatsoever of Lord Balgonie by any subsequent marriage; whom failing, to the heirs of the granter's body, &c., "all and singular the earldom, lordship, barony, lands, and others underwritten, with the pertinents, viz., All and whole the earldom of Leven, and lordship and barony of Balgonie, comprehending therein the particular towns, lands," &c.—(here follows an enumeration of the particular lands composing the earldom of Leven and lordship of Balgonie)—"which whole lands, &c., were united, erected, and incorporated into one whole and free lordship, earldom, and barony, called the earldom of Leven, lordship and barony of Balgonie, conform to charter under the Great Seal in favour of Margaret Countess of Leven, upon the resignation of the deceased Alexander Earl of Leven, her father, dated the 7th day of September 1664: And, in like manner, all and whole the manor-place of Monymail, and mansion-house of Melville, with the pertinents of the same, &c.; together with the greens before the upper gate of the manor-place of Monymail, with all and singular **[1041]** parks and ruinous places round the said manor-place of Monymail, &c.; together with all and whole the Mill of Monymail, mill-lands, &c.: And, in like manner, all and whole the town and lands of Lethem, &c.: And, in like manner, all and whole the lands of Monksmyre, &c.: And all and whole the church-lands of the vicar of Monymail, called Montaggart, &c.: And further, all and whole the lands of Pitlair, &c.: all erected, united, and incorporated into one whole and free lordship and barony, called, and to be called in all time coming, the lordship and barony of Monymail, conform to a charter under the Great Seal granted by Charles II., of blessed memory, to the deceased George, Lord Melville, in liferent, and Alexander, Master of Melville, in fee, dated the 1st day of October 1669: And, in like manner, all and whole the lands of Pitcontie and Muirfield, &c., lying within the lordship of Monymail: And, in like manner, all and whole the town and lands of Markinch; all and whole the lands and town of Over and Easter Markinch, called Kirk-Markinch; the lands of Wester Markinch, and acres belonging thereto;

with the lands of Nether Markinch, and the outfield and ward thereof, with the mill of the same, called Markinch Mill, &c.; the lands of Bighty, Pittenchaggel and Inchinnie; the lands of Treaton, &c.; these three portions of Brunton, called the Three Lochs, &c.; together with those acres of Brunton land, lying upon the common highway which leads from the village of Markinch, &c.; And, in like manner, the town and lands of Newton of Markinch, &c.: And also, all and whole these three-eight parts of the town and lands of Stenton, called Nether Stenton, &c.: And, in like manner, all and whole one-fourth part and two-sixth parts of the town and lands of Utherogill, &c., with all right, title, and interest," &c.

Then follows a reservation of the Earl's liferent of the whole lands and others disponed, with a declaration, that the disposition is granted under the burden of an annuity of L.300 sterling to the then Countess of Leven, and a reserved power to grant the like annuity to any after wife: "And also with and under the burden of the payment of all my just and lawful debts and provisions to my younger children, amounting in whole, after payment and application of the said sum of L.10,000 sterling, received by me from the said John Thornton, to the sum of L.11,000 sterling: And I bind and oblige me, my heirs, executors, and successors whatsoever, not only to pay the interest that shall become due on the said debts, during the subsistence of my said liferent, but also that the said debts and provisions do not, in the whole, exceed the sum of L.11,000 sterling, and shall not exceed that sum at my death." The disposition is further declared to be granted "with and under the several restrictions, provisions, clauses irritant and resolutive, with respect to the lands and lordship of Melville, and lands of Utherogill, contained in the procuratory of resignation hereinafter engrossed." And there is reserved to the Earl and Lord Balgonie "full power and liberty to execute a strict entail, in so far as not hereby entailed, in favour of the same series of heirs, and with and under the same conditions, clauses irritant and resolutive, as are contained in the entail of the lordship of Melville, and lands of Utherogill, engrossed in the procuratory of resignation afterwritten; and with and under such other conditions as I, or the said Alexander Lord Balgonie, may think proper to add thereto; but in such manner as not to disappoint the issue of the said intended marriage, or their succession to the said lands and others in their due course, and to be nowise inconsistent with any of the clauses contained in the said contract of marriage."

The procuratory of resignation, which contains the entailing clauses, is conceived in the following terms:—"And for accomplishing the said infeftment by resignation, I hereby make, constitute, and appoint

and each of them, jointly and severally, my lawful and irrevocable procurators, to resign, as I hereby resign and surrender, all and whole the said earldom, lordship, baronies, and others, **[1042]** with the pertinents," viz.—(here follows a particular description and enumeration of the lands, precisely in the same terms as in the dispositive clause)—"in the hands of my immediate lawful superiors thereof, in favour and for new infeftment of the said lands, and others, to be made and granted to the said Alexander Lord Balgonie, and the eldest and other sons to be procreated of his body, in the said marriage with the said Jane Thornton, in their order, and the heirs whatsoever of the bodies of such sons respectively; whom failing," &c.—(then follow the substitutions)—"but always with and under the several reservations, burdens, and conditions before mentioned; and with and under the further condition, viz., that the said Alexander Lord Balgonie, and whole other heirs of tailzie succeeding to the said lands and estate, shall be obliged to assume the sirname of Leslie, and to use and bear the arms armorial and honours of the house and family of Leven, in all time coming after their succession; and with and under the provisions, conditions, and clauses irritant and resolutive underwritten, which are hereby declared to affect the lands, lordship, and estate of Melville, and lands of Utherogill only, and not to be extended to the lands, lordship, and estate of Balgonie; that is to say, with and under the conditions, limitations, and restrictions following." Then followed the usual conditions and prohibitions of an entail, with corresponding irritant and resolutive clauses.

Besides various other clauses, unnecessary to be noticed, the deed contained a clause of absolute warrandice.

This entail was recorded in the Register of Tailzies on the 4th December 1784, and feudal titles were completed upon it in the person of Lord Balgonie, by charter of resignation under the Great Seal, proceeding upon the procuratory in the entail, upon

which infeftment followed on 23d April 1785, and the seisin was duly recorded. This charter and infeftment comprehend the whole subjects contained in the said disposition and deed of entail, excepting the lands of Utherogill, which hold of the town of Edinburgh; but no infeftment was taken upon the entail.

In 1799 the Earl of Leven and Lord Balgonie granted a trust-disposition for behoof of creditors, in favour of Mr. Murray of Ayton and other persons, as trustees, whereby the Earl and Lord Balgonie alienated, disponed, and conveyed from them, their heirs and successors, to and in favour of the trustees, the lands and others therein described, and, *inter alia*, the lands and estate of Melville, and the lands of Utherogill, heritably and irredeemably, with power to sell certain parts of the said lands, and to borrow money upon the security of the said estates. Upon this deed the parties named as trustees were infeft. Lord Leven and Lord Balgonie executed another trust-disposition for behoof of their creditors, dated in 1800, whereby they conveyed to William Keith, as trustee, the lands and others particularly therein described, and, *inter alia*, the said Melville estates, and the lands of Utherogill; with power to sell to the full extent of the debts of Lord Leven and Melville and Lord Balgonie, or to borrow money on the security of the lands.

Most of the creditors signed a deed of accession to the trust in favour of Mr. Keith. He having assumed the management of the property, it was considered necessary that a part of the property should be sold, but as it appeared to be for the advantage of all concerned that the Balgonie estate should be retained by the family, it was proposed to sell part of the estate of Melville, which was accordingly advertised for sale.

An action of reduction was raised at the instance of the Messrs. Thornton, the trustees appointed in the contract of marriage between Lord and Lady Balgonie, being the trustees at whose instance it was appointed by the contract, that, during the subsistence of the marriage, execution should pass for implement of the obligations contained in it in favour of Lady Balgonie and the issue of the marriage. The Earl of Leven and **[1043]** Melville, Lord Balgonie, Mr. Murray, and the other trustees under the first trust-deed, and William Keith, the trustee under the second trust-deed, were called as defenders. The summons, after narrating the contract of marriage and deed of entail, concluded for declarator—"First, That the foresaid lands and others contained in the said deed of tailzie, under the name of the lordship and barony of Monymail, and which are described and enumerated from that part of the description and enumeration of the lands disponed and resigned, which begins with the words 'And, in like manner, All and Whole the mannor-place of Monymail, and mansion-house of Melville,' and ends with the words, 'all erected and incorporated into one whole and free lordship and barony, called, in all time coming, the lordship and barony of Monymail, conform to charter under the Great Seal, granted by Charles II. of blessed memory, to George Lord Melville, in liferent, and Alexander, Master of Melville, in fee, dated the 1st day of October 1669, together with all the other lands contained in the said deed of tailzie, which lie within the said lordship and barony,'" are effectually entailed by the said deed of tailzie. 2dly, That the foresaid lands of Utherogill, to which the provisions, &c., contained in the said deed of tailzie are declared expressly to apply, are thereby effectually entailed; and, therefore, that Lord Balgonie was bound, and ought and should be decerned, &c., to complete the said entail thereof, by infeftment in his person. "3dly, That it being expressly declared by the said deed of tailzie, that the prohibitory, irritant, and resolutive clauses therein contained shall affect the lands, lordship, and estate of Melville, and lands of Utherogill only, and are not to be extended to the lands, lordship, and estate of Balgonie, the whole other lands and estate contained in the said deed of tailzie, excepting only the said lands, lordship, and estate of Balgonie, are thereby effectually entailed." And, 4thly, That the said deed of tailzie, being for the causes therein and before specified, executed by the Earl of Leven and Melville, as relative to the foresaid contract of marriage betwixt Lord Balgonie and Miss Thornton, of which contract of marriage the said deed of tailzie is expressly declared to be a part, the said deed of tailzie is a truly onerous deed; and, therefore, if any new deed should be necessary for rendering the said deed of tailzie more explicit and effectual, the Earl of Leven and Lord Balgonie should be decerned to execute the same, in further corroboration of the said deed of entail. The summons farther concluded for reduction of both the foresaid trust-deeds, and the infeftment

taken upon the first of them; and the reasons of reduction libelled were,—"*Primo*, That the said two dispositions and deeds of trust are vitiated," &c., in common style; "2*do*, The said two dispositions and deeds of trust are void and null, as being deeds *ultra vires* of the granters, in so far as they convey to the trustees, for the purpose of sale, or granting securities thereon, any of the lands and estates contained in the said deed of tailzie besides the estate of Balgonie, the whole of the other lands and estates contained in the said deed of tailzie being thereby strictly entailed, and the sale, dilapidation, or burdening thereof, strictly guarded against: 3*tio*, The said deeds of trust and infeftment are void and null, in so far as the entailer's lands and estates thereby conveyed are burdened with the debts of the said David Earl of Leven, and Alexander Lord Balgonie, to an unlimited extent; whereas, it is expressly provided by the said deed of tailzie, that the said entailed lands and estate, and also the lordship and estate of Balgonie, shall not be burdened with the debts of the said David Earl of Leven and Melville, further than to the extent of L.11,000 only, under the warrandice of the said Earl that his debts shall not exceed the said sum at his death; and the right of the said Alexander Lord Balgonie to the said entailed lands, is limited by the said deed of tailzie, so as to preclude him from affecting or burdening the same with his debts: 4*to*, The said deeds of trust **[1044]** and infeftment are void and null, as being rights flowing *a non habente potestatem*, the said David Earl of Leven and Melville being, by his execution of the said deed of tailzie, and the said Alexander Lord Balgonie being, by the prohibitory, irritant, and resolutive clauses of the said deed of tailzie, upon which titles were made up in his person, as aforesaid, completely divested of the power to execute, and debarred from the granting of any such deeds: And, lastly, The said deeds of trust and infeftment are void and null, the said trust-deeds being executed *contra fidem tabularum nuptialium*, in breach of the obligations in the foresaid contract of marriage, and altogether inconsistent with, and contradictory to, and subversive of, the said deed of tailzie, which was declared to be a part of the said contract, executed for the onerous causes before mentioned, whereby the said David Earl of Leven, with consent of the said Alexander Lord Balgonie, disponed the lands, lordship, and estates before mentioned, to the said Alexander Lord Balgonie, his eldest son, and the heirs to be procreated between him and his spouse, in their order therein and before specified, and to the other heirs therein mentioned."

Production was satisfied. The Lord Justice-Clerk, Ordinary, ordered the cause to be stated in memorials. Mutual memorials were accordingly given in, one for the pursuers, and the other for Mr. Keith, who designed himself as trustee for the Earl of Leven and Melville, and for Lord Balgonie, and for their creditors.

On advising the memorials, the Lord Ordinary made avizandum to the Court, and appointed the parties to lodge informations.

It was contended for the pursuers;—The rules to be applied to the construction of this deed of entail, forming as it did part of a contract of marriage, were not to be of the same stringent nature as those by which an ordinary entail was to be construed, and more particularly seeing that it was admitted that the lands of Balgonie were sufficient to meet the claims of the truster's creditors. The real question therefore was between the children of Lord Balgonie and the trustee not for Lord Leven's and Lord Balgonie's onerous creditors, but for their Lordships themselves. With regard to the estate of Melville, it was not disputed by the defender that what was called in one part of the deed the lordship of Melville, was the same that was called in another part of it the lordship of Monymail; but the pursuers submitted that this difference of name could not render the entail ineffectual. The lordship of Melville, and the lordship of Monymail were in fact two names for the same property. The crown charter of 1669, referred to in the entail, both in the dispositive clause and in the procuratory of resignation, bore that the name of the lands was declared to be the lordship and barony of Melville and Monymail;—the lands being erected "in unum integrum et liberum dominium et baroniam, nunc, et omni tempore affuturo, dominium et baroniam de Melville et Monymaill nuncupat. et nuncupand." That the estate was called by either name was notorious, and the infeftment on the trust-deed bore that the sasine on it was taken "at the mansion-house of" Monymail *alias* Melville, "for the lordship and other lands, in virtue of a dispensation contained in the charter which followed upon the disposition and entail of 1784." The terms of the entail itself showed that the lordship of Melville was the same as the lordship of Monymail. There were but two

lordships mentioned, and it was declared that one of them, viz., Balgonie, should be free from the fetters of the entail. It necessarily followed that the other lordship of Melville or Monymail was to be entailed. It appeared also that the mansion-house of Monymail was part of the estate of Melville, and that it had been erected into a lordship for George Lord Melville. Moreover, the name of a lordship or barony was a *nomen universitatis*, by which the whole lands comprehended in it might be entailed, and reference might be made to other deeds to show what were the lands comprehended **[1045]** within the lordship or barony. In that respect the rules of construction applicable to the portion of the deed containing the description of the entailed property were different from those applicable to the portion of the deed imposing fetters; for the creditors were entitled to see the fetters from the terms of the entail itself. But in this case there was no necessity for such reference, the lands composing the lordships of Melville or Monymail and Balgonie respectively being distinctly specified; and it being apparent what lands disponed formed the lordship of Balgonie which was declared not to be entailed. The cases cited by the defenders did not rule the point to be decided. There was no dispute as to the conditions or limitations of the entail, but only as to the lands conveyed subject to these conditions, which was to be decided in the same manner as the question, what lands were conveyed by any other disposition and infeftment?

If the point raised could be held to be matter of doubt where onerous creditors were interested, it was not so here, where there were no creditors in that position beyond those whose debts would be more than paid by the proceeds of the unentailed estate. Lord Leven and Lord Balgonie were not entitled to lay hold of inaccuracies in the deed of entail, so as to free themselves from the obligations undertaken in Lord Balgonie's contract of marriage; and, on the contrary, if the entail already executed was defective, they were bound to supply that defect.

It was contended for the defenders;—The lands disponed were conveyed, subject to certain fetters, which were declared to affect the lands, lordship, and estate of Melville, and the lands of Utherogill only. The question, therefore, came to be, what were the lands and lordship of Melville, and the lands of Utherogill? In the dispositive clause of the deed, the lands of Utherogill were distinctly mentioned, but there was no mention made of the lordship of Melville, and there was no clause in the deed from which it could be seen what parcel of the lands disponed was meant by the description "the lands and lordship and estate of Melville." The entail was, therefore, void and ineffectual, except as regarded the lands of Utherogill, to the validity of the entail of which there was a separate objection to be afterwards noticed. It would appear from the description that the earldom of Leven comprehended other lands besides the lordship of Balgonie. The other lands disponed were the lordship and barony of Monymail. There were also disponed the lands of Pitcontie and Muirfield, the town and lands of Markinch, lands of Bighty, and various other lands which were not said to be contained in the charter of 1669, or in any other charter. It was, therefore, impossible to discover, from an examination of the deed of entail itself, what were the lands to which the fetters were intended to apply. The onerous creditors whom the defender represented were not bound to consider the most important clause of the deed of entail as one to be construed by inference and reference to other clauses; but if that was to be the way in which the deed of entail was construed, there was room for other inferences besides that which the pursuers assumed was to be drawn from its terms. As to the reference to the charter of 1669, on consideration of which it was said the difficulty would vanish, as it showed that "Melville and Monymail" was the full name of the lands, and that the name of "Melville," as well as the name "Monymail," might be used to describe the property. There were various answers to that argument:—1. A creditor or purchaser had nothing to do with that charter, and was not bound to travel out of the deed of entail itself. 2. The tailzie contained in the dispositive clause as well as in the procuratory the description said to be taken from the charter of 1669, and set forth that the lands were by that charter erected into one free lordship and barony, to be called the lordship and barony of Monymail. A creditor would not think it necessary to look at the charter, in order to see the description said to be copied from it, and could not suppose that he **[1046]** would then discover that the lands of Melville were the same as the lands of Monymail, when it was expressly stated that the title of the lands in the charter was the lordship and barony of Monymail, without any

mention of the lands of Melville. 3. The lands were described as the barony of Melville and Monymail, not Melville or Monymail. A creditor, when he found that the limitations of the entail were only to apply to the lands, lordship, and estate of Melville, would naturally conclude that there was no intention to entail certain parts of the barony, which it would appear to him belonged, strictly speaking, to Monymail, as distinguished from Melville. But 4th, Had the charter shown that Melville and Monymail were the same name for two baronies, the particular farms of which were described in the dispositive clause of the entail, there would have been no protection to a purchaser; for there were certain detached farms, such as Pitcontie, Muirfield, Markinch, and others, which formed no part of the lands erected into the barony, but which, notwithstanding, the pursuers contended, were in reality part of the estate of Melville, and subject to the fetters of the entail. Were the pursuers to take the description of the lands in the charter of 1669 as describing accurately the estate of Melville and Monymail, and as marking out the whole lands entailed as the "lands, lordship, and estate of Melville," or to show from other sources that the lands entailed as the estate of Melville comprised the other farms and lands disponed in the entail?

The pursuers' argument, that the important part of the clause imposing the fetters of entail was the exception of the lands and lordship of Balgonie, was worthless; the important part clearly was that which declared the fetters to apply to the lands of Melville and Utherogill only, otherwise it would be held that the lands of Pitcontie and Muirfield and others disponed, but not forming part of the estate of Melville, were also disponed under fetters.

After advising these informations, the Court pronounced this interlocutor on 4th December 1801:—"Sustain the reasons of reduction of the two trust-deeds and infeftment challenged, in so far as concern the lands, lordship, and barony of Melville or Monymail, and lands of Utherogill, as libelled, and to the effect libelled, reserving to the creditors any right competent to them over the lands of Utherogill, by virtue of the infeftment following on the first trust-disposition, and to the pursuers their objections as accords; and reduce, decern, and declare accordingly: And with respect to the lands of Markinch, the lands of Bighty, Pittenchaggel, and Inchinnie, the lands of Treaton, these parts and portions of the lands of Burnton, and three-eight parts of the town and lands of Stenton, libelled, the Lords remit to the Lord Ordinary to hear the counsel for the parties, how far these lands fall under the entails or not, and to proceed farther in the cause, and do as he shall see just."

Parties having argued in minutes the points thus remitted, the Lord Ordinary made avizandum to the Court, and this interlocutor was pronounced on 27th February 1802:—"Find that the lands of Pitcontie and Muirfield are part of the lands and lordship of Melville or Monymail, and therefore sustain the reasons of reduction as to these lands, as libelled, and to the effect libelled; but *quoad* the whole other lands mentioned in the preceding minutes, find that they are part of the estate of Balgonie, and do not fall under the entail; and therefore repel the reasons of reduction as to these lands, and decern and declare accordingly."

Alexander Lord Balgonie, on his father's death, became Earl of Leven and Melville, and about the year 1820 was succeeded by his son David, last Earl of Leven and Melville.

In 1858 David Earl of Leven and Melville raised this action against his daughter Lady Elizabeth Jane Leslie Melville or Cartwright, and the other heirs under the entail of 1784, concluding for declarator that he was heritable proprietor, duly vest and seised as of fee in the lands of **[1047]** Monymail, and the lands of Pitcontie and Muirfield, contained in the said disposition and deed of entail; that none of the prohibitions against alienation and contraction of debt and alteration of the order of succession, or clauses irritant or resolutive contained in the entail applied to the lands described, and the lands were not validly entailed conform to the Act 1685, c. 22; and in terms thereof, as well as at common law, and by virtue of the 43d section of the Act 11 and 12 Vict. c. 36, the lands were subject to the debts and deeds of the pursuer.

It was averred for the pursuer;—The deed of entail did not contain, either in the dispositive clause or in the clause of resignation, any lands described as the lands, lordship, and estate of Melville. The deed was not intended to be an entail of the whole lands described in it, as there was expressly reserved to Lord Leven and to Lord

Balgonie power to entail the lands thereby conveyed, but not entailed. In the procuratory of resignation the fetters were declared to apply to the lands, lordship, and estate of Melville and Utherogill only, and not to be extended to the lands, lordship, and estate of Balgonie. There were no words in the disposition applying the fetters to the lands and others therein disponed and described as forming the lordship and barony of Monymail, and lands of Pitcontie and Muirfield and others, referred to in the conclusions of the summons. The pursuer had made up a title on the death of his father, and was vested in the lands forming the lordship and barony of Monymail, and the lands of Pitcontie and Muirfield, and also one-fourth part and two-sixth parts of the town and lands of Utherogill. The lands and barony of Balgonie, Markinch, and others having been sold, were not vested in the pursuer.

In regard to the former action of declarator and reduction at the instance of Messrs. Thornton, it was averred that the pursuer, though then in life, was not cited nor made a party to the said action; the rights and interests of the pursuer, as an heir of entail, were not represented, and, by the decree therein, the rights maintained by the pursuer in the present action were not negatived or affected. The action was sued solely by the Messrs. Thornton, as the trustees named by the contract of marriage between Lord Balgonie and Miss Thornton, and as the parties thereby appointed to sue, "during the subsistence of the said marriage," for implement of the obligations in favour of Lady Balgonie, and the issue of the said marriage. The summons did not set forth any interest or title in the pursuers as representing the rights of the heirs or substitutes under the entail of 1784. The only party who appeared as a defender was Mr. Keith, accountant, as trustee under the trust-conveyance executed by David, then Earl of Leven, and Alexander, then Lord Balgonie, for payment of their debts, being the deeds sought to be reduced in said action. These conveyances embraced various lands, and, *inter alia*, the lands, lordship, and barony of Balgonie, as well as the lands and barony of Monymail, and other lands embraced by the conclusions of the present action. The lands and barony of Balgonie, which were found to be validly conveyed to Mr. Keith, for payment of the truster's debts (and which were afterwards sold for L.104,000), were more than sufficient for that purpose, and Mr. Keith had no real or substantial interest to resist the conclusions for reduction of the trust-conveyances in his favour, *quoad* the lands and barony of Monymail, and other lands comprehended in the present summons, in so far as he represented the creditors. This was well known to Mr. Keith and the other parties, and was in the view of parties and the Court at the date of said action, and proceedings therein. In that action different grounds and pleas were pleaded by the pursuers, irrespective of the plea that the lands conveyed to Mr. Keith were effectually entailed; more particularly (1), It was maintained that the doctrine of strict construction of entails did not apply, in respect the trust-deeds challenged were gratuitous deeds for behoof of the granters; and the **[1048]** pursuers, as representing the heirs or children of the marriage *qua* creditors, were entitled to have the trust-deeds challenged, set aside as *contra fidem tabularum nuptialium*, irrespective of any effect which might have been due to the entail in a question with onerous creditors; and (2), "But, as has been said" (in the words of the pursuer's information), "there is in reality no question with creditors. The unentailed estate of Balgonie is abundantly sufficient for the payment of all debts, and creditors have therefore no concern or interest in the matter, nor do they in reality interfere; and as neither the Earl of Leven, nor Lord Balgonie, nor Mr. Keith, the trustee, has disputed or can dispute that the Lordship of Melville and Monymail are the same, and that all the lands comprehended in that lordship were at least intended to be effectually entailed, this, without any farther, is a sufficient ground for the pursuers prevailing in the present action. The Earl of Leven, a mere liferenter, could not convey this lordship. Lord Balgonie could not lawfully convey it *in fraudem* of the obligations he came under by his marriage-contract and deed of entail; supposing that from some error in framing the entail it was not, as it stands, effectual against third parties, Mr. Keith, their trustee (the interest of creditors being out of the question), cannot do what they could not have done." The Court adopted these pleas and arguments of the pursuer, and therefore, although the primary and leading conclusion of the libel was for decree, finding generally that the lands and lordship of Melville were "effectually entailed" by the entail of 1784, the Court refused to give any decreet in terms of that conclusion, and merely reduced the trust-deeds.

The pursuer pleaded;—(1.) The barony of Monymail, and other lands and subjects described in the conclusions of this summons, not having been entailed in terms of the Act 1685, cap. 22, by the execution and registration of the disposition granted by the pursuer's grandfather in 1784, the pursuer is entitled to decree as libelled. (2.) The alleged prohibitions against alienation and contraction of debt, and alteration of the order of succession, and alleged clauses, irritant and resolutive, not having, by the said disposition and investitures thereon, been validly and effectually applied to the barony and lands and others described in the conclusions of this summons, the same are subject to the deeds of the pursuer as a fee-simple proprietor, and he is, by virtue of the Act 11 & 12 Vict. cap. 36, sect. 43, as well as at common law, entitled to decree as libelled. (3.) The defenders have not averred matter relevant or sufficient in law to support their defences, and their averments and explanations regarding alleged facts and circumstances not appearing *ex facie* of the said disposition of 1784, and the record thereof, and investitures following thereon, cannot competently be remitted to proof, in order to support the defenders' pleas. (4.) The decree in the former process, referred to by the defenders, does not constitute *res judicata*, nor form any bar to the prosecution of the present action. (5.) The defenders' plea, founded on the marriage-contract referred to by them, is untenable, in respect—1st, No obligation can affect the pursuer's right and remedy as heir of entail under the statutes libelled; 2d, The execution of the entail (although defective) was full implement of the alleged obligation; and 3d, The alleged obligation has fallen by the long negative prescription.

Defences were given in for Lady Elizabeth Jane Cartwright and her sisters. They averred;—The lands described and conveyed by the deed of entail executed by the Earl of Leven and Lord Balgonie in 1784, and again described in the procuratory of resignation contained in the same deed, were, in the first place, the leading portion of the Leven estates, constituting the lordship of Balgonie, the particular description whereof ends with the statement that these lands were united into one lordship, earldom, and barony, called the earldom of Leven, lordship and barony of Balgonie, con- **[1049]** -form to charter under the Great Seal in favour of Margaret Countess of Leven, dated in 1664; and, in the second place, the Melville estates, the description of which commences immediately after the clause above quoted, thus:—And, in like manner, all and whole the manor-place of Monymail, and mansion-house of Melville, with the pertinents of the same, &c., after which the description proceeded with the particular names of the different parts of the lands and estate of Melville, described in the conclusions of the summons. The description in the deed of entail then enumerates certain other lands which were found, by decree of Court as aftermentioned, to belong to the Leven estates, or estate of Balgonie. The lands, lordship, and estate of Melville, and lands of Utherogill, were strictly entailed, and the lands described in the conclusions of the summons are and were, long prior to, and at the date of the said deed, the lands, lordship, and estate of Melville, and were then generally known, and beyond the memory of living man have been known, by the name of the lands and estate of Melville. In the deed of entail the description of the estate of Melville, after an enumeration of particulars, states that these lands were "all erected into one whole and free lordship and barony, called and to be called in all time coming the lordship and barony of Monymail, conform to charter under the Great Seal, granted to the deceased George Lord of Melville in liferent, and Alexander Master of Melville in fee, dated in 1669." By the charter referred to, the lands described in the said deed of entail, and also in the conclusions of the summons (excepting only the lands of Pitcontie and Muirfield, separately described), were united and erected "in unum integrum et liberum dominium et baroniam nunc et omni tempore affuturo dominium et baroniam de Melvill et Monymaill nuncupat et nuncupand ordinar," and the manor-place of Monymail (or, as the same is described in the said deed of entail, "the manor-place of Monimail, and mansion-house of Melville"), is declared to be the principal messuage of the lordship and barony. The lands of Pitcontie and Muirfield, although not part of the lands specially mentioned and described as erected into the lordship and barony of Melville and Monymail by the charter of 1669, were part of the Melville lands and estate, having been the property of the Earl of Melville before the union of the two titles and estates. The said disposition and deed of entail contained a variety of conditions and prohibitions, which were expressly made applicable in the said deed to the lands described in the conclusions of the summons, and also to the lands of Utherogill.

In the action at the instance of the Messrs. Thornton, they represented and acted for behoof of the interests of the whole heirs and substitutes called to succeed under the entail of 1784, and *inter alios* they represented the pursuer, who was born in 1785, and was then the heir of entail next entitled to succeed after Lord Balgonie, his father. David, then Earl of Leven and Melville, and Lord Balgonie his son entered appearance as defenders, and their interests as fee-simple proprietors were represented by Mr. Keith. The same pleas maintained by the pursuer of the present action were there maintained by Mr. Keith, and the pleas maintained by the defenders in this action were there maintained by the Messrs. Thornton. "The result of the interlocutors and decrees in that action, which were acquiesced in and acted on, was to repel the pleas now maintained by the pursuer, and finally to decide that the lands described in the conclusions of the summons were validly and effectually entailed by the disposition and deed of entail of 1784, and that the only lands not entailed by that deed were the proper lands and estate of Balgonie. The pursuer has taken the benefit of the judgment, in that case. Lord Balgonie, afterwards Lord Leven, possessed the estates until 1820 as entailed estates, in consequence of the said judgment, and the pursuer thereafter acquired the estates as heir of entail. But for the decree pronounced therein he would have been deprived of the lands described in **[1050]** the conclusions of the summons, which would have been sold by the trustees under the said trust-deed for behoof of his father and grandfather, and for payment of their debts."

The defenders pleaded;—(1.) The subject-matter of the present action is *res judicata*, having been finally disposed of in the action against the pursuer's father and grandfather above mentioned. (2.) The pursuer having taken the benefit of the judgment in the said action, as above explained, is barred from insisting in the present action. (3.) The pursuer, being the representative of Lord Leven and Lord Balgonie, his grandfather and father, the parties to the said marriage-contract, is bound by, and liable to perform the obligations upon them contained therein, and is therefore barred from insisting in the present action, or doing any other act for the purpose of defeating the entail of the lands described in the summons or preventing the succession of the parties mentioned in the said marriage-contract to the said lands. (4.) The lands and estate in question having been effectually entailed by the disposition and deed of entail of 1784, and the grounds of action pleaded by the pursuer being untenable, the defenders are entitled to *absolvitor* from the whole conclusions of the action, with expenses.

On 19th March 1859 the Lord Ordinary pronounced this interlocutor:—"Repels the first, second, and third pleas in law for the defenders: Finds that in regard to the disposition and deed of entail libelled, and in order to determine the question whether any, and what part of the lands thereby disponed are affected by the restrictions and prohibitions and clauses irritant and resolutive contained in the said deed, it is competent to inquire in point of fact whether any, and what lands, being part of the lands so disponed, are sufficiently designated by the name and description of the lands, lordship, and estate of Melville, as used in the said deed, and this by a recurrence to the previous title-deeds of the lands so disponed, or by other clear and sufficient evidence beyond, and in addition to the said deed: Repels accordingly the third plea in law stated for the pursuer; and appoints the case to be enrolled with a view to such inquiry."[1]

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[1] "NOTE.—The deed of disposition and tailzie by David Earl of Leven here in question, conveys, by the dispositive clause, to a certain order of heirs and persons, a variety of lands, which may be thus described:—1st, The earldom of Leven and lordship of Balgonie, said to have been contained in a charter under the Great Seal in favour of Margaret Countess of Leven, dated 7th September 1664; 2d, The manor place of Monymail and mansion-house of Melville, with certain other subjects said to have been erected into the lordship and barony of Monymail, conform to charter under the Great Seal in favour of George Lord of Melville, and Alexander Master of Melville, dated the 1st October 1669; 3d, The lands of Pitcontie and Muirfield, lying within the lordship of Monymail; 4th, The town and lands of Markinch, with various other miscellaneous subjects; and, 5th, Certain parts of the town and lands of Utherogill.

"This disposition is made 'with and under the several restrictions, provisions, and clauses irritant and resolutive, with respect to the lands and barony of Melville and lands of Utherogill, contained in the procuratory of resignation hereinfter engrossed.'

[1051] The pursuer reclaimed, and prayed the Court "to alter the above interlocutor, in so far as it is found, that in regard to the disposition and alleged **[1052]**

The procuratory of resignation contains a similar enumeration of the lands, and authorises them to be resigned for new infeftment, 'with and under the provisions, conditions, and clauses irritant and resolutive underwritten, which are hereby declared to affect the lands, lordship, and estate of Melville, and lands of Utherogill only, and not to be extended to the lands, lordship, and estate of Balgonie.' Then follow the various restrictions and fencing clauses for constituting an entail of the lands and estate of Melville and Utherogill.

"No question is now raised as to the validity of the entailing clauses in themselves. But the present action is brought substantially for the purpose of determining that there are no lands included in the deed to which the entail can apply. The ground of this contention, stated shortly, is, that the lands declared to be entailed are not to be found mentioned in the dispositive clauses of the deed, and it is therefore argued that as it is thus impossible to tell from the deed what lands are entailed and what are not, the whole lands disponed must be held free from the fetters.

"It is obvious that this is an important question, and not one such as generally occurs under deeds of entail. A party dispones certain lands by a general name; but he does not mean that all of the lands disponed shall be entailed. He wishes that some of them shall be entailed, and that some of them shall not be entailed; and in the entailing clauses of the deed he states what part of the lands he wishes to be entailed, or what part of the lands he wishes not to be entailed. In making this explanation, he designates the lands thus excepted by a name or description not to be found in the dispositive clause, but of which, it may be assumed, the application is capable of being ascertained by a recurrence to the titles, or by any other convincing evidence. The question is, whether such an entail is good or bad, the ground of objection being, as already intimated, the impossibility of ascertaining from the deed itself whether the lands excepted are a part of the entailed lands, or of finding in the entail clauses a specific qualification of the clauses of conveyance?

"Thus, to take a simple illustration, a party disponed to a series of heirs the lands of A, and he inserts valid entailing clauses, but declares that these are not intended to apply to the whole lands of A, but only to a part of them, being the lands of B. The lands of B have not been previously mentioned, and are not expressly included in the dispositive clause, though at the same time they are capable of being ascertained, and of being proved to be part of the lands of A. Is this entail bad as to the lands of B in respect of the want of any traceable connection in the deed between the two sets of lands?

"Or let another case be supposed, which is not, perhaps, materially different. A party dispones the lands of A, and declares that these shall be all entailed, except the lands of B, which are not otherwise mentioned in the deed. Is this a bad entail as to any or all of the lands in consequence of uncertainty on the face of the deed, and the impossibility of saying what the lands of B are, and consequently of saying without other evidence what lands are entailed and what are not?

"The Lord Ordinary thinks that this objection of uncertainty, or of the impossibility of identification, is based upon a fallacious use of a known principle, by making the rules of certainty and explicitness, which are applicable to one set of clauses in an entail, extend also to a class of clauses and questions of a totally different kind.

"Clauses prohibitory, irritant, and resolutive, may always be made clear and intelligible in themselves, and ought not to bear reference to any other deed or document than the deed of entail. But a description of lands in a deed does not in itself designate the thing intended. Before it can be practically carried out, it is necessary to inquire what subjects *in rerum natura* correspond to the name and description given, and that inquiry can only be conducted by a reference to extrinsic evidence, such as must be resorted to in all cases of identification. A deed dispones the barony of A, but it does not contain any map of that barony, nor can any of the titles show definitively what it is. If a barony or estate is disponed and entailed,

deed of entail libelled, and in order to determine the question whether any, and what part of the lands thereby disponed, were affected by the restrictions [1053] and pro-

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it may always become a dispute whether a particular field or farm is, or is not, included in the description, and that question can only be resolved by an inquiry proceeding on miscellaneous evidence, *prout de jure*. It seems to follow that such a mode of inquiry may be necessary and competent, not only as regards the application of a general leading description in a dispositive or entailing clause, but also as regards certain qualifying or restrictive clauses. There does not seem to be any good principle for holding that an entailer may not exempt from a general entail all the lands lying in a particular parish, though the parish may not have been mentioned in the dispositive clause, or all the lands lying on the north side of a river as opposed to those on the south side; or that he may not exempt from his entail that farm known by the name of B, though not mentioned in the dispositive clause; or finally, that he may not restrict his entail to certain specified lands, if he names them in such a way that they can be discovered with certainty, on the ground though that name may not be in the dispositive clause, or even in any of the titles of the estate.

"It may be true, that in every case of entail the presumption is in favour of freedom: And yet it may also be true, that in order to ascertain, under such a deed, the lands entailed or not entailed, it shall be necessary to resort to inquiries in point of fact, such as the deed itself cannot answer.

"It appears to the Lord Ordinary that the present case falls under the principles to which he has adverted. A variety of lands are here disponed, and reference is made to the prohibitory and fencing clauses of an entail which are inserted, *ad longum* in the procuratory of resignation. It is declared, however, that the entail is not to apply to the whole lands disponed, but that it is to apply only to a part of them, and that part is stated to be the lands, lordship, and estate of Melville, and the lands of Utherogill, while the entail is not to be extended to the lands, lordship, and estate of Balgonie. The lands of Utherogill are mentioned in the dispositive clause, and Balgonie is mentioned. But the lands, lordship, and estate of Melville are not mentioned in the dispositive clause. The defenders, however, undertake to show that there are, *de facto*, subjects which are sufficiently designated as the lands, lordship, and estate of Melville, and which are part of the whole lands disponed, and comprehend in particular the barony of Monymail disponed, and the lands of Pitcontie and Muirfield also disponed. If the statement of the defenders on this point were not true in point of fact, and if the lands said to be entailed could not be found by any inquiry, the pursuer would gain his case on other grounds. But if that statement be true, it seems not incompetent to inquire whether the lands, lordship, and estate of Melville can be identified as proposed, either by the aid of the titles, or by other satisfactory evidence.

"A recurrence to the titles on such a question does not seem to the Lord Ordinary to lie under the objection that it is making an entail by reference, in the sense in which that phrase is generally used. The Lord Ordinary cannot doubt that, in regard to the description of the lands, it is competent to refer to the older titles for historical or other information. Supposing the separate lands of A and B to have been united by a charter into the barony of C, it would seem to be competent afterwards for the proprietor to dispone the lands and barony of C under the fetters of an entail as applicable to that part of it, which is known in the older titles by the name of A. In truth, the dispositive clause of a deed, which is not to be held subject to a strict construction, embraces and imports into itself all the previous rights and conveyances which constitute or fortify the disponer's title, and it can never, it is thought, be incompetent to refer to these for any purpose connected with the designation or identification of the lands.

"It is plain here, on the one hand, that the effect of the entail cannot go beyond the total extent of the lands contained in the dispositive clause. It is further plain, on the other hand, that the deed describes the lands declared to be entailed as embraced in the lands disponed, otherwise the deed would have no sense or meaning. The question then comes truly to be, whether it is competent to restrict to a part of the lands disponed, if that part be described intelligibly and ascertainably, though not by a name expressly set forth in the dispositive clause.

hibitions, and clauses irritant and resolutive therein contained, it was competent to inquire, in point of fact, whether any, and what lands, being part of the lands so disponed, were sufficiently designated by the name of the lands, lordship, and estate of Melville; and this by a recurrence to the previous title-deeds of the lands disponed, or by other evidence beyond, and in addition to the said deed; and in so far as the interlocutor repelled the third plea in law stated for the pursuer, and appoints the case to be enrolled, with a view to such inquiry; and to repel the whole defences; and to find, declare, and decern in terms of the libel."

Lady Elizabeth and her sisters also reclaimed, and prayed the Court to alter the interlocutor, in so far as it repelled the first, second, and third pleas in law for the defenders, to sustain the whole pleas stated for the defenders, and to assoilzie them.

The case having been heard before the Lords of the Second Division, their

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"Some of the circumstances of the present case seem to be specially favourable to the view here taken. The dispositive clause of the deed refers to two leading charters of Charles II., the one granted to the family of Leven or Balgonie, the other to the family of Melville. The subjects carried by charter to the Melville family are described in the dispositive clause of this deed as the lordship and barony of Monymail. But the charter itself describes the barony as that of Melville and Monymail, or Melville of Monymail. It seems impossible to look at this fact without seeing the important bearing that it has upon the restrictive clause, which declares the entail to affect the estate of Melville, &c., only, and not to be extended to Balgonie. But, further, the defenders aver that the lands of Pitcontie and Muirfield, though not included in the charter of Charles II., are part of the known lands and estate of Melville, which are thus said to embrace more than the mere barony of Monymail. How this shall turn out in evidence may be conjectured from what previously took place in a former litigation referred to in the proceedings, but cannot now be anticipated. All that the Lord Ordinary has done at present is to affirm the competency of the proposed inquiry, and to repel the plea of the pursuer, which would exclude it, as going into matters extrinsic to the deed itself.

"The Lord Ordinary has, at the same time, repelled the three first pleas stated by the defenders, which he thinks ill-founded.

"The former proceedings, at the instance of the trustees or nominees of the marriage-contract of the pursuer's father and mother, approach certainly very near to a *res judicata*, but they do not seem to come fully up to that point; and, before such a plea can be sustained, there must be a perfect correspondence between the former and the new proceedings, both as to the question decided, and as to the parties litigating.

"Apart from other difficulties, it seems to the Lord Ordinary that an element existed in the former case which does not exist here. The trust-deed by Lord Leven and Lord Balgonie, which was then reduced, was challenged, *inter alia*, upon the ground that it was *contra fidem tabularum nuptialium*, and that reason of reduction was sustained. It is impossible to say that such a consideration was not a material one, and it is so argued with great force in the pleading for the marriage-contract trustees. Upon that footing, and in reference particularly to the state of entail law at that time, the entail in question might be held good at the instance of the heirs of the marriage, while it might not have been held good as a simple entail, or in a direct question with onerous creditors.

"In the present litigation, and in the present state of the law, the Lord Ordinary thinks that this deed can only be looked at as an ordinary entail, which, if not good to all intents and purposes, is not good at all. He further thinks that, since an heir of the marriage (the present Lord Leven) has once taken under the marriage-contract, the *jus crediti* under that contract is at an end, and that the present defenders have no right except what is secured to them by the actual terms of the deed of entail as it stands. If that deed is bad, the Lord Ordinary cannot see how the defenders have any claim against their father to make it better. It is on this ground that the Lord Ordinary has repelled the second and third pleas in law for the defenders.

"The Lord Ordinary does not mean to determine whether the proceedings in 1802, and the possession following thereon, may not be available as facts in connection with the matter here at issue as to the identification of the lands."

Lordships, by interlocutor of 8th February 1861, in respect of the importance of the question raised, ordered argument before the whole Court on the following questions:—

"1. Whether the plea of *res judicata*, stated in defence to the action, ought to be sustained or repelled?

[1054] "2. Whether, by the deed of entail libelled, the lands embraced in the conclusions of the summons are with sufficient precision and certainty subjected to the fettering clauses of the said deed?

"3. Whether, in order to determine what lands are subjected to the fetters of the entail, it is competent to resort to evidence beyond the deed of entail, for the purpose of explaining what lands are *de facto* comprehended under the general description under which lands bear to be, in terms of the said deed, subjected to fetters?

"4. Whether, if it be competent to resort to such evidence, there is any limit to the kind of evidence or mode of proof admissible?"

It was argued for the pursuer, on the question whether the plea of *res judicata* ought to be sustained;—This plea, founded on the proceedings which took place in 1801 and 1802, was not an equitable plea or an equitable defence, but a strictly legal defence. It was founded on general expediency, and to protect parties from the retrial of causes; and was pleaded to the effect of preventing the pursuer of the new action from maintaining it; the assumption being that, unless foreclosed by the plea of *res judicata*, he would substantiate the conclusions of his action. A party pleading *res judicata*, required clearly to instruct all the principles and requisites of that plea, viz., (1.) That the parties in the former action were the parties to the new action; (2.) That the former action was litigated upon the same right, and with reference to the same interest, and to the same effect, as the pursuer of the new action was seeking to have discussed; (3.) That the former action proceeded upon the same ground of action or *media concludendi* as the new one; and, (4.) That the subject-matter connected with the right, and the interest which was involved in the former action, was duly pleaded and considered, and the judgment passed *causa cognita* with reference to that controversy. As regarded these points, this action was to be contrasted with the action decided in 1802.

This action was raised against the substitute heirs of entail under the deed of entail of 1784. The pursuer of the action being the heir holding the estate, or, as he might be called, the disponee under the deed of 1784, he brought the action against the substitutes under that deed in order to have it declared that the deed was not a good and perfect deed; the action was founded on the assumption that the deed of 1784, was not a valid and effectual entail under the Act 1685, and the decree sought was that the entail not being conform to the Act 1685, with reference to the lands said to be entailed, the pursuer was both at common law and under the former law of entail, and also the Entail Amendment Act, entitled to decree to the effect sought. The action, the judgment in which was put forward as *res judicata* by the defenders, was one in which Lord Leven was neither actually, nor constructively a party. The question of entail or no entail was no doubt raised; it was visible in the discussion as well as in the conclusions of the summons, but was not directly determined even as against the parties who were parties to that action. The conclusions of the action were in general terms. It was at the instance of parties who described themselves in the process as the trustees under Lord and Lady Balgonie's contract of marriage; and they sought the remedy of declarator and reduction for the benefit of the issue of the marriage, not for the heirs under the deed of 1784. The summons contained conclusions for declarator, which, according to the form of the libel, stood out distinct and apart from the conclusions for reduction. There never was any interlocutor affirming these declaratory conclusions, the interlocutors being limited to the reductive conclusions. The answer to the plea, that the two interlocutors in that case foreclosed the late Lord Leven from prosecuting this action, might be put in two ways; keeping in view that, when the former action was raised, the late Lord Leven was sixteen years of age, and that the present pursuer did not require to maintain that the Messrs. **[1055]** Thornton had no title to prosecute such an action against the acts and deeds of the parties who had become obligants under Lord and Lady Balgonie's contract of marriage; it was submitted—(1) that if it was intended that the rights of the heir then living, and in minority, were to be affected in any

respect, he should have been made a party. The pursuers were trustees nominated for the very limited purpose of protecting the interests of the wife and children of the marriage, while they were incapable of doing so themselves. The pursuer of this action was then capable of suing an action to maintain his own rights; and if the decree in the action could in any way affect his rights, he should have been made a party to it, whereas the action was conducted entirely in his absence. But (2) all that the trustees sought to do by that action was to bring back the estate that had been alienated from the heirs of the marriage. The trustees had no power to affect the rights of the heirs of the marriage *inter se*. All they did, and had power to do, was to rescue the lands from the trustees for the creditors of the granters of the marriage-contract. In the circumstances in which the estate was held by Mr. Keith, that might have been done without raising the question of the validity of the entail at all. There was no intent to raise any question between the parties in the position of the first heir of entail and the substitute heirs; but there was interest on the part of the then living next heir which could be injured,—the estate of Balgonie, which was never entailed at any time, being sufficient to meet the whole of the truster's debts.

The pursuers of the former action did not obtain a decreet in terms of the declaratory conclusions of their summons. The action, as appeared from the interlocutors, had failed *quoad* the declaratory conclusions. The action was said to have been raised for behoof of the pursuer of the present action, and that, therefore, the judgment in it was *res judicata* against him. Suppose the case had been raised in other ways, that Keith, as trustee for the creditors, had raised an adjudication, which had been successfully resisted by the marriage-contract trustees, that decreet could not prevent Lord Leven from raising an action against the substitute heirs to have the entail declared invalid. Or suppose that an action of declarator of contravention against Lord Leven and Lord Balgonie had been raised by the marriage-contract trustees on behalf of the issue of the marriage, decreet in such an action, whether in favour of, or adverse to, the marriage trustees, could not have barred the pursuer of this action from raising a similar action of declarator of forfeiture against the parties who held the trust-deed from Lord Leven. However either of these actions had gone, the decree could not have been pleaded as *res judicata* against the pursuer of this action. There was nothing at all in the view, that because Lord Leven got these estates as entailed estates through the exactions of the marriage-contract trustees, he could not plead against substitute heirs that the entail was defective.

When the proceedings in the former action were examined with reference to the position of parties and the powers of trustees, and with reference to the effect to be now imputed to the judgment obtained, that judgment could not be considered as *res judicata* barring the present action.

The consulted Judges returned the following opinions:—

Lord President, Lords Ardmillan, Mackenzie, Kinloch, and Jerviswoode.—The object of this action of declarator is to have it found that the fettering clauses in the deed of entail, executed by the Earl of Leven in 1784, have not been effectually applied to the lands described in the conclusions of the summons. The action was raised against the substitute heirs of entail by David Earl of Leven, the heir in possession of the estate, who died in 1860, and is now insisted in by his trustees, and by the present Earl.

To this action defences were lodged by Lady Elizabeth Melville or Cartwright, the eldest daughter of the original pursuer, and by her three younger sisters. **[1056]** Besides maintaining the validity of the entail of 1784, the defenders plead that the question raised in this declarator is *res judicata*, under judgments obtained in this Court in 1801 and 1802, in an action of declarator and reduction at the instance of Messrs. Thornton against the then Earl of Leven, and Lord Balgonie, and their trustees.

The primary question now submitted to us is,—"Whether the plea of *res judicata*, stated in defence to the action, ought to be sustained or repelled?" We are of opinion that this plea is well founded, and ought to be sustained.

In the year 1784 a marriage-contract was entered into between Alexander Lord Balgonie, with consent of the Earl of Leven, his father, on the one part, and Miss Jane Thornton, daughter of John Thornton, Esq., of Clapham, and her father, on the other

part. That contract refers to the disposition and deed of entail executed, of the same dates, by David Earl of Leven, with consent of his son, whereby the lands, lordship, and estate of Balgonie, Melville, and others, are settled and provided to Lord Balgonie, and the eldest and other sons to be procreated of his body by the said intended marriage, in their order, and the heirs whatsoever of the bodies of such eldest and other sons, whom failing to certain other heirs; and "the said David Earl of Leven, and Alexander Lord Balgonie, bind and oblidge them, and their foresaids, neither to do any act, nor grant any deed, which may anywise prejudge or disappoint the succession of the issue of this marriage to the said lands and others, according as the same is settled by the destination contained in the disposition above mentioned."

The marriage-contract contains the following clause:—"And it is also hereby agreed that, during the subsistence of the marriage, all execution shall pass hereupon for implement of the several obligations conceived in favour of the said Miss Jane Thornton and the issue of the said marriage, at the instance of Samuel Thornton, Robert Thornton, and Henry Thornton, Esq., or either of them."

The disposition and deed of entail executed by David Earl of Leven in 1784 proceeds on this narrative,—"That at the time of entering into the contract of marriage, signed by me of this date, and executed betwixt Alexander Lord Balgonie, my eldest son, with my consent, on the one part, and Miss Jane Thornton, daughter of John Thornton of Clapham, Esq., with his consent, and by himself, on the other part, L.10,000 sterling of the lady's portion was paid to me by the said John Thornton, her father, to be applied towards payment of part of my debts: And in consideration thereof, and of the said marriage, it was covenanted and agreed betwixt the parties contractors, that I should execute the disposition and entail underwritten, and that such deed should be held as part of the marriage-contract."

The deed of entail then proceeds as follows:—"Therefore, and for the better preservation of my family, and the continuance of my lands and estate after-mentioned with my children and other relations after-named, and for certain other causes and considerations moving me, I have disponed, as I do hereby, with consent of the said Alexander Lord Balgonie, give, grant, and dispone to the said Alexander Lord Balgonie, and the eldest and other sons to be procreated of his body in the said marriage with the said Miss Jane Thornton in their order, and the heirs whatsoever of the bodies of such eldest and other sons; whom failing, to the eldest and other sons of the said Alexander Lord Balgonie in any subsequent marriage, and the heirs whatsoever of their bodies respectively in their order; whom failing, to the heirs whatsoever of the body of the said Alexander Lord Balgonie of the said marriage with the said Miss Jane Thornton; whom failing," &c.—(here follow the other substitutions)—"the eldest heir-female always succeeding without division."

Then follows an enumeration of the lands conveyed, which may be thus described, generally:—1st, The earldom of Leven and lordship of Balgonie, as contained in a charter under the Great Seal in favour of Margaret, Countess of Leven, dated 7th September 1664; 2d, The manor place of Monymail and mansion-house of Melville, with certain other lands erected into the lordship and barony of Monymail, by a charter under the Great Seal in favour of George, Lord of Melville, and Alexander, Master of Melville, dated 1st October 1669; 3d, The lands of Pitcontie and Muirfield, lying within the lordship of Monymail; 4th, The town and lands of Markinch, and a variety of other lands; and, 5th, Certain **[1057]** parts of the town and lands of Utherogill. All these lands were conveyed to Lord Balgonie as institute, and to the substitute heirs, under reservation of the Earl of Leven's right of liferent.

In the procuratory of resignation, authority is given to resign the lands conveyed for new infeftment, "with and under the provisions, conditions, and clauses irritant and resolutive under-written, which are hereby declared to affect the lands, lordship, and estate of Melville, and lands of Utherogill only, and not to be extended to the lands, lordship, and estate of Balgonie." Among other conditions the deed contains prohibitions against altering the course of succession, contracting debts, and alienating the lands thereby entailed; and these prohibitions are fenced with irritant and resolutive clauses. The lordship and estate of Balgonie, like all the other lands contained in the disposition of 1784, were settled upon Lord Balgonie and the heirs of his marriage with Miss Thornton, but were not brought under the fetters of the entail,

which were declared only "to affect the lands, lordship, and estate of Melville and lands of Utherogill."

The deed of entail was recorded in the Register of Tailzies on the 4th December 1784; and feudal titles were completed upon it in the person of Lord Balgonie, by charter under the Great Seal, followed by sasine on 23d April 1785. All the lands described in the conclusions of the present summons are comprehended in that charter and sasine.

In 1799 David Earl of Leven, and Lord Balgonie, the grandfather and father of the original pursuer, granted a trust-disposition, whereby they conveyed the lands therein mentioned, including the particular lands described in the conclusions of the present summons, and the lands of Utherogill, in favour of Alexander Murray, Esq., of Ayton, and others, as trustees for the creditors of the granters, with power to sell the lands, and to borrow money upon the security of the estates. Upon that deed the trustees were infeft, and the sasine in their favour was duly recorded on 15th April 1799.

As the powers conferred upon these trustees were found to be too limited, the Earl of Leven and Lord Balgonie, with their consent, executed a new trust-deed in March 1800, conveying the whole lands contained in the former trust-deed to William Keith, accountant in Edinburgh, as trustee for the granters' creditors, with power to sell the lands to the full extent of the debts, and to borrow money on the estates.

In January 1801, Messrs. Thornton, the trustees named in the marriage-contract, raised an action of declarator and reduction in this Court for protecting the rights of the heirs of the marriage under the contract and deed of entail. The defenders called in that action were the Earl of Leven and Lord Balgonie, the trustees named under the first trust-deed, and Mr. William Keith, the trustee under the second trust-deed.

To the declaratory conclusions of that summons reference may be made, in order to show the nature of the plea maintained by the Thorntons on behalf of the heirs of the marriage. The leading conclusion, shortly stated, was to have it declared, that the lands to which the present question relates, were effectually entailed by the disposition of 1784, "in respect that the lands and lordship of Melville, to which the provisions, restrictions, limitations, conditions, and clauses prohibitory, irritant, and resolutive of the said deed are declared to apply, are the same with the said lordship and barony of Monymail."

The summons then concluded for reduction of the two trust-deeds, and the sasine upon the first of them; and the reasons of reduction, after the usual words of style, were the following:—"*Secundo*, The said two dispositions and deeds of trust are void and null, as being deeds *ultra vires* of the granters, in so far as they convey to the trustees therein and before mentioned, for the purposes of sale or granting securities thereon, any of the lands and estates contained in the said deed of tailzie, besides the foresaid lands, lordship, and estate of Balgonie, the whole of the other lands and estates contained in the said deed of tailzie being thereby strictly entailed, and the sale, dilapidation, or burdening thereof, strictly guarded against by the clauses prohibitory, irritant, and resolutive, above mentioned: *Tertio*, The said deeds of trust and infeftment are void and null, in so far as the entailed lands and estates thereby conveyed are burdened with the debts of the said David Earl of Leven and Melville, and Alexander Lord Balgonie to an **[1058]** unlimited extent; whereas it is expressly provided by the said deed of tailzie that the said entailed lands and estates, and also the lands, lordship, and estate of Balgonie, shall not be burdened with the debts of the said David Earl of Leven and Melville, further than to the extent of L.11,000 only, under the warrandice of the said Earl that his debts shall not exceed the said sum at his death; and the right of the said Alexander Lord Balgonie, to the said entailed lands, is limited by the said deed of tailzie, so as to preclude him from affecting or burdening the same with his debts: *Quarto*, The said deeds of trust infeftment are void and null, as being rights flowing *a non habente potestatem*, the said David Earl of Leven and Melville being, by his execution of the deed of tailzie, for the onerous causes before-mentioned, and the said Alexander Lord Balgonie, being, by the prohibitory, irritant, and resolutive clauses of the said deed of tailzie, upon which titles were made up in his person as aforesaid, completely divested of the power to execute and debarred from the granting of any

such deeds: And, lastly, The said deeds of trust and infeftment are void and null, the said trust-deeds being executed *contra fidem tabularum nuptialium*, in breach of the obligations in the foresaid contract of marriage, and altogether inconsistent with, contradictory to, and subversive of the said deed of tailzie, which was declared to be a part of the said contract executed for the onerous causes before-mentioned, whereby the said David Earl of Leven, with consent of the said Alexander Lord Balgonie, disponed and conveyed the lands, lordships, and estates before-mentioned, to the said Alexander Lord Balgonie, his eldest son, and the heirs to be procreated of the marriage between him and the foresaid Jane Thornton, now Lady Balgonie, his spouse, in their order therein and before specified, and to the other heirs therein mentioned."

Then followed a conclusion, that the deeds challenged should be reduced and declared null and void, "and the pursuers, at whose instance execution is appointed to pass upon the said contract and deed of tailzie, and the heirs procreated or to be procreated of the foresaid marriage betwixt the foresaid Alexander Lord Balgonie, and the foresaid Jane Thornton, in the order pointed out in the foresaid deed of tailzie (and in whose behalf the present action was brought), ought and should be reponed thereagainst *in integrum*."

After that action came into Court, the question as to the validity of the entail executed in 1784 was fully discussed in informations for the parties, one being given in for the Thorntons, and the other for "William Keith, accountant in Edinburgh, trustee for the Right Hon. David Earl of Leven, and the Right Hon. Lord Balgonie, eldest son of the said Earl, and their creditors, defenders."

Thereafter the Court pronounced this interlocutor on 8th December 1801:—"Upon report of Lord Justice-Clerk, and having advised the mutual informations for the parties, the Lords sustain the reasons of reduction of the two trust-deeds and infeftment challenged, in so far as concerns the lands, lordship, and barony of Melville or Monymail, and lands of Utherogill as libelled, and to the effect libelled; reserving to the creditors any right competent to them over the lands of Utherogill by virtue of the infeftment following on the first trust-disposition, and to the pursuers their objection as accords, and reduce, decern, and declare accordingly; and with respect to the lands of Markinch, the lands of Bighty, Pittenchaggel, and Inchinnie, the lands of Treaton, these parts and portions of the lands of Burnton, and three-eight parts of the town and lands of Stenton libelled, the Lords remit to the Lord Ordinary to hear the counsel for the parties, how far these lands fall under the entail or not; and to proceed further in the cause, and to do as he shall see just."

Some further procedure followed on the remit, after which the action was brought to a close by a judgment on 2d March 1802, in the following terms:—"Upon report of Lord Justice-Clerk, and having advised the foregoing minutes, the Lords find that the lands of Pitcontie and Muirfield are part of the lands and lordship of Melville or Monymail, and therefore sustain the reasons of reduction as to these lands as libelled, and to the effect libelled; but *quoad* the whole other lands mentioned in the preceding minutes, find that they are part of the estate of Balgonie, and do not fall under the entail; and therefore repel the reasons of reduction as to these lands, assoilzie the defenders, and decern and declare accordingly."

By these judgments, the trustees under the marriage-contract prevented the estates from being sold under the trust-deeds, and preserved the rights of the heirs **[1059]** of the marriage as substitutes under the entail of 1784. Lord Balgonie, who became Earl of Leven, possessed the estates under the entail till his death. David Earl of Leven, his eldest son, who was the original pursuer of the present action, made up titles to the estates, as heir of tailzie and provision to his father, Lord Balgonie, in 1820. The retour of the Earl's service bears that he is the nearest and lawful heir of tailzie and provision of his said father, "in omnibus et singulis terris, dominio, et baronia de *Melville, alias Monymail*, cum terris de Pitcontie et Muirfield;" and the retour specially sets forth the decree of reduction and declarator obtained by the Thorntons, as a step in the progress, in order to show that the infeftment on the trust-deed was no longer a burden on the title.

The general rule of law is clear that, in order to found the exception of *res judicata*, it must appear, 1st, That the question determined in the former suit was the same as that raised in the subsequent suit; and, 2d, That the decree founded on in support of

the plea was obtained in a process litigated between the same parties, or their predecessors or authors.

As to the first of these points, we think it indisputable, that the question raised in the former action was simply whether the fettering clauses in the deed of 1784 were properly applied to the lands described in the conclusions of the present summons. For the pursuers in the former action it was maintained successfully, that the lands composing the lordship and estate of Melville were completely entailed by the disposition of 1784, and were thereby secured to the heirs of the marriage, not only in a question with the Earl of Leven and Lord Balgonie, but in a competition with their onerous creditors. On the other hand, the defenders in that action contended that, as no mention was made in the dispositive clause of the "lands, lordship, and estate of Melville," to which the restrictions applied, it was impossible to tell from the deed what lands were to be regarded as entailed and what were not, and therefore that the whole lands disponed must be held free from fetters. After full argument, the Court rejected the defenders' plea, and sustained the validity of the entail as regards the lands now in question. There can be no doubt, therefore, that the point which was directly adjudicated upon in the former action is precisely the same as that which is raised in the present case.

It will be observed that, by the first interlocutor, of 8th December 1801, the Court sustained the reasons of reduction "in so far as concerns the lands, lordship, and barony of Melville or Monymail, and lands of Utherogill as libelled, and to the effect libelled" (with a certain reservation as to Utherogill, which is of no consequence, as these lands are not here in question), "and reduce, decern, and declare accordingly;" while the final judgment is expressed in similar terms as regards the lands of Pitcontie and Muirfield. In the argument before us, it was made a question, and it is, perhaps, not clear on the terms of the judgment, whether the Court expressly affirmed the declaratory conclusions of the summons in the former action. But supposing the declaratory conclusions not to have been expressly affirmed, that is a matter to which we attach no practical importance. For the reasons of reduction were substantially the same as the grounds of declarator, and quite sufficient of themselves to raise the question as to the validity of the entail; and as these reasons of reduction were all sustained by the Court as libelled, it follows that there was a clear judicial decision upon the very point at issue in the present action.

Holding the question determined in the first action to be the same as that litigated here, the next point for inquiry is, whether it was so determined between the same parties, or their predecessors or authors?

By the law of Scotland the exception of *res judicata* is pleadable, not only against the parties to a suit and their universal representatives, but against their successors in a particular estate, in regard to questions relating to that estate, though not otherwise representing their authors—Stair 4, 40, 16; Ersk. 4, 3, 3. Now the former action was raised by Messrs. Thornton, being the parties named in the marriage-contract, at whose instance execution was to pass during the subsistence of the marriage, for implement of the obligations in favour of Lady Balgonie and the issue of the marriage; and it was brought to support the validity of the entail (which was declared to be a part of the marriage-contract) and to protect the interests of the heirs of the marriage, who were the first class of substitutes called in the entail. In that action, decree was obtained against the Earl of Leven, the **[1060]** entailer, and Lord Balgonie, the institute or fiar then infeft in the estate, and their trustees.

The defenders in the present action, who plead the exception of *res judicata*, are Lady Elizabeth Cartwright and her three younger sisters, being the daughters of the late Earl of Leven, and grandchildren of Lord Balgonie, the institute. They are heirs of the marriage between Lord Balgonie and Jane Thornton, and as such are substitutes in the entail. It appears to us, that these ladies, the defenders in the present action, were directly represented in the former action by Messrs. Thornton, who obtained on their behalf the decree on which they now found. We hold it to be equally clear that the original pursuer of the present action, the late Earl of Leven, against whom this exception is pleaded, was represented in the former action by his father, Lord Balgonie, who was then infeft as fiar in the entailed estate, to which the late Earl afterwards succeeded, and made up titles in the character of heir of tailzie and provision to his father. It is true that the decree was not obtained directly or *nominatim* against the

late Earl; but its operation as *res judicata* against him rests upon this ground, that it was a decree respecting the validity of the entail, obtained against the person vested with the entailed estate at the time, and was therefore effectual against all his successors in that estate. It is admitted on the record that the late Earl represented generally his father and grandfather, but it is not necessary to found upon that circumstance here; because the plea of *res judicata* extends to the case of successors in a particular estate in regard to questions relating to that estate, even where they do not otherwise represent their predecessors.

In the former action, Messrs. Thornton, as pursuers of the action, represented the late Earl of Leven, as well as all the heirs of the marriage, born or unborn, who were called substitute heirs of entail. There can be no doubt that it was then for the interest of the late Earl that the estate should be preserved under the entail, so as to secure his succession after the death of his father. That object was accomplished by the judgment then pronounced, of which he obtained the full benefit. After he succeeded to the estate, the position of the late Earl was changed, so that he considered it for his advantage, as heir in possession, to try to get rid of the fetters of the entail; and as the judgment in the former action is now pleaded, adversely to his altered interests, we think it important to keep in view that in the former action these interests were represented by his father, Lord Balgonie, the fiar then infeft in the estate, who, as heir in possession, contested the validity of the entail, on the same grounds as those advanced by his successor, the late Earl, in this action. The opposing interests of the heirs-substitute, and of the heir in possession under the entail, were both represented in the former action; and they are both represented in this action. That the late Earl was represented on both sides of the former suit,—by the Thorntons, as pursuers on the one hand, and by his father, Lord Balgonie, as a defender on the other,—cannot weaken the case of the present defenders, or detract from the effect of the decree.

To show how far the exception of *res judicata* has been admitted against the successors of parties to the suit, we may refer to the case of Gordon *v.* Ogilvie, 17th Feb. 1761, M. 14,070. The principle of that decision is thus given in the marginal summary, "An apparent heiress having made up titles in the person of a trustee, by an adjudication upon a trust-bond, in order to challenge her predecessor's deed, and decree of absolvitor having passed against her, this was found a *res judicata* against the next apparent heir making up titles in the same manner, and challenging the deed." It was strongly urged for the second apparent heir, that though connected by blood, he took nothing from the first apparent heir, and succeeded to no right which was vested in her. But the prior decision was held binding on the second apparent heir, who was considered as the successor of the former one in that matter. And the judgment was affirmed on appeal; 2 Patton's App. Cases, p. 61.

A similar question arose in Rutherford *v.* Nisbet, 27th November 1832, 11 S. p. 123. There the trustee for a party claiming to be apparent heir raised a reduction to set aside the titles of a proprietor in possession of an estate, on the allegation of illegitimacy, and decree of absolvitor was pronounced. After the death of the first claimant, his grandson, who claimed the same character, brought a second action of reduction of the same titles on the same ground. To this the **[1061]** defender opposed the plea of *res judicata* under the former absolvitor; and though it was urged by the pursuer of the second action, as in Gordon's case, that he did not represent his grandfather, who had never obtained access to the estate, the Court sustained the defence, holding the trial as to the right of succession to the estate, at the instance of the immediate heir for the time, to be conclusive against more remote or future heirs. These decisions did not relate to entailed estates; but, so far as regards this matter, we apprehend there is no distinction between heirs of entail called under a special destination and other heirs. The case of Maule *v.* Maule, 5th July 1831, 9 S. 876, and H. of L., 27th August 1833, 6 W. & S. 586, related to an entailed estate; and, although the case was a circumstantial one, the general doctrine was on all hands recognised.

Cases may be figured which might give rise to questions of difficulty. If a remote substitute were to raise a declarator of contravention against the heir in possession, it is possible that the judgment in such a case might not be binding on prior substitutes, whatever effect it might have in any question with the pursuer or parties claiming under him. Or, to put the converse case, if the heir of entail in possession were to

raise a declarator of freedom from the fetters directed against a remote heir, without calling the prior existing substitutes next in the order of succession, it is possible that the decision given in such a case might not be effectual against these prior heirs.

No such difficulties present themselves here. For the judgment was obtained in an action raised by the marriage-contract trustees on behalf of the heirs of the marriage, who were the substitute heirs first called under the entail, against the fiar or heir in possession of the estate and his trustees; and we see no reason to doubt that this judgment is conclusive in any future question relating to the same matter, between substitute heirs who are heirs of the marriage on the one hand, and the heir of entail in possession of the estate for the time on the other.

Being of opinion that the plea of *res judicata* is well founded, we consider it unnecessary to answer the other questions raised, none of which can be gone into if the plea of *res judicata* shall be sustained.

LORDS IVORY, DEAS, and NEAVES.—We are of opinion, upon the first question proposed to us, that the plea of *res judicata* stated in defence to the action ought to be sustained.

The plea of *res judicata* holds good where there has been a previous judgment respecting the same subject or matter, on the same grounds, and, as Mr. Erskine says, "between the same parties or their ancestors or authors," or, as Lord Stair expresses it, "their predecessors or authors."

In this case there is a decree in a former action deciding that the entail now in question was a good entail, and that the objection now stated to it, founded on the discrepancy in the names of the lands, was not a good objection, and setting aside as *ultra vires* a conveyance of the lands which the heir then infeft or in possession had granted for the benefit of creditors. The subject or matter of that decree, therefore, was the same with that which is now at issue; the same points were raised and decided; and, in particular, the same determination was given as that which the present defenders seek to obtain, as to the heir's want of power to deal with the lands as held in fee-simple.

The only remaining question, therefore, is as to the identity of the parties in the former case and in the present. Was the former decree pronounced between the same parties or their predecessors, ancestors, or authors?

The validity of the entail was then maintained by the Messrs. Thornton, as trustees named in Lord Balgonie's contract of marriage, being the parties at whose instance, during the subsistence of the marriage, execution was appointed to pass for implement of the obligations in favour of Lady Balgonie and the issue of the marriage; and the action was insisted in for giving effect to the entail which was a part of the contract of marriage, and so as to protect the interests of the heirs procreated or to be procreated of the marriage in the order pointed out by the deed of entail. The action was directed, and decree was obtained against Lord Leven, the entailer, and Lord Balgonie, the institute then infeft in the estate, and their trustees.

We think it may be held that the present defenders, Lady Elizabeth Cartwright and others, were directly parties in obtaining that decree, as being issue of the [1062] marriage, though they are the grandchildren and not the children of Lord Balgonie. But be that as it may, the late Lord Leven, their father, the original pursuer of the present action, was clearly a party to the decree, as the eldest son of the marriage, and so represented by the Thorntons, the pursuers of the former action.

We are of opinion, that in a question as to the validity of an entail where no specialty arises, a decision obtained by one heir-substitute or expectant, establishing the validity of the entail, is a good decision in favour of any subsequent heir-substitute or expectant, and that in this respect the first heir is the predecessor, ancestor, or author of the succeeding one. Let it be supposed that the former action had been tried and determined at the instance of the late Lord Leven himself against his father and grandfather, and that after he had got decree he had died, predeceasing his father, and leaving issue, we cannot doubt that such issue would have had the benefit of the decree which their father had so obtained, and this whether they represented him as to payment of ordinary debts or not. They would succeed to him as their predecessor, ancestor, or author, in respect of his being the party through whose blood and propinquity, under the destination, they derive their right of succession.

On this ground, we are of opinion that it must be held that the decree there

pronounced as to the validity of this entail was obtained, if not by the present defenders themselves, yet at least by their predecessor, ancestor, or author.

On the other hand, the decree which was obtained against Lord Balgonie and his trustees was in our opinion a decree against the predecessor, ancestor, or author of the late Lord Leven. We think that Lord Balgonie, as the heir then infeft, was the predecessor, ancestor, or author of his son the late Earl, who was the original pursuer of the present action, and who is still pursuing it through his trustees, and pursuing it on the same grounds which were there maintained by his father Lord Balgonie and his trustees.

Reference may here be made to the cases of Gordon *v.* Ogilvie, 2 Patton, App. p. 61, and Rutherford *v.* Nisbet, 11 Sh. p. 123, as important illustrations of the law on the subject. Those cases did not relate to entailed estates, but in this matter there seems no good distinction between heirs of entail and other heirs. The material point is that, as fixed in the cases referred to, the heir for the time represents all who afterwards succeed him as far as regards the question of *res judicata*, whether they represent him otherwise or not.

The former decree, therefore, now pleaded as *res judicata*, was a decree respecting the same matter, and litigated upon the same grounds as the present action, and between the several predecessors, ancestors, or authors of the same parties who are litigating here.

It is clearly of no consequence that the parties there maintaining the entail were pursuers, and that here they are defenders. The forms of procedure admit of such a question being raised in either way, and if the question is fairly tried and duly decided, the effect is the same in both cases.

Neither is it of any consequence that the late Lord Leven may be considered to have been a party to the former action on both sides, as being represented on the one hand by the Thorntons as pursuers, and as now representing, on the other hand, his father, Lord Balgonie, who was a defender. This circumstance, if it does not strengthen, can certainly not weaken the effect of the former decree. Take the simple case of the heir in possession litigating as to the validity of the entail with the next substitute, and a decree given finding the entail to be valid, it seems impossible to hold that the substitute who thus obtains this decree can immediately, upon his own succession, be allowed to repudiate it, and, on the very grounds formerly debated, maintain the invalidity of the entail against the new substitute who comes next after himself. A decree of that kind, in such a litigation, seems, as already said, to be a decree in favour of every succeeding heir-substitute against every succeeding heir in possession. If this were not so, the plea of *res judicata* would scarcely be available as to entails at all, and there would be little or no limit to the perpetual revival and litigation of the same question, however often decided.

It is clear that there is no specialty here as to the position of Lord Balgonie and that of the late Lord Leven. If Lord Balgonie was well fettered, and could not grant a conveyance even to his creditors, the late Lord Leven was fettered **[1063]** also, and had as little, if not even less, power to grant a gratuitous conveyance.

If it were of any moment, it might be observed that the late Lord Leven is expressly admitted, in the record in this cause, to represent his father and grandfather. It is certainly not immaterial to notice, that when the late Lord Leven came to make up his title to his father Lord Balgonie, the retour of his service specially set forth the former decree as a step in his progress, and as removing out of the way the infeftment of Lord Balgonie's trustees, which had been reduced. The title of the late Lord to the lands came thus to be based upon the old decree, and upon the established identity of the lands of Monymail and the lands of Melville, being the very point that is now sought to be disputed. If, by any possibility, the late Lord could have repudiated the former proceedings, whether on his own part or on the part of his father Lord Balgonie, the course thus followed seems to be a complete bar to such an attempt, and to amount to a full adoption of the decree as a good decree for and against the several heirs for their respective interests, and as an integral part of the title and tenure of the entailed estate.

Being of opinion, on these grounds, that the plea of *res judicata* ought to be sustained, and understanding that this opinion is likely to be adopted by the Court at large, we think it unnecessary, and even incompetent, to proceed to answer the other questions

put to the consulted Judges, which it would only be important to consider upon the assumption that the plea of *res judicata* was to be repelled.

LORD NEAVES.—Upon a reconsideration of this case, with the advantage of additional argument and consultation with my brethren, I have come to adopt the views expressed in the above joint opinion, to which I have given my concurrence along with Lords Ivory and Deas.

LORD CURRIEHILL.—In order to decide the question, whether the plea of *res judicata*, stated in defence to the present action, ought to be sustained or repelled, it is necessary, in the first place, to attend to what was adjudged between the pursuers and the defenders of the former action; and then to inquire whether it is the same thing which we are called upon to adjudge in the present action, and whether the parties to the present action are to be held as being identified with those who were the parties to the former one.

The former action was instituted in 1801, at the instance of Messrs. Samuel, Robert, and Henry Thornton, on behalf of the issue of the marriage between the then Lord and Lady Balgonie. Their title to sue that action consisted of a provision in the marriage-contract between Lord and Lady Balgonie, that during the subsistence of their marriage, execution should pass at the instance of these gentlemen for implement of the provisions in the contract in favour of that issue. The defenders were Lord Balgonie, who was then vested with the fee of the lands, lordship, and barony of Melville, which formed the subjects in dispute, and likewise his father, the then Earl of Leven, who was liferenter of that estate, and certain trustees to whom the estate had been conveyed by Lord Balgonie and his father, in order that the same might be sold for payment of debts then owing by them, and that the residue should be accounted for to them. The conclusions of that action were generally—1st, That the estate should be found to be effectually entailed by a deed of entail which had been executed in 1784, simultaneously with, and as part of, the marriage-contract between Lord and Lady Balgonie; and, 2d, That the trust-conveyances I have just mentioned ought to be reduced and declared to be null and void. The reasons of reduction, *inter alia*, were, that the granting of these trust-deeds was *ultra vires* of the granters, in respect that the subjects were, by the deed of entail of 1784, "strictly entailed, and the sale, dilapidation, or burdening thereof, strictly guarded against, by the clauses prohibitory, irritant, and resolutive," therein contained. Appearance was made in that action by William Keith, accountant (the only accepting and acting trustee), as representing Lord Balgonie and his father, and the creditors for whose behoof, in the first instance, the trust was granted. The import of the defence, as stated in the printed information for the defender, was, that "as no mention is made in the dispositive clause of the lands, lordship, and estate of Melville, and as the meaning of these terms is not distinctly explained in any other clause in the deed, the defenders apprehend that the entail must be perfectly void and ineffectual."

The parties joined issue on the question which was thus raised, both in the rea- [1064] -sons of reduction and in the defence. That question was fully and fairly argued, as appears from the printed pleadings. The result was, that by decree, dated 4th December 1801, the Court did "sustain the reasons of reduction of the two trust-deeds and infeftment challenged, in so far as they concern the lands, lordship, and barony of Melville or Monymail, and lands of Utherogill as libelled, and to the effect libelled" (under a certain reservation as to Utherogill), "and reduce, decern, and declare accordingly." And on 27th February 1802, certain parcels of land called Pitcontie and Muirfield were found to be parts of the lands and lordship of Melville and Monymail, and the decree was repeated as to them. The question now is, do these decrees support the defence of *res judicata* stated against the present action?

In order to clear the way for the consideration of this question, let us first of all see clearly how far these decrees would have operated as *res judicata* among those who were the immediate and actual parties to the action. And, 1st, It was settled definitively by these judgments, that the trust-deeds were nullities in questions among the parties. 2d, There is more difficulty in the question, whether or not it was farther decided definitively, as among these parties, that abstractly the entail was effectual, and in particular, that the fetters were effectually applied to the estate, not-

withstanding its having been described in the fettering clauses of the deed only by the general denomination of the lands, lordship, and barony of Melville; while in the dispositive clause of that deed, the parcels of which it consisted were described only by their special names. What gives rise to this difficulty is, that although the summons concluded for a decree of declarator to that effect, the decrees which were pronounced appear to have disposed only of the reductive conclusion, and to have left the separate declaratory conclusions undisposed of. It is maintained by the present defenders, that the word "declare" in the judgments of 1801 and 1802, should be read as applying to these declaratory conclusions. I cannot so read the decrees. According to the established and technical form and style of a summons of reduction, it concludes not only for reduction of the deeds under challenge, but likewise for a declarator that they are null and void. I think that the decrees of 1801 and 1802,—by reducing the deeds under challenge, and decerning and declaring accordingly,—merely pronounced decree of reduction and declarator of nullity of the deeds, in the usual form, and left the separate declaratory conclusions undisposed of. But although this was the case, I think that the question, even under the conclusion for reduction itself, was brought to the issue whether or not the fetters of the entail were effectually applied to the lands in question, notwithstanding their being described by different names in the dispositive, and in the fettering clauses in the deed of entail. I have quoted the terms of the reasons of reduction stated by the pursuers, and also the terms of the defence pleaded by the defenders, in order to show that the Court was called upon to adjudicate that question between the parties, as being truly the question upon which the validity of the trust-deeds depended. And, accordingly, the Court, by expressly sustaining the reasons of reduction, adjudicated upon that question. It also did so by not sustaining the defence which was pleaded, as above mentioned. If that defence had been sustained, the judgments would have operated as *res judicata* of the matter so decided in favour of the defenders, according to the principle of the case of the Marquis of Huntly, 9th January 1858; and by not sustaining that defence (for that must be held to be implied, although not expressed) the judgments operated as *res judicata* against them.

I therefore think, that if any other litigation had arisen among the immediate parties to that action depending upon the validity of that entail, these judgments would have supported a plea of *res judicata* in favour of the parties by whom, or for whose behoof, it was obtained, against the parties who were opposed to them. For example, if Lord Balgonie had afterwards contravened the tailzie by not using the name and arms thereby prescribed, and an action of declarator of forfeiture had been instituted against him by, or on behalf of, any heir of entail who was of the issue of the marriage, and his Lordship had pleaded the same defence as that which had been unsuccessfully urged on his behalf in the reduction, that defence would have been barred by the plea of *res judicata*. The same plea would have excluded any such defence by him in an action of declarator of forfeiture against him for any other contravention of the conditions of the entail, such as alienating the estate, or contracting debt for which the estate was adjudged. In like **[1065]** manner, if those creditors of Lord Balgonie, for whose behoof the trust was constituted, and who had acceded to it, had afterwards sued for adjudication of the estate for the debts owing to them, on the ground that these lands were not sufficiently identified with those set forth in the fettering clause, I think that such a plea would have been excluded by the judgments in question, which would have been held to have been pronounced against all these creditors, through Mr. Keith, as trustee for them.

On the other hand, however, I am not prepared to hold, that if other third parties, as singular successors, had acquired rights to the estate from or through Lord Balgonie, the plea of *res judicata* could have been pleaded against them; because an entail may be pleadable against and binding upon an heir of entail, and those succeeding to him, and yet not be pleadable against, nor be binding upon, the singular successors of such parties. This is indeed exemplified by a provision in the statute 1685, cap. 22, itself. And if Lord Balgonie had contracted debts to other parties subsequent to 1802; and if these creditors had adjudged the estate, and maintained their adjudication on the ground that the fetters of the entail of 1784 were not effectually applied to the subjects, would such parties have been held to be excluded from doing so by a plea of *res judicata* founded on the decrees of 1801 and 1802, although they had not been parties to these

decrees? Would not such creditors have been entitled to plead, that if they could show that, according to the legal construction of the only entail of the estate which appears in either the Register of Entails or the Register of Sasines, no fetters were effectually applied to it, that estate could not be protected from the diligence of its owner's creditors, although, in some former question between a predecessor of that owner and a different set of creditors a judgment to that effect had been pronounced? Or if a conveyance of the estate to an onerous disponee had been granted by Lord Balgonie, and the purchaser's right had been challenged as being a contravention of the entail, would the purchaser have been precluded from supporting his right as having been derived from a fee-simple proprietor, by judgments pronounced in a case to which he had not been a party? Or would even a gratuitous disponee of Lord Balgonie have been so precluded from defending his right? In all such questions with third parties acquiring a right to the estate by singular titles, would not the former judgment have been dealt with as *res inter alios acta et judicata?* Or would it have been held that the estate, although it could be shown to be truly held by a fee-simple title, was nevertheless to be dealt with in all future time as being effectually entailed in questions with creditors or disponees, merely because at some former time in a question between some of the substitute heirs of entail and the institute and his creditors, a judgment to that effect had been pronounced? I am not prepared to find that the plea of *res judicata* could be maintained to that effect in questions with such third parties.

Having thus seen how far, in my opinion, the judgments in the former action operated as *res judicata* between those who were the immediate parties thereto, I proceed to consider how far they have the same effect between the parties to the present action in reference to what is now sought to be adjudicated. And here the first inquiry is, whether both the parties who are now pleading on these judgments, and also those against whom they are pleaded, are to be held the same as those in favour of whom, and against whom respectively, they were pronounced? Unless this be the case, the plea of *res judicata* would be effectually met by the counter plea of *res inter alios acta et judicata.*

The parties in whose favour these judgments were pronounced were Messrs. Thornton, who were the pursuers of the former action. The parties who are now founding upon them are four daughters of the late David Earl of Leven, the original pursuer of this action. And how are these parties said to be identified? The answers which the defenders make to the question are, first, that the judgments were truly pronounced for behoof of parties who were at the time substitute heirs of entail, and that in law judgments pronounced for or against parties who are in that predicament, regarding the rights arising under the entail, are pleadable by and against the other substitute heirs of entail; and, secondly, that at all events these judgments, which were pronounced in favour of Messrs. Thornton for behoof expressly of the issue of the marriage between Lord and Lady Balgonie, are pleadable by the parties who are now maintaining this defence, being four grand- **[1066]** -daughters of that marriage. I do not adopt the former of these answers. Messrs. Thornton, in suing the original action, were not the representatives of all the substitute heirs of entail *in esse* and *in posse.* The heirs of entail who are now existing, and who are called as defenders in this action, consist of a multitude of persons, and include all the members of a number of different families; and, excepting such of them as are issue of the marriage between Lord and Lady Balgonie above mentioned, none of them were represented by Messrs. Thornton in the former action. The summons in that action expressly bears to be sued by Messrs. Thornton on behalf of such issue, and concludes that they, on behalf of such issue, should be reponed and restored against the deed under challenge. If, therefore, the parties who have appeared to plead this defence of *res judicata* were any of the defenders who are not issue of that marriage, I do not think they could plead that they, through Messrs. Thornton, were parties to the former action, or that the judgments therein were pronounced in their favour. It is said that the case is the same as it would have been if the pursuers of the former action had been themselves substitute heirs of entail, and that in that case these substitutes would have represented all the other substitutes, whether *in esse* or *in posse.* I doubt much whether the case is the same as it would have been if the reduction had been sued directly by heirs of entail then existing. But apart from this, I do not think they would have represented all the other heirs of entail then existing and to come into existence in future generations.

Although every substitute heir of entail, however remote he may be in the order of succession, has not only a *spes successionis*, but likewise a *jus crediti*, which entitles him to challenge contraventions of the conditions of the entail; yet such a substitute, when he exercises that right, does so only for behoof of himself individually, and not as representing all the other heirs of entail. He is not, like the heir in possession of the estate, the legal administrator of it, whose acts of administration, whether judicial or extrajudicial, except in so far as prohibited by the entail, are binding upon his successors in the estate. He is merely one of a body of persons, each of whom, in his own right individually, has a *jus crediti* against the heir in possession, and his judicial proceedings as such creditor are not binding upon the other creditors. For example, in the case of Dundas *v.* Murray, 29th Nov. 1770, a party who was only the twenty-fifth in the order of succession, under the destination in an entail, was found to have a legal title to sue a challenge of an alleged deed of contravention of an entail; but had he failed in that challenge the decree of absolvitor would not have extinguished the separate right of all and each of the twenty-four nearer heirs, or even of those still more remote, from challenging the contravention. Lord Kames in his Elucidations (p. 183) thus states the law:—"An absolvitor in a process of irritancy, carried on against a tenant in entail by the immediate substitute, will not, after that substitute's death, bar a new process upon the same facts carried on by the substitute next in order." And he adds that "this is one of the many hardships a tenant in entail is subjected to."

But even assuming that the defenders would not have been entitled to avail themselves of the judgments in question, if they had not belonged to that class of heirs of entail who are issue of the marriage between Lord and Lady Balgonie, I am of opinion that, as they do belong to that class, they are entitled to do so. Messrs. Thornton, by the conditions of the contract of marriage, were, during the subsistence of the marriage, entitled to enforce implement of the provisions contained in that contract in favour of all the issue of the marriage, whether *nati* or *nascituri*. And, according to the terms of the contract and the relative deed of entail, the *jus crediti* created by the latter was included among the provisions under the contract in favour of all such heirs of entail as should be issue of that marriage. I therefore think that the four ladies who are pleading this defence are to be dealt with as parties in favour of whom, through Messrs. Thornton, the judgments in question were pronounced.

In the next place, I likewise think that the Earl of Leven, who instituted the present action, was, as the heir of Lord Balgonie, his father, and as his successor in the estate, to be held as a party against whom the judgments in question were pronounced. Lord Balgonie was the owner—the *verus dominus*—of the estate, and its legal administrator, although his right was restricted by the *jus crediti* which was created in favour of the substitute heirs of entail. The proprietor for **[1067]** the time of an estate, however strictly entailed, is acting within his powers when he sues or defends actions affecting the estate; and judgments pronounced for or against him in such actions may be founded upon as *res judicata*, not only by or against himself, but likewise by or against those who succeed to him as heirs of entail.—*Vide* Maule, 5th July 1831, and Marquis of Huntly, 9th January 1858. Lord Balgonie was so represented by his eldest son, the late Earl of Leven, who instituted the present action, and against whom, therefore, and those who have since sisted themselves as pursuers in his place, the judgments pronounced against his predecessor are pleadable. And although he, as a child of the marriage between Lord and Lady Balgonie, was one of the parties for whose behoof that judgment was obtained, that circumstance does not destroy nor diminish the legal effect of the judgments as *res judicata* against him as representing his predecessor. No doubt the application of the principle of representation to such a case is attended with the peculiarity that the heir, besides having that character, is likewise the creditor of the deceased. But this does not interfere with the operation of the principle of representation as to all proceedings which are within the power of the owner for the time.

It only remains to ascertain whether, or how far, what is now sought to be adjudged in this action is the same with what was adjudged in the former action? This is to be ascertained by comparing the judgments in the former action with the conclusions of the summons in the present case. There are two different sets of conclusions in this summons, and it is of importance to discriminate between them in considering this question. By the first set of conclusions it is sought to be found and declared that the

prohibitory, irritant, and resolutive clauses contained in the deed of entail of 1784, and investitures following thereon, were not thereby applied to the estate in dispute; and that that estate is not thereby validly entailed in terms of the statute 1685, c. 22, and 11 & 12 Victoria, c. 36. And by the other set of conclusions, it is sought to be found and declared that that estate is and shall be "subject to the acts, deeds, and debts of the pursuer and his successors, and may be lawfully alienated, burdened, affected, or disposed of, onerously or gratuitously by his or their deeds, *inter vivos* or *mortis causa*, at pleasure," as being held in fee-simple; and that "all dispositions, or other deeds of alienation or conveyance, onerous or gratuitous, redeemable or irredeemable, and all tacks, fee-rights, or other writing which have been, or may be made or granted by the pursuer or his successors in the said lands and others, are and shall be valid to the granters or receivers, as if the said disposition and pretended entail and investitures thereon had not contained any prohibition or conditions, clauses irritant and resolutive." Are then both, or either of these two sets of conclusions, barred by the defence of *res judicata?*

I am of opinion that, as to the former, this question should be answered in the affirmative. The object of that set of conclusions is to have it adjudged that the right, which was vested in the original pursuer, the late Earl of Leven himself, as heir of tailzie and provision to his father (the Lord Balgonie already mentioned), had not been effectually restricted in terms of the statute 1685, but was a fee-simple, in respect of the alleged discrepancy in the descriptions of the subjects in the dispositive and in the fettering clauses of the deed of entail. I think, on the grounds I have already stated, not only that, in a question between the pursuers of the action in which these judgments were pronounced and Lord Balgonie, it was definitively adjudged, that notwithstanding the difference in these two descriptions of the estate, it was effectually entailed; but likewise that these judgments are pleadable on the one hand by the defenders in the present action, as having been, in effect, parties in whose favour they were pronounced; and that, on the other, they are pleadable against the original pursuer, as having been the heir and representative in the estate itself, of one of the parties against whom they were pronounced. If an action of declarator of irritancy, or forfeiture of the late Lord Leven's right, had been sued against him by the present defenders, in respect of the estate having been adjudged for debts contracted by him, or of part of it having been alienated by him, or of his having failed to use the name and arms prescribed by the deed of entail, or any other ground,—I think that, as the successor and representative of his father in the estate, he would have been barred, just as his father would have been, by this plea of *res judicata*, from resisting the demand, **[1068]** on the ground that the fetters of the entail had not been effectually imposed on his right to the subjects. I farther think that the plea is equally available against the parties who have sisted themselves as pursuers in place of his Lordship, in so far as they are insisting on the conclusions I am now dealing with, for declaring the nature of the right which was vested in the person of his Lordship himself. To that extent and effect I am of opinion that the defence of *res judicata* ought to be sustained. No question is raised in this action as to any right which they may have derived from his Lordship as disponee or otherways.

It is quite a different matter whether this defence ought to be sustained as barring the question raised by the other set of conclusions, the object of which is to have the validity declared of rights which might be acquired by third parties,—as adjudging creditors of the estate, or as disponees thereof, or otherwise. As already stated, an entail, although it be binding on the heirs of entail themselves, may, in certain circumstances, not be effectual against such third parties. And the question I am now dealing with is, was it effectually adjudged in the action at the instance of Messrs. Thornton that rights so acquired by third parties would not be effectual? There is certainly no direct finding to that effect in these judgments. Although it was therein adjudged that the two special trust-conveyances to Mr. Keith and others were null and void, there was no such finding as to rights which might be acquired by other third parties, either judicially or extrajudicially. Even if there had been such an abstract finding as to rights to be so acquired by other third parties, I do not see how they could have been of any effect against such third parties who were not parties to the action in which they were pronounced, for as to them such a judgment would have been *res inter alios acta*. It appears to me that a party acquiring right to an estate by

conveyances, judicial or extrajudicial, could not be held to be barred from supporting that right upon its own merits, merely because some other party with whom he has no connection, had failed to support some other right which he had obtained to the estate. The judgment in the one case, however available it might be as a precedent in the other, would still be *res inter alios*, and consequently would not support a plea of *res judicata*. Hence the former judgments, in so far as they merely reduced the trust-deeds granted to Mr. Keith and others, and declared them to be null and void, would not be available as *res judicata* against third parties, the grantees or receivers of entirely different rights. This would have been the case even if a finding against the validity of such rights to third parties had been contained in the former judgments. But, as I have already stated, they contain no such finding. And thus, to this extent, what is now sought to be adjudged in the present action not only could not have been effectually adjudged in the former action, but *de facto* was not adjudged at all in that action. I therefore think that the defence of *res judicata* ought not to be sustained as to the set of conclusions I am now dealing with.

I abstain from stating my opinion on the other questions put to the consulted Judges; and I do so for two reasons. One is, that as a majority of all the Judges are of opinion that the defence of *res judicata* should be sustained without qualification, the case will of course be decided upon that ground.

The other is, that although I think that defence ought not to be sustained as to the latter set of conclusions, it appears to me that, even supposing I am right in that opinion, the result would be that the action, *quoad* these conclusions, would fall to be dismissed on a different ground. On that assumption, a decree in terms of these abstract conclusions would be of no avail, as these conclusions are not made to apply to any actual transaction or dispute, and a decree disposing of them in this action would itself be *res inter alios acta* in any future question with third parties. The demand for such a decree in this action is in effect therefore nothing more than a consultation of the Court by the pursuer as to a matter on which we cannot give a judgment which would have any practical effect. And this being the case, I think that, *quoad* the latter conclusion, the action ought to be dismissed without any decision whatever on the merits. The cases of Murray, 21st May 1833, and the Earl of Galloway, 26th June 1838, are precedents for so dealing with such judicial consultations.

At advising,—

Lord Wood.—When the case was first heard in this Division, upon the defence [1069] of *res judicata*, I was satisfied that that defence was well founded. On further consideration, and assisted by additional argument, I have seen no reason to alter that opinion.

Having regard to the opinions of the consulted Judges, in which I generally concur, I shall abstain from any introductory statement of facts, which is thereby rendered unnecessary.

Assuming the identity of the question in the original process, and in this process, to be clear, and that that question was decided in the former by its being there found that the deed of entail of 1784 was a valid entail, in terms of the Act, as regarded the same lands which the present summons concludes to have it found are not effectually entailed,—assuming this, it appears to me that it would be difficult to arrive at any other result than that the defence of *res judicata* to the present action is good; without its being substantially involved that, in questions as to the validity of an entail, the plea of *res judicata* is inadmissible to exclude the same point being again raised for decision at any time by an heir of entail, in the course of the descent of the estate, if only the parties litigant are individually not the same, or even where one of them is individually and personally the same, and whose position is only reversed, by craving the Court now to find that an entail is bad, which he had formerly craved the Court to find—and which the Court did find—to be a binding and effectual entail, whereby his succession to the entailed estate was secured.

But in considering the merits of the plea of *res judicata*, it is not, I conceive, the individuality of the parties in litigation that is to be regarded, but the identity of the question involved, and by and for whom, or what class of persons, it was on either side maintained in the original suit, and is again put in issue in the depending action. Although the parties to the second action be not individually the same as those to the

first, it is sufficient if the former represent, or are represented by, the latter, which, agreeably to undoubted law, may be the case by representation in the particular estate as to which the question arises without representation generally or universally. If so, then in law the parties are the same, and the question of the validity of the entail must be held to have been thus far settled conclusively in the original suit, that—to a depending action raised by an heir of entail, who was represented in the original suit, to have it at his instance declared and found that the entail is not a valid entail in terms of the Act 1685, and that he holds the lands as a fee-simple—*res judicata* will be a good defence, although, as individuals, the parties may be different.

How then and in what circumstances did the former action arise? What was the question raised and decided in it, and by and for whom was it litigated?

The entail of 1784 was part and parcel of the marriage-contract, of the same date, between Lord Balgonie and Miss Jane Thornton. So says the contract which was made by David, the then Earl of Leven, with consent of his son Alexander Lord Balgonie; and so says the entail which was executed by the same parties, of even date with the contract. Then, that the entail was to be a strict entail of the lands intended to be fettered, containing all the cardinal prohibitions duly fenced, is certain. It is proved by the terms of the deed itself, as framed in implement of the marriage-contract obligations, by which, *inter alia*, "the said David Earl of Leven, and Alexander Lord Balgonie, bind and oblige them and their foresaids, neither to do any act nor grant any deed which may anywise prejudge or disappoint the succession of the issue of this marriage to the said lands and others, according as the same is settled by the destination contained in the disposition above mentioned."

By the entail the lands therein contained (so far as now in dispute) were conveyed, subject to the usual fetters of a strict entail, to and in favour of Lord Balgonie and the eldest and other sons to be procreated of the intended marriage in their order, and the heirs whatsoever of the bodies of such eldest and other sons; whom failing, to a series of other substitutes; whom failing, to the heirs whatsoever of the said marriage with the said Miss Jane Thornton.

The entail was duly recorded, and a feudal title was completed upon it in the person of Lord Balgonie, by charter under the Great Seal, and infeftment thereon followed, dated 23d April 1785, and in virtue of that title he possessed the estates till his death.

[1070] Now, referring to the opinion of the consulted Judges for details, it is obvious that the trust-deeds, granted by Lord Leven and Lord Balgonie in 1799 and 1800 to trustees for behoof of their creditors and payment of their debts, the reversion, if any, to be accounted for to the granters—upon the first of which deeds infeftment passed, and to both of which there was a large accession of creditors—were totally inconsistent with, and if carried into effect would have been subversive of the interests created by the marriage-contract and relative entail in favour of the issue of the marriage, and the other substitute heirs; and that consequently if these interests were not to be allowed to be defeated, it was essential that some one should judicially interpose for their protection, who had right and title to do so.

In this state of matters, and for that purpose, the former action was instituted by the Messrs. Thornton, at whose instance, or either of them, it was by the contract of marriage agreed that, "during the subsistence of the marriage, all execution shall pass hereupon for implement of the several obligations conceived in favour of the said Miss Jane Thornton, and the issue of the said marriage." The summons accordingly bears to be sued by the Messrs. Thornton, as trustees so appointed, and to have been brought in behalf of the heirs procreated and to be procreated of the said marriage.

To that action there were called as defenders the Earl of Leven and his son Lord Balgonie, and the trustees under the trust-deeds. And the action concluded for declarator of the validity of the entail, and also for the reasons there set forth (the basis of all which is the efficacy of the deed as constituting a strict entail of the particular lands libelled), for reduction of the trust-deeds, as granted in violation alike of the obligation of the contract of marriage, and of the entail executed in implement thereof, and by which it was contended that the rights of the heirs of entail were effectually secured, not only against the voluntary or gratuitous acts and deeds of the Earl of Leven or Lord Balgonie, but also against the deeds which they had granted in favour of their creditors, and any rights which it might be maintained had by these creditors been thereby obtained. To defend the action there appeared William Keith, accountant

in Edinburgh, the trustee under the second trust-deed, on whom all the rights of the trustees under the first had devolved, and who stood in their room and place with fuller powers. Mr. Keith gave in defences and other pleadings, as "trustee for the Right Honourable David Earl of Leven, and the Right Honourable Lord Balgonie, eldest son of the said Earl, and their creditors, defenders," and in that character litigated the case throughout.

It will be observed, that the question which by the conclusions of the action was involved, and on which the parties joined issue, was not whether the lands said to be entailed were entailed to this or that extent, or to any extent short of being strictly entailed, in terms of the Act 1685, but whether they were entailed in terms of that Act, as respects all the cardinal prohibitions. Any other than that the question could not be, because the formal sufficiency of the prohibitory, irritant, and resolutive clauses were beyond all controversy, and accordingly was not disputed. Holding these clauses to be aptly framed, the question as to the validity of the entail depended on, whether the clauses were or were not applied to the lordship and barony of Monymail, and the lands of Pitcontie and Muirfield, said to lie within the lordship of Monymail, being the lands alleged to be effectually entailed; the contention being by the pursuers, on the one hand, that they were so applied; and by the defenders, on the other, that they were not so applied; while, *ex concessis* of the defenders, if the fettering clauses were applied to the lands in dispute, then these lands were validly entailed.

Now there can be no denial that that action, issued in judgments in favour of the pursuers as to certain of the lands there mentioned, and which lands are the same as those contained in the summons in the present action. Some discussion indeed there was, whether the judgments imported a decree in terms of the declaratory conclusions of the libel, or applied only to the reductive conclusions,—a point which seems to me to be wholly immaterial; for, having regard to the grounds or reasons of reduction, and to the terms of the judgments, it admits of no doubt that the positive validity of the entail, as an entail well made in terms of the Act 1685 (and therefore effectual to exclude the deeds granted in contravention thereof, to the defeasance of the rights of the parties thereby called to the succession), was fully recognised and decreed. At the same time, I may say that I agree with those [1071] of the consulted Judges, who are not disposed to accept the present pursuers' reading of the judgments, that they do not apply to the declaratory conclusions of the action.

Such having been the result of the litigation, the original pursuer, the late Lord Leven, in accordance therewith, and taking the benefit thereof on the death of his father Lord Balgonie, who had, previous to that event, become Earl of Leven, made up titles to the estates as heir of tailzie and provision to his father in 1820. The terms of the retour of his service are quoted in the opinion of Lord Curriehill, and I abstain from repeating them.

With regard again to the present action, it was raised by the late Lord Leven against Lady Elizabeth Melville or Cartwright, his eldest daughter, and her three younger sisters, who are issue of the marriage with Miss Thornton, for whom alone defences have been lodged, and the other substitute heirs of entail; and its object is to have it found that the lands embraced by its conclusions are not entailed by the deed of entail 1784, and were held by the late Lord Leven, the original pursuer, in fee-simple: the result of which, if the action were successful in its conclusions, would be this, that the lands would be well disposed of, to the disappointment of the rights of the issue of the marriage, by the disposition and settlement executed by the late Lord Leven in 1857, in favour of the trustees therein named, and for the purposes there set forth, and who have since the late Lord Leven's death been sisted as pursuers in his room and place. The ground on which the invalidity of the entail is maintained is precisely the same as that on which, by the defenders in the previous process, it was maintained, but unsuccessfully, that these lands were not validly entailed. On the other hand, the defenders in the present action—in addition to the plea of *res judicata* in bar—maintain, on the merits, the validity of the entail, on precisely the same grounds as it was maintained, and successfully maintained, by the pursuers, the Messrs. Thornton, in the previous action; and in conformity to which contention the trust-deeds executed in contravention of the entail were reduced and set aside, and the lands left to descend as entailed lands to the late Lord Leven.

But it being thus certain that the question in both processes is absolutely the same as regards the validity of the entail 1784 (although it is true that in the former its effect as against the trust-deeds there libelled was in issue, while in the present action no matter of that kind is specifically in issue), and that it was deliberately decided in the former action, that the entail was a valid entail—the point now to be determined is, ought the defence to the present action of *res judicata* to be sustained, or is there any ground for holding that it ought to be repelled, and the question of the validity of the entail as to the lands, now contended to be unfettered, again tried upon its merits?

The vindication of the rights which the heirs of entail might have in virtue of the entail—and, in particular, of the rights of the issue of the marriage—having become necessary, if they were not passively to be permitted to be extinguished, can any good reason be alleged for saying that the parties, who, by the former action, were brought into the field, were not the proper and sufficient parties for the trial and determination of the validity or not of the deed of entail.

Take, in the first place, the pursuers. Surely the individuals appointed by the marriage-contract were parties within whose competency it was, and who had a perfect title to institute proceedings for behoof of all the issue of the marriage *nati* or *nascituri*, and to insist, on their behalf, that the lands, which were considered to be well entailed in their favour, were well entailed, and consequently not only not affectable by voluntary or gratuitous deeds, but not affectable by the trust-deeds which had been granted for behoof of creditors; and that, so far as the lands were embraced by the trust-deeds, these deeds ought to be reduced. As it appears to me, the Messrs. Thornton were clearly the proper parties to do so, and would have been guilty of a dereliction of duty had they abstained from doing it. Therefore, by them, as pursuers of the original action, the issue of the marriage were in that action duly represented for any right or interest they might have under the entail; and the interests of the other substitute heirs being manifestly the same,—viz., the preservation of the lands,—they may, I conceive, be taken to have been also represented for their right and interest. But even were that doubtful, it would, for the purposes of the present question, be of no importance; because the late Lord Leven, [1072] by whom, as the original pursuer of the depending action (now insisted in by his trustees in order to support his voluntary disposition and settlement in contravention of the entail), the validity of the entail is attempted to be again brought *sub judice*, was one of the issue of the marriage, and, as the eldest son, the person directly interested in establishing the validity of the entail, and in the challenge of the trust-deeds. It was his right in the lands, as one of the issue of the marriage, that by these deeds would have been more immediately defeated, and in succession to him the right of the rest of the issue. Therefore, for him and them, at least, and their interests under the entail, the Messrs. Thornton were the proper parties to be the pursuers of the action which they brought, and by them, as pursuers, Lord Leven and the whole issue of the marriage were in that action duly represented. The action was, through the Messrs. Thornton, truly an action at the instance of Lord Leven, and of all the issue of the marriage *nati* or *nascituri*. Consequently, granting that the defenders, the daughters of the late Lord Leven, who found upon the judgments in the former action, the defence of *res judicata*, would not be entitled to so avail themselves of them, if they did not belong to the class of heirs of entail consisting of the issue of the marriage, in respect that they would then not have been represented in the action by the Messrs. Thornton, and so not parties to it; no such objection can be maintained against their doing so, seeing that the defenders do belong to that class, and, being of that class, were represented by the Messrs. Thornton.

Then, observe, in the next place, who were the defenders. It was not an action against a particular creditor or creditors having obtained securities on the entailed lands, which might have made a difference as respected the effect of the judgments to be pronounced accordingly. The parties concluded against were, as already stated, the then Earl of Leven and his son Lord Balgonie, the father of the late Lord Leven, both of them obligants in the contract of marriage—both of them granters of the deed of entail, and both of them granters of the trust-deeds. By the entail the right of the then Lord Leven in the estates had become that of a liferenter; while, by the same deed, and the feudal title completed in virtue of it by Lord Balgonie, he was the feudal proprietor of the entailed lands—the *verus dominus;* and, as such, in virtue of his proprietory

powers for the time, however strictly the estate might be entailed, entitled to sue and defend actions affecting the estates, so that, as observed by Lord Curriehill, "judgments pronounced for or against him in such actions may be founded upon as a *res judicata*, not only by or against himself, but likewise by or against those who succeed to the estate as heirs of entail to him."

Further, there were called as defenders to the action, the trustees in the trust-deeds; and, in particular, Mr. Keith, the acting trustee under the second deed, in whose favour the trustees under the first had devolved their rights, and who, on the one hand, represented the granters and all their rights and interests, and, on the other, the creditors for whose behoof the trust-deeds had been executed. The fact, however, no doubt is, that while the action was called against all these parties as defenders, they did not, each of them individually, appear to defend. The only party who appeared, and by whom the action was defended, was Mr. Keith, the trustee under the second trust-deed. But then he represented the rights and interests of all the other defenders. They were all representatively vested in Mr. Keith, and he had representatively both title and interest competently to appear in behalf of all of them. He, as has been before explained, did appear, and he did so without objection or interference by any party, and as their representative, and for the interests of all and each of them, defended the action throughout. The legal effect of the proceedings, therefore, is the same as it would have been had the then Lord Leven and Lord Balgonie personally appeared as defenders.

Such being the facts in reference to the original litigation, and the parties to it, I am at a loss to discover what other parties could have been made parties to it that would have rendered it more apt and fitting for the final adjudication of the question of the validity of the entail, which was thus brought forward for judgment, in whatever way that question was decided, whether it was for or against the validity of the entail. And hence, I cannot but arrive at the conclusion that, in the circumstances of the present action, as respects the parties to it, the judgments pronounced in the prior action must be attended with that effect, unless it is to be **[1073]** held that judgments, finding the validity of an entail between the proper parties to try the question at the time (and which would indisputably afford a good defence of *res judicata* in any question that might be raised in regard to the entail, between those who were individually parties to the suit), are, and can be of no binding efficacy as establishing its validity against succeeding heirs, or of any avail as founding a plea of *res judicata* in bar of its validity being again challenged by them on exactly the same grounds. But that is a proposition which, I venture to think, is not maintainable; and yet, as far as I can see, there is no other position which can be taken by the pursuers of the present action. For how does the matter stand when you come to look at that action, which is one of declarator of liberation from all entail fetters of the lands libelled, and to have it found and declared that these lands are not validly entailed, and were held as in fee-simple?

The present action, as already stated, has been instituted by the late Lord Leven, one of the issue of the marriage between his father, Lord Balgonie, and Miss Thornton, he having been the eldest son of that marriage, against, as defenders, the four ladies, his daughters, who, although a step removed, are also of the class of issue of the marriage, and the other heirs substitute to whom the lands were conveyed by the entail executed in implement of the marriage-contract obligations; and this upon identically the same grounds on which, in the former action, it was contended that the lands were not subject to any entail fetters, and which in that action were repelled as unsound. Thus the question in the two actions differs not in its nature and substance, but only in its form—the one having been raised in behalf of the late Lord Leven, and the issue of the marriage, in order to have the entail found to be valid, and which it was found to be—and the other having been raised by Lord Leven to have it found to be invalid. But this difference in form can make no distinction in principle, as regards the plea of *res judicata*. Then the late Lord Leven, the original pursuer of the present action (and his death, and the sisting in his stead of the trustees under his trust-disposition and settlement, does not affect the case), was, at the date of the action, the heir in possession, as heir of entail of the lands libelled. He was the *verus dominus*, just as Mr. Keith, the defender—who appeared in the former action—was the representative of, among others, the makers of the entail, one of whom, Lord Balgonie, was

in the feudal fee and the *verus dominus* of the lands; while, again, the defenders in the present action are the substitute heirs of entail, including among them,—with the exception of the late Lord Leven,—the whole issue of the marriage, who, through the Messrs. Thornton, as their representatives, were the pursuers of the prior action. Thus, on the one hand, those of the defenders in this action, who consist of the issue of the marriage, and for whom alone defences have been stated, were represented in the former action by the Messrs. Thornton, and are the parties for whose behoof, and for that of the late Lord Leven, the decree was obtained on which the defenders now found the defence of *res judicata;* and, as so represented, they were, as pursuers, together with Lord Leven, parties to that action. On the other hand, the original pursuer of this action, the late Lord Leven, against whom that defence is pleaded, having succeeded to the entailed estate, represented his father, Lord Balgonie, one of the defenders in the former action, who was infeft as fiar in the estate, and whose powers, as such, have been already adverted to,—and Lord Leven, as thus representing his father, is to be held as a party against whom the judgments in the prior action were pronounced.

No doubt, in consequence of the change that took place in the late Lord Leven's position, by his succession to the entailed estates, which led him to consider it for his advantage, as heir of entail in possession, to make the attempt by the present action to get rid of the fetters of the entail, and of the former judgments by which its validity was determined, and whereby alone his succession was secured, the application of the principle of representation to the case is attended with the peculiarity, that when to the present action the defence of *res judicata* is proponed, the judgments in the former action are pleaded adversely to the interests of the late Lord Leven, as now insisted in; while, when obtained, they were directly and immediately in favour of what was clearly then his interest as well as that of the rest of the issue of the marriage. But this cannot interfere with the operation of the principle of representation as to all proceedings which [1074] were within the power of the fiar of the lands for the time. The important consideration, however, is, as stated in the opinion of the Lord President and the other concurring Judges, that the opposing interests of the heirs substitute, or at least of those of them who were of the class of issue of the marriage, and of the heir in possession under the entail, were both represented in the former action, and they are both represented in this action. In short, when the matter is examined, it will be found that there is truly no difference in the parties to the two actions, except a difference in the individuality of person, which must constantly exist in cases of entail where a question in regard to the entail is, in the course of the succession, proposed to be raised a second time, and which, if it were relevant as an answer to the defence of *res judicata*, must almost always be at hand to exclude it. As the case stands, and having regard to those who were parties to the first action, and those who are parties to the present one, no element appears to be wanting which is requisite to the sustaining of the defence of *res judicata*. To my mind nothing of the kind has been pointed out by the pursuers in the course of the arguments which have been addressed to the Court.

It was said, indeed, that the late Lord Leven, then about sixteen years of age, and having a *persona standi*, ought to have been a pursuer of the former action *suo nomine* to make the judgments in it conclusive, as affecting his rights in any after question with him as heir of entail in possession. But would the instance have thereby been rendered more complete, or adequate to the final trial of the question raised in the action, as regards the interest of the issue of the marriage, so as to render the judgments pronounced in it a *res judicata?* I am unable to see how the appearance of Lord Leven in that form would have been more satisfying for that purpose than his and their appearance through a party duly charged with the protection of their interests, and I therefore think, that, as regards the instance, nothing was wanting or defective.

But then it was with no great consistency contended, that notwithstanding the parties who, it has been pointed out, were called as defenders to the former action, and made appearance by Mr. Keith, Lord Leven ought to have been called as a defender, in order to make the judgment binding on him and the succeeding heirs. This has neither common sense nor principle to support it, nor was it shown to be countenanced by any practice, direct or analogous. If it be not assumed that Lord Leven was to be an instrument to sacrifice the interests of himself, and those of the other heirs of entail,

which the action was brought to vindicate, and in which, through the Messrs. Thornton, as representing him, he was a party pursuer, what must have followed from his being called as defender? He must either have made no appearance, or, if he did appear, and a *curator ad litem* was appointed to him, then the only course the curator could have adopted would have been to decline lodging any defence, or to put in a defence admitting all the statements of the pursuers,—thus in the one case tacitly, and in the other openly, acquiescing in judgment being pronounced as craved. But if so, it would be difficult to conceive how the calling of the late Lord Leven as a defender could have been of the remotest utility in giving binding effect, for any purpose whatever, to the judgments that might be pronounced, whether in favour of or against the validity of the entail.

I shall only advert to one other point stated by the pursuers against the plea of *res judicata*. It was said—but in the form of general allegation only, for how or in what manner it could have been done was never explained—that the action should have been confined to the sufficiency of the obligation undertaken by the then Lord Leven and his son in the contract of marriage of the latter, or at all events to the sufficiency of the entail executed in implement of the contract for protecting the interests of the issue of the marriage against the particular acts—the trust-deeds—by which they were attempted to be violated, and that in so far as it went beyond that it was unnecessary, and the Messrs. Thornton in prosecuting it exceeded any duty imposed on them, and in reality prejudiced instead of preserving their interests intact; and it was argued that the effect of the judgments pronounced as forming a *res judicata* should be limited to the point which alone required to be tried, leaving it open to the pursuer, or any subsequent heir of entail, to contest the validity of the entail in all other respects.

It, I apprehend, may well be doubted whether, supposing what is thus ascribed to the action were correct, it could lead to the result contended for, assuming (and [1075] anything to the contrary has not even been insinuated) that its conclusions were *bona fide* insisted in, and that the judgments were obtained as being considered necessary to the end in view,—the protection of the interests of the issue of the marriage. But be that as it may, it is to be kept in view that that which the Messrs. Thornton, as representing them, had to attack and defeat was—if so it may be called—the wholesale act of the then Lord Leven, and his son, Lord Balgonie, the liferenter and fiar of the entailed lands, disponing these lands to trustees for behoof of the body of their creditors, and with a reversionary interest in their own favour, by trust-deeds, on one of which infeftment had passed, and to which the creditors had acceded. That being the case, it is needless to say that to have limited the grounds of action to the obligation in the marriage-contract in relation to the lands in question, without founding on the entail executed in implement as absolutely and completely restricting the rights and powers of Lord Leven and his son, Lord Balgonie, over these lands, would have been a wholly futile proceeding against creditors so situated, and the deeds by which they were placed in the position they occupied. It was only through the force of the entail, as a valid strict entail of the lands, that in such circumstances the interests of the issue of the marriage could by possibility be saved. And then, again, granting the necessity (as granted it must be) of founding on the deed of entail, and maintaining its validity, I have already explained in the earlier part of this opinion how, from the nature of the case, it was of its essence that in pleading the validity of the entail nothing less could be involved than its entire validity as a perfect entail, in terms of the Act 1685, having the legal operation of a perfect entail against the defenders, and in particular against Lord Balgonie, the fiar infeft, or in any question with the heir of entail in possession, whether as regarded voluntary and gratuitous or onerous acts, and more especially its validity against the acts of contravention committed by the granting of the trusts, the setting aside of which it was a direct object of the action to accomplish. The entail was either an entail to that effect, or no entail at all. There was no room to separate it into parts.

And this leads me, in conclusion, to advert to a difficulty expressed by Lord Curriehill as to the application of the plea of *res judicata* to both sets of conclusions, which, as he has pointed out, the action contains. I cannot say that, upon that point, any difficulty presents itself to my mind. It may or may not be true that the judgments in the former action would not be conclusive against third parties, who may

hereafter obtain onerous deeds affecting the entailed lands from the heir of entail in possession (for as to gratuitous deeds I do not understand that Lord Curriehill's difficulty applies), and that it might be competent to them, in defence of their rights, to try over again the question of the validity of the entail upon its merits. But however that point may stand, it will not, I apprehend, be in any degree more touched or prejudiced by sustaining the defence of *res judicata* to the last conclusion of the action, to which Lord Curriehill hesitates to apply it, than by sustaining it to the first, to which he holds that it ought to be applied.

In sustaining the defence of *res judicata* to the action in all its conclusions, the Court will sustain it as between those who are parties to the action, or who may come to represent them, so that, between all such parties, the judgment to be pronounced will be binding, and will thus effectually shut the mouths of all heirs succeeding to the entailed estates, or, at least, all those heirs who legally are to be held as coming into the same position as the late Lord Leven, and their voluntary or gratuitous disponees (who can have no higher rights than their author whom they represent), from being heard to maintain in any action they may institute, or in any action that may be brought against them for acts of contravention or otherwise, that the lands in question are not validly entailed in terms of the Act 1685, as now insisted in by the first conclusion of the present action, or to maintain that the lands are held by them in fee-simple, which is the sum and substance of the second conclusion.

By the first conclusion, it is sought to be found and declared that the prohibitory, irritant, and resolutive clauses contained in the deed of entail of 1784, and investitures following thereon, were not thereby applied to the lands in dispute, and that these lands are not thereby validly entailed in terms of the statute 1685, cap. 22, and 11 and 12 Victoria, cap. 36, or, in other words, to find in direct opposition to that which was found in the prior action. Now, to that conclusion, *res* [1076] *judicata* is to be sustained as a good defence, which amounts in effect to a negativing of the proposition contained in the conclusion, and to a finding that it has been finally determined that the lands are validly entailed in terms of the Act 1685. But the conclusion that follows (and for the terms of which, without stopping to quote it, I refer to the summons and to Lord Curriehill's opinion), as I read it, and as I think it must be read, is in reality merely the same thing over again. It is nothing more than a sequence to, and goes no further than the first conclusion, only setting forth in a more expanded form that which would be the consequence of an affirmation of the first conclusion, and which may be summed up in this, that the lands are held in fee-simple. Hence the second conclusion, like the first, asks the Court to find directly the reverse of what was found by the judgments in the prior action, and this, at the instance of Lord Leven (or his trustees in his place), who, as one of the issue of the marriage, obtained these judgments to be pronounced. Therefore, if the plea of *res judicata* is a good defence to the first conclusion, it seems to me to follow that it is also a good defence to the second conclusion, and that by sustaining it to the second, no more is done as affecting the rights of future onerous third parties, than by sustaining it to the first.

Being thus of opinion, with the consulted Judges, and which I understand to be also the opinion of your Lordships, that the defence of *res judicata* is well founded, and ought to be sustained, I abstain from entering upon any of the other questions that were put to the consulted Judges, which could only have required to be considered had the defence of *res judicata* been repelled.

Lord Cowan.—When this cause was originally debated, it appeared to me that the difficulty expressed by the Lord Ordinary on the question of *res judicata* required serious consideration. The renewed discussion before the whole Court, however, has satisfied me that the defence on this ground is well founded, and ought to be sustained.

I adopt generally the reasoning contained in the opinions of the consulted Judges, subject to the observation afterwards made in reference to the terms of the judgment to be pronounced, and have very little to state in addition to that reasoning. All I propose doing is to state very shortly the grounds that have more especially satisfied my own mind.

We are agreed that, in order to found the *exceptio rei judicatæ*, the former suit must be shown to have involved the same matter, presented for the judgment of the Court on substantially the same grounds, and to have been between the same parties,

their predecessors, or authors. That the proceedings relied on as the foundation of the exception in this case were concerning the same matter, and presented the question as to the validity of the entails for judgment on the same grounds, is not doubtful;—and it has only to be considered whether the suit was between the same parties, their predecessors, or authors

As regards the pursuers of the former action, I concur in the opinion that all the heirs of the marriage, for whose behoof or on whose behalf the Messrs. Thornton insisted as trustees under the contract of marriage, must be held to have been fully represented, and to have been in truth and substance pursuers. The consequence is, that the defenders here, who are confessedly heirs of the marriage, were parties to the former suit. But was the original pursuer of this action, the late Earl of Leven, also duly and properly represented in that litigation by the parties who were called as defenders? That is the only part of this case which has throughout given me any difficulty. For, to my mind, it is not enough to say that, as an heir of the marriage, he too, as well as the defenders, were represented by the Messrs. Thornton as pursuers.

Had the action at the instance of the marriage-contract trustees been directed merely against creditors of the then Lord Leven and Lord Balgonie, the plea of *res judicata* could not have been maintained. These creditors might have had real rights in security conferred on them by the heir of entail in possession, and which rights were made the subject of challenge and reduction at the instance of the subsequent heirs, or of trustees for them. Still, if the proceedings for reduction of those rights had been directed exclusively against creditors, the substitute heirs of entail, as a class, could not have been held parties to that litigation. The defence of *res judicata* must in that case have failed, however strongly [1077] the judgment might be regarded as an authoritative precedent. But when the proceedings are examined, it is not creditors of the heir in possession, through their trustee, Mr. Keith, alone who were the defenders. The action was directed against the Earl of Leven and Lord Balgonie, and their trustee, Mr. Keith. The purpose of the deed, no doubt, was to pay debts incurred by the trusters, in the first place; but it was farther a trust, as regarded the surplus after the estate was sold and the debts paid, for behoof of the granters themselves. The leading parties in the suit as defenders, through Mr. Keith, as trustee for them as well as for their creditors, were the Earl of Leven, who had propelled the estate to his son Lord Balgonie, reserving his liferent, and Lord Balgonie who was infeft in the fee, and was *verus dominus* of the estate. The validity of the entail was thus brought into Court by heirs substitute of tailzie, represented by the Messrs. Thornton, and next in succession to the estate; and the question was decided, *inter alios*, as against the heir of entail infeft and in possession. It was not a question with a third party as to the validity of some right acquired by him from the heir in possession. The question was raised directly with the heir in possession himself. And assuming the matter at issue to have been properly raised, fairly argued, and finally decided—which is not disputed—the only point remaining for inquiry is, whether the judgment so obtained is *res judicata* against the heirs substitute succeeding to the estate, although not themselves called in the action as parties? Is it sufficient that the validity of the entail was tried with the heir in possession for the time, so as to make the decree binding upon the succeeding heirs?

The opinions before us are at one on that point; and the authorities referred to are important. A question of this kind occurred for consideration in one of the decisions cited in the opinions, Rutherford *v.* Nisbet's Trustees, 27th November 1832, and is alluded to by Lord Moncreiff in the note to his judgment. As regards the particular case before him, being one of fee-simple succession, his Lordship held that no difficulty existed, as "the one trial of the question with the proper party at the time must be conclusive, and bind all the heirs of that destination." But his Lordship adds, that in the case of entailed succession there may be a doubt for the reasons he states,—"whether the trial of any such question, without calling all the existing substitutes, will be effectual against them; though even in that case it is thought that a deliberate judgment on the question must be conclusive." The case of Maule *v.* Maule, 1831, involved the general question; and Lord Moncreiff concurred with the minority of the Judges in this Court, whose views were adopted by the Lord

Chancellor in the reversal of the judgment by the House of Lords. The plea of *res judicata* was repelled in this Court, but was declared to be effectual by the judgment on appeal. Now, the minority of the Judges in this Court gave it as their opinion that a judgment "pronounced *causa cognita* against the immediate heir of entail, who would have been *verus dominus* if the entail subsisted, does constitute *res judicata* against all other heirs claiming under the same entail;" and the majority of the Judges who concurred in an opinion framed by Lord Corehouse,—while they arrived at a different result in the particular case,—state that, "whenever the interests of the heir and the substitutes coincide, he (the heir of tailzie in possession) represents them in every lawsuit respecting the subjects of the entail; and a decree pronounced against him, *causa cognita* and without collusion, is effectual against them." And the recent judgment of this Division of the Court in the Marquis of Huntly against Nicol, 9th January 1858, recognised the same view of the representative character in this respect of the heir of entail in possession.

Entertaining the opinion, therefore, that a deliberate judgment fairly obtained, as the former judgment was, against the heir of entail in possession, in support of the validity of the entail, is final and conclusive against all the heirs called to the succession of the estate,—I concur in holding that the original pursuer of this action—who was also, as heir of the marriage, represented by the Messrs. Thornton as pursuers—was effectually barred, *exceptione rei judicata*, from insisting in the conclusions of the summons. And I consider that the defenders are entitled on this ground to be assoilzied generally from the whole conclusions; for I cannot adopt the distinction taken by Lord Curriehill in this respect. The former suit raised for the decision of the Court the validity of the trust-deeds executed by the heir of entail in possession, and of the infeftments following thereon. Under these deeds the creditors of the granters, and who had subscribed a deed of accession to **[1078]** the land, had their debts effectually secured by the trust created to provide for their payment, if the estates conveyed could be lawfully alienated in payment of debt. It was found that they could not,—the entail being effectual. It appears to me that the legal sufficiency of the deed of entail to exclude the heir in possession for the time from executing deeds in favour of third parties was matter of express decision, and that, consequently, the very subject of the whole conclusions of the present summons was disposed of as between the parties to the former litigation. And so as between the present parties, what the pursuer asks to have declared having been decided, the exception of *res judicata* applies to the whole action. It is of no moment that were an heir in possession to contract with a third party, notwithstanding our decree, the decree might not, as against him, be *res judicata*. The present judgment is against the heirs-substitute of tailzie, and the defence is pleaded for them, and is, I think, insuperable. Had it not been so, I could not have held the pursuer excluded from seeking declarator of his position and rights under the Entail Amendment Act of 1848, on the ground of his thereby asking a hypothetical judgment from the Court. The cases of Murray and of the Earl of Galloway would not, as I conceive, have excluded the pursuer from insisting in the declarator, in so far as laid on the Act of Victoria, had that part of the conclusions of the summons not been open to be met by the exception of *res judicata* equally with the other conclusions of the summons. But it is unnecessary to enter on this point farther.

On the whole, then, I concur in the result arrived at by the consulted Judges.

LORD JUSTICE-CLERK.—I agree so entirely with the Lord President and Lord Ivory, and the other consulted Judges who subscribe the same opinions, as well as with your Lordships, that I should have thought it superfluous to attempt any farther exposition of the grounds on which I think the judgment of the Court ought to proceed, had it not been for the difficulties suggested by my brother Lord Curriehill.

The question raised and determined in the former action, was clearly and distinctly, whether the lands embraced in the conclusions of the present summons were not effectually subjected to the fetters of the entail, in respect of the way in which these lands are described in the fettering clauses. No doubt this question was decided only for the purpose and to the effect of determining whether an attempt to alienate these lands for the payment of debt was effectual. But it was impossible to reach the latter question without having first determined the former. I am therefore of opinion

that it is *res judicata* between the parties to the original action, that the lands embraced in the conclusions of this summons are effectually subjected to the fetters of the entail, or at least that the way in which these lands are specified and described in the fettering clauses, as contrasted with the terms of the dispositive clause of the deed of entail, affords no ground for holding that these lands are not subjected to the fetters.

What, then, are the conclusions of the present summons, and do they raise the same question? Omitting the first conclusion, which merely affirms, what nobody disputes, that the original pursuer, David Earl of Leven and Melville, was, at the date of the summons, heritable proprietor of the lands, and, throwing aside also the conclusion for expenses, the only remaining conclusion asks for declarator, that none of the fetters "contained in the foresaid disposition and pretended entail and investitures following thereon were thereby made applicable or apply to the lands, lordship, barony, teinds, subjects, and others hereinbefore described, or any part thereof; and that by the execution and registration of the entail the said lands," &c., were not and are not "strictly, validly, and effectually entailed," but "are and shall be subject to the acts, deeds, and debts of the pursuer, and may be lawfully alienated, burdened, affected, or disposed of onerously or gratuitously by his or their deeds," &c. "And that all dispositions or other deeds of alienation or conveyance, onerous or gratuitous," &c., "which have been or may be granted by the pursuer or his successors in the said lands and others, are and shall be as valid to the grantees or receivers as if the said disposition and pretended entail," &c., "had not contained any prohibitions or conditions, clauses irritant and resolutive." By the condescendence and pleas in law it is made quite clear, that the only ground on which this conclusion is rested is, that the lands in question are not properly or sufficiently described in the fettering clauses.

[1079] The substance of this action of declarator, therefore, is in a very few words a demand for judgment that, in respect of the way in which the lands in question are described in the fettering clauses of the entail, the pursuer holds the lands in fee simple, and is entitled to alienate or burden them, and that his acts of alienation and the like will be effectual to the grantees.

The parties between whom it is sought to have this declaratory judgment pronounced are, on the one hand the heir in possession (the original pursuer), and on the other the whole substitutes of tailzie, and in particular the class of substitutes first called to the succession, who have lodged defences and joined issue with the pursuer.

It would seem to follow, then, that the only question remaining to be solved is, whether the pursuer and defenders were respectively represented in the former action. And on this question, also, there is no room for serious doubts, for the whole Court are agreed that the present parties were so represented in the former action as to make that judgment *res judicata* against them.

But the difficulty suggested, as I understand it, is that the former action did not decide anything that could be binding against creditors or onerous purchasers not represented in that action, while the conclusions of the present seem in form to demand a declarator to the effect that deeds of alienation and the like by the pursuer in the hands of third parties will be effectual,—a proposition which Lord Curriehill is not prepared to negative, or to hold to be settled by the former judgment as *res judicata*. Indeed his Lordship expresses a distinct opinion, that any disponee, onerous or gratuitous, of an heir of entail in possession of this estate would be entitled to maintain the validity of his disposition against the substitutes of tailzie, on the same grounds which were negatived in the former action.

So far as regards a gratuitous disponee of the heir in possession, I must take leave to dissent entirely from that opinion, on the simple ground that a gratuitous disponee is nothing better in such a case than the representative of the disponer, and is liable to all pleas which are available against his author.

But there is no occasion to dispute, that if the late Earl of Leven had, during his life, sold the estate, and the purchaser had obtained a title for a full price paid, the former judgment could not have been pleaded as *res judicata* against the purchaser, because he would be entitled to plead that he had bought the estate on the faith of the registers—the register of sasines, and register of tailzies—which did not disclose sufficiently or intelligibly that the estate in question was subjected to the fetters of this

entail, while the former judgment was not and could not be registered for publication, or as part of the conditions on which Lord Leven held the estate.

But this creates no real difficulty; and the semblance of difficulty seems to me to arise only from not distinguishing precisely between the two questions which the Court have to solve in disposing of the defence of *res judicata*, viz.—(1.) Whether the matter determined in the previous action is the same which is sought to be put in issue in the present? and (2.) whether the parties to the present are either the same parties, or the representatives of the parties who litigated in the former case?

As regards the first of these questions, it appears to me that when the Court in the former case reduced an onerous deed of alienation (as they did), on the ground that the objection to the description of the lands was not fatal to the validity of the entail, they necessarily affirmed these three propositions—(1.) That the objection to the entail was bad; (2.) that deeds of alienation by the heir in possession were therefore void and ineffectual; and (3.) that the grantees of such deeds could take no benefit by them. Now, these three propositions are precisely contradictory of the three propositions contained in the conclusions of the present summons, which, as has been seen, are—(1.) That the entail is bad, by reason of the mis-description of the lands in the fettering clauses; (2.) that the heir in possession is free to alienate or burden the estate; and (3.) that his deeds of alienation and the like shall be effectual to the grantees. The *exceptio rei judicatæ* therefore appears to me to apply to every part of the conclusions of this summons, if the parties to the two actions be identified.

But it is only on condition that the parties are thus identified that the defence can be sustained. It is because the parties here are the heir in possession on the **[1080]** one hand, and the substitutes of tailzie on the other, that the former judgment is pleadable as *res judicata*. But if pleadable at all, it is pleadable to the full extent of barring the whole conclusions of this summons, because the whole questions which they raise were determined in the previous action. And to hold these questions as *res judicata* now, will no more prejudice parties not represented in this action, than the judgment in the former action prejudiced any one who was not represented there.

In short, the present summons is a declarator of freedom, and nothing else; and I must say, with every possible respect for my learned brother, that he seems to have allowed himself to be very unnecessarily puzzled by the somewhat verbose repetitions usually contained in the conclusions of such a summons. It is a declarator of freedom, on the ground of the very same supposed defect or ambiguity in the deed of entail, which was adjudged to be no good ground of objection to the entail in a previous case between the predecessors and authors of the pursuer and defenders. If such be really the nature of the case, the mere form of expression of the conclusions of the summons cannot be of any importance. To say that the entail is bad, that the heir is free to sell and contract, and that his deeds in the hands of third parties will be effectual, is merely to assert the same legal fact three times over, or to view the same legal fact in three different aspects. But surely it is entirely immaterial which of the three forms of expression is used, or whether all of them be used, so long as judgment is either pronounced or asked to be pronounced only between the heir in possession and the substitutes of tailzie.

LORD BENHOLME declined, in respect his children, who were substitute heirs of entail, were called as defenders.

The Court recalled the interlocutor reclaimed against, sustained the plea of *res judicata*, assoilzied the defenders, and found them entitled to expenses.

[Cf. *Duke of Atholl* v. *Glovers of Perth*, 1 F. 661.]

No. 155. **XXIII. Dunlop 1080.** 13 June 1861. 1st Div.—Lord Benholme.

WILLIAM BAIRD, Pursuer and Suspender.—*Cook.*

WILLIAM RANKEN FORTUNE, Defender.—*Patton.*

Minority—Prescription.—Observed, that where there is no special statutory exception, the years of minority are not deducted in questions of prescription, and that where

usage is founded on as interpreting a grant, what occurred during the minority of the grantee's representative is not to be thrown out of view.

See *ante*, 25th May 1849, vol. xxi., p. 848.

The judgment in this case having been reversed in the House of Lords on 25th April (see House of Lords cases in this volume), the Court was now moved to apply the judgment. There was no opposition.

LORD DEAS.—This is not a case in which we can feel the least surprise that different views should be taken of it in this Court and the House of Lords; and it is not upon that point I should, in any event, presume to offer an observation. Nor does there seem to be any difficulty as to how the judgment of reversal falls to be applied. But, on perusing the notes,—furnished to us with this view,—of the opinions delivered in the House of Lords, I observe a passage in the opinion of the Lord Chancellor, which, in the absence of explanation from us, might somewhat unsettle the notions of parties and the profession as to the views taken in this Court in administering the law of minority and prescription.

In the passage referred to, the noble Lord is reported to have said that he could not properly conclude without taking some notice "of the attempt to lessen the protection given to minors by the law of Scotland, which says, that prescription shall not run against them during their minority. 'It is true,' Lord Deas observes, 'there was a minority during part of the time, but the sellers knew what they had sold, and the heir's interests were doubtless attended to by those acting for him, just as if he had been major.' If this house, when hearing an appeal from Scotland, had proposed to act upon the law of England, which disregards a supervening disability after prescription has begun to run, we should have been justly blamed for [1081] seeking judicially to assimilate the discordant laws of the two portions of the United Kingdom; and, I must say, that, till the law of Scotland respecting the suspension of prescription by minority is legislatively altered, it is the duty of all tribunals in the United Kingdom to give full effect to it."

"Now, my Lords, in the opinion which I delivered, with the sanction of your Lordships, the words quoted undoubtedly occurred. But I will undertake to say, that no Judge in Scotland would have used these words had he been delivering an opinion, or judgment, founded upon the long prescription in a question (which this was) of heritable rights. We are as familiar as we are with the alphabet with the statute 1617, c. 12, which bears, in express terms,—"That in the course of the said forty years' prescription, the years of minority and less-age shall noways be counted." But the opinion which I delivered, and in which your Lordships concurred, was not founded upon prescription at all. The defender Fortune had acquired North Muircambus, part of the barony of Elie, "with the pertinents." A right to take "wrack and ware" from the sea-shore, was attached to the barony, and the question was, whether, amongst the pertinents of the part sold, a share of this right had been included. My opinion expressly bore,—"The question is not one of prescription, but of construction: —what is the meaning of the deed?" We may have been quite wrong in thinking that usage, and the mode in which the right had been exercised in connection with the lands from 1794, when North Muircambus was first separated from the barony, down to Fortune's purchase in 1814, and again from 1814 down to the first challenge in 1854, could competently be regarded in construing the word "pertinents" in the progress of titles which commenced in 1794, and in the disposition to Fortune of 1814. Or, what is still more probable, we may have been quite wrong in thinking the evidence thus afforded sufficient to show that the very flexible term "pertinents" included in this case the right of taking drifted wrack and ware for manuring the lands sold. But I do not observe that the noble Lords who disposed of the appeal, had, in general, any difficulty in seeing that these were the questions which alone we had dealt with, and to which I referred when I said, for myself and your Lordships, that we took "into view all the elements afforded by the titles and the proof, without saying what might have been the effect of the absence of any one of them." In a question of that kind,—a question what was meant by a flexible term in a deed, or a progress of deeds, as construed by usage during a long period of years,—the portion of that period which occurred during a minority may be entitled to less weight than the rest of the period, but I never heard that it was to be deducted as a blank, as it would be in

a question of prescription under the Act 1617. It is not even in all cases of prescription or limitation that minority is deducted. It is not deducted in the septennial limitation of cautionary obligations under the statute 1696, c. 5. Nor in the triennial prescription under the statute 1597, c. 83. Mr. Erskine (3, 7, 16) takes notice of the exception of minority having been introduced into some of the statutes establishing the short prescriptions, "but left out in most," which, he says, "intimates, not obscurely, that the short prescriptions run against minors in the general case." He adds—"And though it has been judged reasonable to indulge minors with privileges in particular cases, because their interests may be neglected by their tutors or curators, yet, where statute does not take them out of the common case, they must be subjected to the common rules."

This was the trite law which I had in view when I made the observation that the heir's interests were no doubt attended to during his minority, and which, I have no doubt, was present to the minds of your Lordships when you acquiesced in that observation. We had laid aside prescription as inapplicable to the case. I observe, accordingly, from the opinions of several of the noble Lords, that prescription was not even pleaded in the House of Lords. And, what is still more remarkable, the Lord Chancellor begins his observations by saying "The opinion in favour of the respondent anxiously declares that it was not founded either on 'grant' or 'prescription.'" Well, —if it was not founded on prescription,—if it was anxiously declared in the opinion not to be so,—how could there be an "attempt to lessen the protection given to minors by the law of Scotland, which says that prescription shall not run against them during minority?" I own, I think—if the noble Lord has been correctly reported—there must have been some misapprehen- **[1082]** -sion here which it is important to remove. I refrain from explaining how far "grant" was an element in the judgment of this Court, or how it was that we thought we were giving effect to the language of the deeds, because that might seem apologetic for, or defensive of, the judgment, which is no part of my object. But, as regards the protection which the law of Scotland gives to minors in the suspension of prescription—a protection which we in this country think valuable, have no desire to see weakened—I trust the House of Lords will rest satisfied—in common with the public and profession—that we cordially concur in the sentiment, and wish to see it acted on in every branch of the law of Scotland, that, until legislatively altered, "it is the duty of all tribunals in the United Kingdom to give full effect to it."

The Court then applied the judgment.

No. 157. **XXIII. Dunlop 1089.** 14 June 1861. 1st Div.—Lord Kinloch.

WILLIAM LOWSON and Others (WILLIAM ALLEN FLOWERDEW'S Trustees), Chargers.—*Young—Scott.*

Mrs. MARY COOPER or REID, Suspender.—*E. S. Gordon—Thoms.*

Process—Suspension—Statute 1 *&* 2 *Vict. cap.* 86, *sect.* 6—*A. S.* 24*th December* 1838.—*Held* (*aff.* judgment of Lord Kinloch), that the prescribed form of a note of suspension, "that the complainer has been charged, or is threatened to be charged," &c., is a mere clause of style, and not to be construed literally, so as to exclude review by suspension of decrees in absence of such a character that a charge could not follow on them.

[1090] Mrs. Mary Cooper or Reid presented a suspension of a threatened charge against Henry Flowerdew, William Lowson, and James Kennedy, as trustees of the late William Allen Flowerdew, writer, Dundee, setting forth "that the complainer is threatened to be charged on a decree dated 8th June 1858, obtained at the instance of the said Henry Flowerdew, William Lowson, and James Kennedy, as trustees foresaid, in a summons and action of constitution at their instance, dated the 9th of April 1858, against Margaret Cooper or Gellatly," &c., Mary Cooper or Reid, &c., and Jean Cooper

or Scott, &c., the only surviving children and heirs-portioners of the deceased James Cooper, and their husbands as their administrators, and for their interest, defenders.

The extract-decree bore that in the action—which was one "concluding that the defenders, the said Margaret Cooper or Gellatly, Mary Cooper or Reid, and Jean Cooper or Scott, the only surviving children and heirs-portioners of the said deceased James Cooper, and held as duly charged to enter themselves heirs-portioners in general to their said father, by virtue of the citation and execution following upon the said summons, and also for themselves, to the extent to which they may be directly liable, and also the other defenders, ... for themselves and their interest, and as individuals, ought and should be decerned and ordained, conjunctly and severally, or severally in the proportions and to the extent to which they may be severally found liable, to make payment to the pursuers of the sum of L.2494, 11s. 4½d. sterling, being the balance due as at 31st January 1857 on the accounts of charge and discharge of the said late William Allen Flowerdew, and the pursuers as his trustees, with the estates of the said late James Cooper, specified in a trust-disposition, dated the 23d day of February 1828, executed by the said deceased James Cooper in favour of the said William Allen Flowerdew, his heirs and assignees, and in a trust-deed, dated the 22d day of June, 1836, also executed by the said James Cooper in favour of the said Willliam Allen Flowerdew and his assignees, and with the said James Cooper and the defenders, conform to the accounts of charge and discharge, abstract thereof, docquets thereon, and vouchers, all produced in process; together with interest,"—"a minute of restriction was lodged, wherein Mr. Charles Scott, advocate, procurator for the pursuers, stated that the said summons was intended solely for the purpose of obtaining a decree *cognitionis causa tantum*, or of constitution merely, for the purpose of making the sums concluded for a charge against the trust-estate and succession of the deceased James Cooper, surgeon in Dundee, afterwards residing in Broughty Ferry; and that he restricted the conclusions of the said summons to that effect accordingly: Whereupon, sitting in judgment the said Lords, of the date hereof, decerned, and hereby decern, against the defenders in absence, conform to the conclusions of the libel as restricted by said minute, No. 254 of process."

The note of suspension, after narrating the extract-decree, concluded, in the usual style, that it was pronounced wrongously and unjustly in absence. May it therefore please your Lordships *simpliciter* to suspend the said decree in absence and charge, and whole grounds and warrants thereof, and to repone the complainer against the same, or to do otherwise in the premises as to your Lordships shall seem proper."

In the reasons of suspension the complainer stated numerous objections to Flowerdew's management of the trusts, and also to his accounts. James Cooper, with reference to whose trust-estate the account was said to have been incurred, died in 1839. The late Mr. Flowerdew, and afterwards the respondents, continued the management of the trust, and the last item of the account sued for was dated in 1857.

The respondents gave a history of the action in which the decree above quoted was obtained, describing it as "one *cognitionis causa tantum*, or of **[1091]** constitution merely—no expenses were decerned for;" and stated that, having thus obtained decree of constitution, they served upon the defenders in the action a summons of adjudication proceeding upon it, in which decree was pronounced and extracted, and registered 29th July 1859. "More than a year and a half was allowed to elapse after the date of the said decree of adjudication and infeftment before the present suspension was had recourse to; and no other adjudication having been led against the subjects in the meantime, the respondents have obtained a legal and valid preference over the subjects adjudged. The averment in the note of suspension, that the suspender is threatened to be charged upon the decree, is altogether unfounded; and the said note of suspension is incompetent, and wholly null and void."

The respondents pleaded, *inter alia*;—(1.) The suspension is incompetent under the Act 1 & 2 Vict. cap. 86; and, *inter alia*, it is incompetent under that Act, inasmuch as that statute and relative schedule only authorise suspension of a charge given or threatened, or competent to be given, whereas, under the decree sought to be suspended, no charge was given, or threatened to be given, or could by possibility be given. (2.) It is wholly incompetent to suspend a decree of constitution *cognitionis causa* merely; at least it is incompetent to do so when it has been followed up by decree of adjudication and infeftment thereon. (3.) Farther, the complainer is barred by acquiescence in,

and homologation of said decree of constitution and adjudication, and proceedings thereon, and by taciturnity and *mora*.

On 20th March 1861 the Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having heard parties' procurators on the objections stated to the competency of the present process of suspension, as contained in the three first pleas in law for the respondents, Repels the said objections and pleas; and appoints the cause to be enrolled, in order to be further proceeded with."[1]

[1092] The respondents reclaimed, and pleaded;—There was no charge or threatened charge here possible. The respondents were in possession on a decree of adjudication, which exhausted this decree. Therefore there was no room for a charge, and therefore this suspension was not competent.[2] The remedy of suspension did not apply to a case of this kind at the date of the passing of the statute of Victoria, and the statute was not intended to extend it.[3]

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[1] "NOTE.—By the Act 1 & 2 Victoria, cap. 86, sect. 6, it is provided, that 'it shall be lawful for any party to bring a suspension of any decree in absence pronounced in the Court of Session, by lodging in the Bill-Chamber a note of suspension of the form and effect of notes of suspension hereinbefore allowed to be brought of decrees *in foro* of inferior courts.'

"The Act of Sederunt, 24th December 1838, prescribes forms to be observed in the case of notes of advocation and suspension; and in the case of a suspension of a decree in absence pronounced by the Court of Session, the prescribed form begins, 'That the complainer has been charged, or is threatened to be charged,' &c.; and the prescribed prayer is, 'May it therefore please your Lordships *simpliciter* to suspend the said decree in absence and charge, and whole grounds and warrants thereof, and to repone the complainer against the same.'

"The complainer in the present case has used the identical words of the Act of Sederunt. But the respondents object that, although the decree in absence complained of had the form of a decree for payment against the defenders in the process, as representatives of the deceased James Cooper, yet it was restricted in its effects to a decree of constitution against Mr. Cooper's trust-estate and succession, so that no charge could be given on it; and therefore, it is contended, the present suspension, as of a threatened charge, is incompetent.

"The Lord Ordinary can by no means give effect to this objection. The clause is one of style; and clauses of style are not to be construed literally. The clause is simply the appointed form for bringing the decree in absence under review. It is no more to be objected to on the ground of not possessing literal accuracy, than is the common judgment 'finding the letters and charge orderly proceeded,' as every day pronounced in processes of suspension and interdict, and other processes of suspension, where no charge exists, or, in the strict sense, can possibly exist. The substance of the note lies in the prayer, which, rightly, prays the Court 'to suspend the said decree in absence, and whole grounds and warrants thereof, and to repone the complainer against the same.' If the note also refers to a non-existent or fictitious charge, this will not affect its competency and efficacy otherwise. The argument of the respondents, if well founded, would preclude from being reviewed in this way decrees of declarator, and many others; indeed every decree, except a decree for payment, in the narrowest sense. Yet the statute declares it lawful 'to bring a suspension of any decree in absence pronounced in the Court of Session.'

"With regard to the objection that a process of adjudication has followed on the decree in absence, this cannot prevent the decree being opened up, any more than the occurrence of any other kind of diligence. Under the 4th section of the statute, it is made lawful to suspend not only the decree itself, but also 'any diligence or proceedings following thereon.' The objection of acquiescence and *mora* has no more place here than in the case of every decree in absence on which diligence has followed."

[2] Ivory's Forms of Process, p. 99; Ersk. 4, 3, 8, & 18; Macintosh, 26th November 1830, 9 S. 75; Gordon *v.* Edinburgh, Perth, and Dundee Railway, 13th July 1852, *ante*, vol. xiv. p. 1001; Moir, 10th February 1853, *ante*, vol. xv. p. 380.

[3] 1 & 2 Vict. cap. 86, sect. 4; A. S. 24th December 1838; White, 14th February 1835, 13 S. p. 470; Simpson *v.* Young, 8th July 1852, *ante*, vol. xiv. p. 990.

LORD PRESIDENT.—This is an unusual sort of case, and I am not surprised that there was difficulty in finding any precedent for dealing with a decree of this kind, either by suspension or by reduction, because I doubt whether there is any precedent at all for such a decree as this. I think it is very difficult to read it, and say what it is. The action appears to have been raised as an action of constitution at the instance of Flowerdew and others, acting as trustees for James Cooper, against various parties who are described as the only surviving children of the truster, for payment of an alleged balance due on the accounts of Flowerdew and his trustees. That is the character of the action, and then there appears to have been a minute of restriction lodged, which stated that "the summons was intended solely for the purpose of obtaining a decree *cognitionis causa tantum*, or of constitution merely, for the purpose of making the sums concluded for a charge against Cooper's trust-estate and succession." I do not know whether these words are intended to be a description of the restriction, or a description of the purpose for which the restriction was made,—the object which the party had in making it. That is not clear, but they "restricted the conclusions of the summons to that effect accordingly." It is not said to which effect. Now it appears that Cooper, the truster, died in 1839, and the balance on the account is said to be due in 1857;—a balance said to be on the accounts of charge and discharge of the late William Allen Flowerdew, and the pursuers as his trustees, with the estates of Cooper and with the defenders. Now, I do not very well see what is the meaning of an ordinary decree *cognitionis causa tantum* in reference to such accounts,—accounts incurred after the death of the truster,—with reference to what was his estate, and with these defenders themselves. It is a decree of constitution, and it is a decree of constitution against these parties who are charged to enter heirs, and in this proceeding there is no absolvitor from liability under the passive titles at law which is usual in a decree *cognitionis causa tantum*. Generally, there is a minute of renunciation given in, in such cases, and absolvitor proceeds in respect of that minute. I cannot therefore look upon this as a decree *cognitionis causa tantum* at all. It is a decree of a very anomalous kind. I do not see how, if it came to be discussed on its merits, it could be sustained as a good decree. But the question we have to determine is, whether it is competent to suspend this proceeding, to get this party reponed, and have his liability tried, and to have this done in the form of a suspension? Now, the words of the statute certainly are very broad, that any party may "bring a suspension of any decree in absence [1093] pronounced in the Court of Session, by lodging in the Bill-Chamber a note of suspension, of the form, and to the effect of notes of suspension hereinbefore allowed to be brought of decrees *in foro* of inferior courts." Now these words are very broad. I desiderate any words for taking this case out of the words of that enactment. In order to bring it within the words of this enactment, it is not necessary to shew that such a decree had previously been the proper subject of suspension, because I do not believe that there ever was such a decree. But on the other hand, was it necessary to proceed by reduction in such a case? The answer is, No; because there never was such a decree. The object here is to get the decree pronounced in absence opened up, and the species of remedy given by that Act of Parliament applied to it, which is a convenient mode of proceeding in itself, and I see nothing to prevent this decree falling within the rule, whether we look upon it as a decree *cognitionis causa tantum*, or a blundered, or a nameless decree.

There was a matter which did raise in my mind some difficulty in regard to this case at first, and that was, how to deal with the proceedings which have followed upon this decree—I mean the adjudication and infeftment in the estate—how that was to be set aside by mere suspension in this Court. It was said that that was diligence following upon the decree, and that the diligence would be affected—would stand or fall with the decree. But I do not feel that it is necessary to come to any decided opinion upon that point, because there is no incompetency in a party bringing a reduction if he chooses; therefore I do not feel impressed by that view, and I am for adhering to the interlocutor of the Lord Ordinary which repels these preliminary defences.

LORD IVORY.—I am of the same opinion. This leads back to former practice, which is not very easy to follow. My first difficulty would be to hold that there was any valid decree here at all. But that is on the merits. There is clearly no decree

cognitionis causa tantum, nor *contra hæreditatem jacentem*, and it may be difficult to find that there has been any adjudication. If not, that certainly would relieve of all difficulty in regard to one of the pleas repelled; but it is a diligence which is not within the prayer of this suspension, and the passing of this note of suspension cannot affect it. It may be, that eventually it will fall with the decree, or it may be that some other form of proceeding is necessary to reach it. But, in the meantime, it stands, and all we have to do is to consider whether it is competent to entertain this suspension to any effect. The general ground on which the party goes, and which it is material for the Court now to dispose of, is that stated in his first plea. I am by no means prepared to take that narrow view of the matter of incompetency, nor should I have held that the words used are words which an Act of Sederunt could have rendered operative, to the effect of refusing a remedy under the statute, if the statute gives a remedy. The question is, therefore, has the statute given a remedy? For the mere terms of the Act of Sederunt could not preclude the Court from construing the Act judicially, and giving effect to it. Therefore I fall back on the statute, and I think the words are broad enough to carry this matter through. I read this clause of the statute as applying to a case which had never before existed in the shape in which it is here introduced—that kind of remedy which, in the inferior Court, and this Court, had in other circumstances been held quite competent with reference to the revival, or setting agoing again of litigation which had failed from technicality, and without the parties having ever joined issue. The Lord Ordinary has, I think, pronounced a proper interlocutor.

Lord Curriehill.—My opinion is that this suspension is competent. It is a suspension of a decree in absence, and is founded on the statute 1 & 2 Vict., c. 86, sect. 6, which, in general and unqualified terms, allows suspensions of decrees of this Court in absence. I do not say that there may not be exceptional cases; but, at all events, the case before us is not an exception. The reasons for maintaining it to form an exception are, in the first place, that it is a decree *cognitionis causa tantum;* and, in the second place, that suspension of it would not have been competent before the statute. There are two conclusive answers to these objections. The first is, that a decree *cognitionis causa tantum* could have been competently suspended before this statute. The effect of a decree of this kind is to entitle the pursuer to use execution, by poinding and adjudication, against the moveable and heritable **[1094]** estate in the *hæreditas jacens* of a deceased debtor. Such a decree is capable of execution against the estate. As to the present decree, looking to its peculiar form, I am not certain that personal execution is incompetent upon it, but it certainly allows execution against the estate. I think that suspension is competent of any decree upon which execution can follow, whether against the person or against the estate; and, therefore, as execution might follow on this decree against the estate, I think suspension a competent remedy. In the next place, I do not think this is a decree *cognitionis causa tantum*. A decree of that kind is one cognoscing a debt as being owing by the defunct; but when we look at the summons on which this decree followed, we see that it cannot have been for a debt due by the defunct, for he died in 1839, and different parties had dealings with his estates afterwards, and the account upon which the summons is laid is, among other things, for debts said to have been incurred during a period of eighteen years after the death of the defunct. That is not a debt for which decree *cognitionis causa tantum* could be taken against the defunct's estate. Accordingly that is not the nature of the decree. It proceeds upon the statutory equivalent for a general charge against the defenders to enter as heirs to the defunct. The effect of such a charge was to render the parties liable upon the passive titles. They might have appeared and renounced the succession, and had that taken place, there would have been a decree assoilzieing the defenders from the passive titles, but decerning against them to the effect only of attaching the *hereditas jacens*. The statutory equivalent for that charge, of which the pursuer availed himself in his summons, is precisely the same. But in this case there was no renunciation and no absolvitor from the passive titles. A minute was given in limiting the demand to one for a decree "*cognitionis causa tantum*, or of constitution." A decree of constitution is a personal decerniture; and according to which of these alternatives was the decree pronounced? Decree was given in terms of the minute, and it was therefore a decree containing a personal decerniture, and a decree upon the passive titles, from which the parties were not assoilzied. And how did the pursuer act upon

this decree? He proceeds to adjudicate, not *contra hereditatem jacentem*, but to give the statutory equivalent for a special and general charge to the defenders to enter heirs in special and in general. That is his own statement in record in the present action. These proceedings took place subsequent to the series of statutes passed by Lord Rutherfurd which dispensed with special charges, and made the service of the summons of adjudication have the same effect. After this, accordingly, the pursuers proceeded to adjudge the estate, not as being in the *hereditas jacens* of the defunct, but from the defenders as being vested in them. These proceedings afford clear indications that the decree under challenge was not considered one of constitution *cognitionis causa tantum*, but as a decree containing a personal decerniture.

On the whole, I am clearly of opinion that suspension is competent.

LORD DEAS.—The only questions which we have to decide or can decide, appear to me to be, whether this is one of those decrees in absence which can be reviewed by suspension; and, if so, whether this suspension is in proper form. It is said that, prior to the statute of Victoria, suspension of a decree of this kind was incompetent, and that the remedy of suspension given by that Act is limited to cases in which suspension was previously competent. The only ground upon which it is maintained that, prior to the Act of Victoria, suspension would have been incompetent is, that this is a decree in absence upon which no charge could have been given, and that the remedy of suspension of a decree in absence was limited to decrees which could be followed by a charge. I think that was not so. I do not think that, according to the law and practice previous to the statute of Victoria, the remedy of suspension against a decree obtained in absence in the Supreme Court was limited to the case of a decree which could be followed by a charge. I think that the law and practice were, that all decrees in absence of the Court of Session were reviewable by suspension, whereas decrees *in foro* were reviewable only by reduction. I do not mean that decrees in absence could not also be reviewed by reduction. They might be reviewed either by suspension or reduction; but decrees *in foro* only by reduction. It was not contended, as I understood the argument, that it was because this decree bore to be a decree *cognitionis causa tantum*, that suspension was inapplicable, but because it was a decree on which no charge could follow. We **[1095]** have nothing to do with the question whether it was a regular or irregular decree, and I do not wish to enter into that at all.

Such a decree in absence as that in the case of Fraser, Dict. 12,194, which was a declarator of a right to a peerage, might be reviewed by suspension, although there was no room for a charge. It does not indeed appear from the report, whether, in that case, review was obtained by reduction or suspension. But it does appear that what the Court did was to turn the decreet into a libel, which was a common practice in those days, and shows that such decreets might be reviewed without being reduced. If, in a case like the present, the heir had appeared, and given in a renunciation, the decree would have become a decree *in foro*, and might not have been reviewable by suspension. But there is nothing here to make it a decree *in foro*. If, then, there was nothing in the old practice to make suspension an incompetent mode of review, the question does not arise, whether the Act of Victoria makes review by suspension competent in cases where it was not competent before. The only question would be as to the form of the suspension,—whether it could be in the form of the schedule, which bears to be a note of suspension of a charge or threatened charge. Now that would be a very narrow objection. The statute of Victoria does not make the old form incompetent so far as I can see. The party might have brought the suspension in the old form; and when it comes to that, I think it would be very difficult to say that the statute does not authorise, in cases like this, the adoption of the short form in place of the old form, notwithstanding of the introduction of the words "charge or threatened charge," which are directory merely. Upon these grounds, without going into the general question, I agree with your Lordship that the interlocutor is well founded.

The Court pronounced the following interlocutor:—"Adhere to the interlocutor of the Lord Ordinary submitted to review, and refuse the reclaiming note: Find the reclaimers liable to the suspenders in expenses since the date of the Lord Ordinary's interlocutor, and remit," &c.

No. 159. **XXIII. Dunlop 1099.** 14 June 1861. 2nd Div.—Lord Kinloch.

Mrs. JESSIE MACLEAN or MORRISON and Others, Pursuers.—*Young—Black.*

CHARLES MACLEAN and Others (MACLEAN'S Trustees), Defenders.—*Sol.-Gen. Maitland—A. R. Clark.*

Process—Issues—Testament—Fraud.—In an action of reduction of a trust-deed and codicils by the next of kin of a deceased on the ground of incapacity, facility, fraud, and circumvention, and defective execution, the trustees pleaded that by other deeds, holograph of the deceased, the pursuers were excluded from the succession. The pursuers then raised an action for declarator that these previous deeds were mere instructions to an agent to prepare the deeds sought to be reduced, and were not to be treated as testamentary writings, but concluding also that if they were testamentary, they too should be reduced on the grounds of incapacity, facility, and circumvention. The actions were conjoined. *Held*, 1. That the question, whether or not holograph deeds *ex facie* complete, were intended to receive effect as testamentary writings, was not a proper subject for trial by jury; 2. That, before deciding that point, it was proper to send for trial by jury issues as to the alleged facility, fraud, and circumvention, and defective execution.

Alexander Maclean, sometime Lieutenant-Colonel of the Third West India Regiment, died at Millport, in the Island of Cumbrae, on 17th April 1859, at the age of eighty. He left a trust-disposition and settlement dated 27th October 1856, a codicil thereto, dated 7th June 1858, and a secqnd **[1100]** codicil dated 19th February 1859. By the trust-deed he conveyed to Charles Maclean and others the sum of L.20,000, then invested in three per cent consols in trust for certain educational purposes of a charitable nature. The first codicil directed the trustees to pay an annuity of L.50 to Janet Macdonald or Crawford, who had been in his service in the capacity of housekeeper, and on her death, an annuity of L.25 to each of her two daughters, on certain conditions, and for a certain period. The second codicil conveyed to the trustees the whole of his property for the purposes of the trust, in addition to the sum conveyed to them by the trust-deed. These deeds were put on record by the trustees. Under the trust-deed and codicils, no part of Colonel Maclean's estate was destined to any of his relations.

Colonel Maclean's next of kin raised an action of reduction of the trust-deed and codicils, in which the trustees and Mrs. Crawford and her husband were called as defenders. It was averred that at the time the deeds were executed, Colonel Maclean was not of disponing mind, being insane, and afflicted with organic disease of the brain, and was in a weak and facile state of mind, and easily imposed upon. He had conceived a groundless hatred of his near relations, which was suggested or fostered by Mrs. Crawford, who had obtained an undue influence over him, and had by fraud or circumvention impetrated the deeds from him. It was besides averred that the writs were not properly executed.

The defenders averred;—The deceased's dislike of his relations was not groundless. Colonel Maclean usually enjoyed good health up to the time of his death. The deeds sought to be reduced were the result of Colonel Maclean's deliberate wishes regarding the disposal of his estate, and were prepared by a writer to the signet in Edinburgh, after correspondence with the Colonel. When the deeds were executed, he was not insane or facile. It was further averred;—(Cond. 8.) "Besides the trust-disposition and codicils sought to be reduced in the present action, two other testamentary writings were left by Colonel Maclean, by which his whole means and estate will fall to be regulated and disposed of, supposing the said trust-disposition and codicils were to be set aside. (1.) There was left by Colonel Maclean a testamentary writing (No. 62 of process) duly signed by and holograph of him, whereby he bequeathed in trust to the trustees therein named L.20,000 government funds, for the education of boys of the name of Maclean, subject to certain conditions and provisions as therein expressed; and (2.) There was left by Colonel Maclean another testamentary writing, holograph of and subscribed by him, bearing date 'Millport, 6th February 1859,' (No. 63 of process), by which he bequeathed to his housekeeper, the defender Mrs.

Crawford, and after her death, to her daughters Mary and Janet Crawford, an annuity of L.50. By this testamentary writing, Colonel Maclean also disposed of any residue there might be of his means and estate for the purposes of the trust, which, by the other writing, he had constituted for the education of boys of the name of Maclean. By these two testamentary writings," "the pursuers would be entirely excluded from any interest in Colonel Maclean's estate and succession, even supposing the trust-disposition and codicils now challenged were to be set aside."

The defenders pleaded;—The pursuers had no right, title or interest to sue this action; all right, title, or interest which they might otherwise have had being excluded by the two unchallenged testamentary writings of Colonel Maclean above mentioned.

Colonel Maclean's next of kin then raised an action, concluding for declarator that these writings "were of the nature of mere instructions (in so far as the said Alexander Maclean was capable of giving instructions) with reference to the preparation of testamentary writings, and were not intended by the said Alexander Maclean to be, and were not in fact, the concluded **[1101]** and final expression of his testamentary intentions (in so far as he was capable of forming such intentions) or finished and completed writs;" concluding also that if held to be testamentary writings, they should be reduced on the ground of incapacity, fraud, and circumvention.

The pursuers averred that these writs were not intended to be dealt with as completed testamentary writings; and, in so far as they could be so regarded, they were reducible, because, at the time they were signed, Colonel Maclean was not of sane and disposing mind, or, at least, was in a weak and facile state of mind, and was induced to grant the deeds by the fraud or circumvention of the defender, Mrs. Morrison.

The actions were conjoined.

The deed, No. 62 of process, was without date, was conceived in testamentary language, was holograph of Colonel Maclean, and was subscribed by him in the same way as the formal trust-deed and codicils. Its provisions were substantially the same as those of the trust-deed of 27th October 1856. The other deed, No. 63 of process, was dated 6th February 1859; it was also conceived in testamentary language, was holograph of the Colonel, and signed by him. Its provisions were substantially the same as those of the second codicil dated 19th February 1859.

The pursuers proposed the following issues for trial of the cause:—

"14. Whether the said writ, No. 62 of process, was a paper of instructions, or a memorandum not intended by the said Alexander Maclean to be a completed deed regulating his succession?

"15. Whether the said writ, No. 63 of process, was a paper of instructions, or a memorandum not intended by the said Alexander Maclean to be a completed deed regulating his succession?"

The defenders objected to these issues, and the Lord Ordinary reported the case by interlocutor dated 6th February 1861.[1]

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[1] "NOTE.—There is no variance between the parties, except as to the admissibility of the two last issues.

"These issues regard two writings, produced in process, said to be holograph of the deceased Colonel Maclean; one of them declared *in gremio* to be his 'last will and testament,' and running in the usual terms of such; the other setting forth certain legacies which he thereby declared he bequeathed.

"The pursuers aver that these writings, although *ex facie* complete testamentary deeds, were only papers of instructions or memoranda for an after settlement; and they propose, under the issues in question, to establish this averment by parole evidence before a jury.

"The defenders object to the competency of their doing so, and for reasons which appear to the Lord Ordinary of the greatest possible weight. The proposal is to prove by parole evidence that the writings in question (executed—as must on this part of the case be assumed—by a man of perfect capacity) had not the meaning and intention which their words express. The writings are to be cut down by parole proof; not on the head of fraud, or incapacity, or any other of the grounds to which parole proof is admittedly applicable, but on the ground that the granter did not intend what the

[1102] After parties had been heard, it was agreed that the questions raised by the declaratory conclusions of the second summons, and involved in the 14th and 15th issues, should be decided upon the writings produced. Minutes adjusting the facts admitted for the purpose of that judgment were lodged, and farther probation as to these questions was renounced.

The letters produced and minutes of parties proved that Colonel Maclean sent the document, No. 62 of process, to his agent, on 8th May 1856, with instructions to prepare a formal deed in conformity with it; that the agent had accordingly framed the trust-deed, which was sent to Colonel Maclean for signature, and was afterwards returned to the agent for safe custody. The note of instructions, No. 62 of process, was returned to Colonel Maclean, and was found in his repositories. It was not proved that the document, No. 63 of process, had ever passed out of Colonel Maclean's possession; but he sent a writing in similar terms to his agent, who, by Colonel Maclean's instructions, made out from it the second codicil of 19th February 1859.

The pursuers maintained that it was established that the two writings in question were memoranda or instructions for the preparation of formal deeds. They could not, at the same time, be both instructions for the preparation of wills, and wills. If the testator's agent had been instructed not to proceed to frame the formal wills, these memoranda could not receive effect. It was thus established that they were not valid testamentary writings originally; and if not so originally, nothing had occurred which could change their character.[1]

LORD JUSTICE-CLERK.—The first question we have to consider is as to the course of procedure to be adopted for trying the various questions raised in these actions. The testator died on 17th April 1859; immediately thereafter his trustees and executors recorded in the Books of Council and Session a trust-deed, dated 27th October 1856, and two codicils, dated respectively 7th June 1858 and 19th February 1859, thereby announcing that these writings constituted the whole testamentary

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writings unequivocally bear. The pursuers propose to bring witnesses to establish this, and thereby to set aside the writings.

"The Lord Ordinary cannot discover any sufficient authority for this proceeding, which he considers to be not only at variance with the general principle that writings are not to be cut down by parole proof, but also, if sanctioned, to involve consequences of the most serious character as regards the security of written instruments. If the course is a legitimate one, it will be equally open in the case of the most formally probative deed, as in that of a holograph writing. The result will simply be, that every writing, however probative, will be liable to be set aside by tendering witnesses to prove that the granter did not intend what he expressly says in the instrument subscribed by him. It is scarcely possible to calculate the practical evils which might arise from sustaining the competency of this proceeding. There is no practical evil involved in an opposite conclusion—for it simply implies the very reasonable rule, that a man should not put his signature to an *ex facie* completed deed if he does not intend it to be so held.

"The Lord Ordinary was referred to the case of Munro *v.* Coutts, as decided in the House of Lords, 3d July 1818, (1 Dow, 437.) But the writing, which was there held to be a mere paper of instructions, had not the form (at least not conclusively the form) of a completed instrument. It commenced,—'I wish a codicil to be made to my last will and testament in the following manner.' It was enclosed in a letter from the party to his law agent, in order apparently to be turned into a formal deed, and a long correspondence took place between them on the subject of the execution of the deed, as to which the last letter written by the intending testator bore,—'When you have finished my last codicil or additional settlement, I request you will send it to me to be signed as soon as possible.' Independently, therefore, of the terms of the writing itself, it was here established, by written evidence, that it was not intended to be a completed deed. Another case, also referred to, Stainton *v.* Stainton, 17th January 1828, 6 Shaw, 363, was of the same description, only still less favourable as an authority. Neither of these cases, nor any case of which the Lord Ordinary is aware, countenances the present proposal."

[1] Munro *v.* Coutts, 3d July 1818, 1 Dow, 437.

writings of the deceased. Soon afterwards, the first action, now before your Lordships, was raised by Mr. Morrison and certain other parties, as the heirs and next of kin of the deceased, concluding for reduction of the deeds on various grounds: First, on the ground of the incapacity of the granter of the deeds; secondly, that the granter was facile at the time the deeds were executed, and that they were obtained by fraud or circumvention; and, thirdly, that they were informal and ineffectual, in respect of bad execution.

One of the defences is of the nature of a title to exclude. It was maintained by the trustees, that, even should the pursuers succeed in setting aside the trust-deed and two codicils, there still remained two unchallenged testamentary writings of Colonel Maclean sufficient to exclude them from the succession. And if that [1103] defence be well founded, it is no doubt conclusive, and establishes a good title to exclude.

These two writings were holograph of the testator. The one is without a date, the other is dated 6th February 1859. And it was at once obvious that the undated holograph writing was substantially of the same import and effect as the trust-deed; while the holograph paper of 6th February was of the same tenor as the codicil of 29th February sought to be reduced.

In these circumstances the pursuers of that action raised a second process, in which they concluded for declarator that these two writings were of the nature of mere instructions for the preparation of testamentary writings, and were not of the nature of testamentary writings; and they further concluded for reduction of these two holograph writings, if found to be testamentary, on the ground of incapacity, and of facility and circumvention. Of course, the third ground of reduction against the trust-deed and codicils, namely, bad execution, could not be stated against these two deeds, they being holograph. These two actions were conjoined by the Lord Ordinary by interlocutor of 10th January 1861, and he appointed parties to lodge issues; and, after having heard parties, he reported the case to us, intimating an opinion that the pursuers were not entitled to their 14th and 15th issues. These issues were intended to try the questions raised by the declaratory conclusions of the second summons, whether these two deeds are to be received as two testamentary writings, or as mere instructions for the preparation of testamentary writings; and he further intimated an opinion that the character of these writings could not depend upon parole evidence. Your Lordships were of opinion that the questions proposed to be raised by the 14th and 15th issues are unsuitable for trial by jury. It then became a consideration of importance whether these questions should be determined before the rest of the case was sent to a jury; or whether the consideration of their legal character and effect should be left to be determined after settling whether they are liable to be set aside on the grounds of reduction stated or not. We had a full argument as to the character of the writings, and as to whether they were testamentary writings or not; but, after giving full attention to the argument, and to the state of the process, I think it would not be a proper course to determine the character of these writings at present. It seems to me that there are various results, which may follow from the trial of the issues,—challenging the validity of both the formal and the holograph writings, on the ground of the incapacity of the testator, and of facility and circumvention, and challenging the validity of the formal documents on the ground of bad execution. The pursuers may succeed in reducing the whole of these deeds, and the question under the declaratory conclusions of the second summons will not require to be decided at all; or, the pursuers may fail to reduce any of the deeds, and then there will be no need to try the declaratory conclusions; or it may happen that the formal trust-disposition of October 1856, and the two codicils, may be set aside, and the holograph writings not set aside. It is obviously only in that event that it will be necessary to determine the declaratory conclusions of the second action. That state of matters may arise in two ways; the trust-disposition and codicils may be reduced on the ground of the incapacity of the testator, or on the grounds of facility and circumvention, and the holograph papers may remain unreduced, because not liable to challenge on these grounds. That would be a case of the testator being incapable, or under undue influence at the time of granting the later papers, but not at the time of executing the holograph papers, and if that were the state of the fact, we should, as regards the undated paper, be placed in this position, that we should have to consider the case of a testator having written a holograph deed under no incapacity or undue influence, and afterwards embodying it in a formal deed when in a state of incapacity. That would be a case of supervening incapacity or

facility in the interval between the execution of the one paper and the other, and would raise the question under the declaratory conclusions in a peculiar way. And if the law of Scotland be the same as the law of England in questions of this kind, that sudden intervening incapacity or facility would be a most material element in forming our judgment under the declaratory conclusions of the action. But then you may have the allegations of incapacity and facility negatived, and yet the trust-deed and codicils cut down as badly executed. Then this question will arise under the **[1104]** declaratory conclusions, whether when a truster writes a holograph paper in testamentary language, intending it to be used as the foundation of a more formal deed, but fails in making such a formal deed as can receive legal effect, the informal holograph writing can, in such circumstances, receive effect. I think the first of these questions is totally different from the second, and, therefore, I think it would be very imprudent and premature to determine the questions raised by the declaratory conclusions of this summons till we know what the questions are that arise for determination, and that therefore we ought, in the first place, to send those issues to trial. We shall then be in a condition, if necessary, to take up the declaratory conclusions. It has been suggested by the pursuers that this course involves some degree of hardship on them, being persons unable to afford a great expense. That consideration does not weigh with me, because the course which I suggest would not cause more expense than would be caused if we should first find the holograph deeds ineffectual, and then send the case to trial on the other issues. Because the pursuers' case, on the ground of incapacity and facility, is not of such a kind that there can be any material difference in the proof in regard to Colonel Maclean's state of mind when he executed these holograph writings from that which must be led as to his state of mind at the date of the formal documents.

The other Judges concurred.

On the case being again called, the defenders suggested that the issues relating to the document, No. 62 of process, should stand first and second, it being the first in date.

The pursuers objected to mixing up the case as to the letters of instructions with the deeds bearing to be formally executed.

LORD JUSTICE-CLERK.—These issues are the pursuers' issues, and all we have to do is to see that they accurately represent the pursuers' case. The pursuers assail the formal testamentary writings. To which the defenders answer: Supposing these to be out of the way, there remain two other writings sufficiently expressive of the testator's wishes. And to that the pursuers reply that they are equally open to objection as the others. The attack on these deeds comes naturally at the end of the case.

The Court pronounced this interlocutor:—"Having heard counsel on the declaratory conclusions of the second action, and on the course of procedure to be followed in the conjoined process, Find, that before disposing of the said declaratory conclusions, it is proper and necessary that the reductive conclusions of both actions should be disposed of: Disallow the 14th and 15th issues proposed by the pursuers, and appoint them to lodge amended issues.

The Court afterwards approved issues in the same terms as the first thirteen issues proposed by the pursuers.

[Sequels, 23 D. 1262; *Morrison* v. *Maclean's Trs.*, 24 D. 625; 1 M. 304; 3 M. (H.L.) 42.]

No. 160. **XXIII. Dunlop 1104.** 15 June 1861. 2nd Div.

ANDREW KYLE, Petitioner.—*Fraser.*

Minor — Guardianship — Curator — Appointment — Stat. 1672, c. 2. — The Court dispensed with the citation of the next of kin of a bastard, in an edict for choosing curators, neither the mother, nor the bastard's next of kin on the mother's side, being resident in Scotland.

The petition stated that the petitioner was the illegitimate son of David Kyle, a farmer in the county of Roxburgh, who had left a will leaving the petitioner his sole executor and universal legatory. The petitioner, being in minority, had raised an

edict of curatory before the Sheriff of Roxburghshire, but being illegitimate he had consequently no nearest of kin who could be cited to the edict, or to the making up of inventories, as directed by the statute 1672, c. 2. The petitioner's mother, and his nearest of kin on the [1105] mother's side, were resident in England. The petition prayed the Court to order intimation, and, "in respect of the circumstances of this case, to authorise the Sheriff of Roxburghshire, the judge-ordinary of the bounds within which the petitioner resides, to proceed to the appointment of curators to the petitioner on the citation of all having interest, edictally, as use is, and to make up and complete the curatorial inventories at the sight of a delegate appointed by the said judge-ordinary; and to dispense with the citation of the nearest of kin by the father's and mother's side."

The Court ordered the circumstances in which the petitioner was placed, and the grounds of the application, to be stated more particularly in a minute.

A minute was accordingly given in. It was set forth:—"In the case of persons illegitimate, the Court had been in the practice of dispensing with the citation of the nearest of kin by the father's side, and authorising the election of curators, and the making up of the inventories at the sight of the nearest of kin on the mother's side.[1] But in such cases the nearest of kin on the mother's side were within the kingdom. In the case of legitimate children, where the nearest of kin on either side is out of the kingdom, the Court dispense with citation;[2] and, in the case of illegitimate minors, the Court recently dispensed with citation altogether.[3] In the present case, the petitioner's nearest of kin on the mother's side are all resident in England."—(The places of residence of the petitioner's mother, and of her three brothers, were stated). "In these circumstances, the petitioner, having no next of kin on the mother's side resident in Scotland who could concur with him in choosing curators and making up inventories, was obliged to ask the Court to dispense with the citation of such persons, and to sanction the proceeding being carried through in the most formal way applicable to his case,—viz., by a delegate named by the Judge. The brother of the petitioner's father is still alive; but no precedent was found for citing a relative on the father's side to the election of curators and the making up of inventories by an illegitimate minor."

The petition was executed edictally against all concerned, and intimated on the walls and in the Minute-book.

On resuming consideration of the case,

The Court granted the prayer of the petition.

No. 161. **XXIII. Dunlop 1105.** 18 June 1861. 1st Div.—Lord Mackenzie.

The Earl of Kintore, Pursuer.—*Sol.-Gen. Maitland—Hunter.*

The Honourable Algernon Hawkins Thomond Keith Falconer, Lord Inverury, and Others, Defenders.—*Young—A. R. Clark.*

[4 Macq. 520; 10 S.R.R. (H.L.) 602.]

No. 163. **XXIII. Dunlop 1128.** 19 June 1861. 1st Div.—Lord Mackenzie.

Samuel Sturgis, Pursuer.—*Young—A. R. Clark.*

Richard Dennistoun Campbell and Others (Meiklam's Trustees), Defenders.—*Macfarlane—W. Ivory.*

Trust—Construction—Residue—Intestacy.—Terms of trust-deed on a construction of which held that a direction that the trustees should dispose, in a certain manner, of

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[1] A B, 23d June 1838, 16 Sh. & D. p. 1209.

[2] See Hobbs or Lamont, 29th June 1831, 9 Sh. & D. p. 841; Shields, 2d February 1832, 10 Sh. & D. p. 282; Fordyce, 23d June 1836, 14 Sh. & D. p. 992; Steel, 25th November 1847, 20 Jurist, p. 40; Duncan, 23d May 1848, 20 Jurist, p. 371.

[3] Wilson *v.* Alexander, 15th March 1859, *ante*, vol. xxi. p. 736.

"the residue and remainder" of the estate on the death of an annuitant whose annuity did not exhaust the free annual proceeds, carried the accumulations as well as the capital, and that there was not intestacy as regarded the proceeds not specially appropriated.

The late James Meiklam of Carnbroe died on 13th October 1854, and was survived by a son and daughter. He left a trust-disposition and settlement, dated 31st January 1853, whereby he conveyed his whole estate and effects, heritable and moveable, to R. D. Campbell, Esquire, of Jura, and others, as trustees. The purposes of the trust were, 1st, for payment of the granter's debts; 2d, for payment of certain annuities and provisions; and, lastly, the trustees were directed and appointed 'to hold the whole residue and remainder of my said trust-estate and effects hereby conveyed, and to pay over the free annual proceeds and profits thereof to John Meiklam, Esquire, my only son, during all the days of his life, as an alimentary provision, declaring that the same shall not be assignable by him, nor arrestable nor attachable by the diligence of his creditors, nor affectable by or for his debts in any manner of way; and with special power to my said trustees, if the said John Meiklam have conducted himself to their satisfaction, and if they shall, in the exercise of their discretion, deem it advisable so to do for his benefit, to pay and assign, dispone, and make over the said residue and remainder of my estate to the said John Meiklam on his attaining the age of thirty years;' but subject to the burden of the annuities provided to the widow, if she should then be alive. 'And in the event of the trustees finding it not expedient to make over the said residue to the said John Meiklam under the power above given them, I direct and appoint them, on his death, to pay and assign, dispone, and make over the same,' equally among the lawful issue of his body, and failing such issue, to Isabella Meiklam, the truster's only daughter, and the lawful issue of her body, whom failing, to her heirs and assignees whomsoever.

"To this trust-disposition and settlement a codicil was subjoined, dated 31st May 1853, which, after setting forth that notwithstanding his repeated remonstrances and admonitions, the conduct of his son had not improved, and that in consequence he considered it necessary to make an alteration on his settlement, proceeds thus:—'Therefore I do hereby recal the direction to my said trustees in my trust-disposition and settlement, to pay to my said son, John Meiklam, the whole annual proceeds and profits of the residue and remainder of my means and estate during his life; and I direct and appoint them to pay to him in its stead the sum of L.300 yearly out of the proceeds and profits thereof by equal half-yearly payments, in advance, at the terms of Whitsunday and Martinmas in each **[1129]** year, and that as an alimentary provision; declaring that the same shall not be assignable by him, nor arrestable or attachable by the diligence of his creditors, nor affectable by or for his debts in any manner of way: And on my said son arriving at the age of thirty years, but not sooner, or at any time thereafter, they shall, in the exercise of a sound discretion, see fit, and if his conduct previously shall have been such as to lead them to believe that he is competent to manage his affairs, and that it would be for his benefit and advantage, I hereby authorise and empower my said trustees to pay, assign, convey, and make over the said residue and remainder of my estate to the said John Meiklam, subject to and under the burden always of the foresaid annuity, and additional annuity to the said Mrs. Christiana Alston Campbell or Meiklam, if she be then alive, and which additional annuity of L.200 shall be constituted a real burden over the residue of the heritable estate before my said trustees shall denude thereof; and if my said trustees shall not see fit to exercise the power before written, then, on the death of the said John Meiklam, I direct them to dispose of the residue in manner specified in my said trust-disposition and settlement, which I hereby confirm and corroborate in all points, so far as not altered by these presents.'

"Then follows a clause declaring that the testator considered the sum of L.100 a fair and adequate proportion of the provisions contained in the truster's marriage-contract to be allotted to his son, 'in respect that I have by my said deed of settlement settled upon my said son the foresaid annuity of L.300, and contingently the whole residue and remainder of my estate on him or on his lawful issue.'

"By a second codicil, dated 9th August 1853, the truster revoked 'the destination of the residue and remainder of my means and estate provided to my daughter,

Isabella Meiklam, in my said settlements,' and directed the trustees to pay the free annual proceeds to her during her life, and after her death to make over the estate of Carnbroe to her eldest son; 'and I direct the rest of my means and estate to be divided equally among her other children,' declaring, 'that if there shall be only one child of her body, my trustees shall pay and convey the whole residue and remainder of my means and estate to such child, and, failing children, to her heirs and assignees whomsoever.'"

The truster was survived by one son, John, and one daughter, Isabella, mentioned in the trust-deed in 1858, John Meiklam being then a prisoner in the Queen's Prison in London. His whole estates, real and personal, were, by order of the Court for the relief of insolvent debtors in England, vested in Samuel Sturgis, as provisional assignee, in trust for his creditors. In that character Sturgis raised this action against the trustees of James Meiklam to have it found and declared "that the pursuer is entitled to the income and proceeds of the free residue of the trust-estate of the said James Meiklam, which have accrued since his death, and which may accrue until the death of the said John Meiklam, or at least until the defenders, the trustees of the said James Meiklam, may convey and make over the said trust-estate to the said John Meiklam."

It was pleaded for the pursuer that, according to the sound construction of the trust-deed, and the codicils, they did not dispose of the income and proceeds of the residue of the estate; and the truster must be held to have died intestate in regard to the same. The said income and proceeds were therefore payable to the pursuer as provisional assignee foresaid, until the death of the said John Meiklam, or until the trustees made over the whole residue to him.

On 20th March 1861 the Lord Ordinary pronounced the following interlocutor:—"Finds that, according to the sound construction and true meaning of the trust-disposition and settlement of the late James Meiklam, dated **[1130]** 31st January 1853, and two codicils thereto annexed, the one dated 31st May and the other 9th August 1853, the free income of the trust-estate, after satisfying the debts, legacies, and annuities, was not left undisposed of by the truster, but forms part of the residue, and falls to be distributed as included in the residue: Finds that the pursuer, as provisional assignee of John Meiklam, is not entitled to any part of the free income of the trust-estate, as claimed by him under this action: Repels the pleas in law for the pursuer, assoilzies the defenders from the whole conclusions of the action, and decerns: Finds the pursuer liable in expenses to the defenders; allows an account to be given in," &c.[1]

[1] NOTE.—(After narrating the deeds quoted above),—"It is maintained by the pursuer that the free income of the trust-estate, after satisfying the annuities and burdens, was left undisposed of by the truster, and so falls in whole or in part to the pursuer as assignee of John Meiklam. In support of this theory it is said that the residue described in the last purpose of the trust-deed is a residue consisting exclusively of capital at the testator's death, without including any of the annual income accruing after that date, which was all directed to be paid over to John Meiklam; that although the first codicil recals the direction to pay the whole annual proceeds to John, and limits his claim to an alimentary annuity of L.300 out of the proceeds, the trustees are not directed to accumulate the surplus, and that in giving them discretionary power to make over to him, at the age of thirty, 'the said residue and remainder of my estate,' the word 'said' necessarily draws back to the previous clause in the codicil, where residue appears to be used in a restricted sense, as consisting exclusively of capital, without reference to any income accruing after the death. The Lord Ordinary is unable to see any sufficient grounds to support this construction of the trust-deed and first codicil, being of opinion that the surplus income was included in the directions given as to the residue, and consequently was not left undisposed of by the truster.

"The question depends upon what appears to have been the intention of the testator. He conveyed to the trustees all his property of every description, heritable and moveable, belonging to him at his death. The trustees were directed to hold the whole estate conveyed, with its accruing fruits and produce, for the purposes of the trust. Intestacy, as regards any part of the trust-estate or its produce, never was contemplated by the truster. By the trust-deed he directed the trustees to pay to his son the whole annual proceeds and profits of the residue during his life; and, so long

[1131] The pursuer reclaimed. At advising,—

LORD PRESIDENT.—In this case I cannot say that, upon the words of the deeds, the construction is very satisfactory; but, upon a consideration of the whole deed and of the codicils, I have come to be of opinion that the interlocutor of the Lord Ordinary is right.

In the trust-deed there is a conveyance of the whole estate, heritable and moveable, to certain trustees, and directions are given to them how they are to deal with it. By the deed the trustees are to pay over the whole annual proceeds to the truster's son, and they are to pay him the residue on his attaining the age of thirty, if they think fit. But the truster afterwards alters that direction, and directs that, instead of paying over the whole of the proceeds to his son, they are to pay over only L.300 a-year out of the proceeds; and that, when the son reaches thirty, but not before, they may pay him the whole residue if they see fit. But in the event of their not seeing fit, there is a different direction; and that other direction is, that if they shall not see fit to exercise the power before-written, then, on the death of the son, "I direct them to dispose of the residue in the manner specified in my said trust-disposition and settlement." And then he says, "In respect that I have, by my said deed of settlement, settled upon my said son the foresaid annuity of L.300, and contingently the whole residue and remainder of my estate on him, or on his lawful issue"—he therefore allots him L.100 as his proportion of the provision in the marriage-contract. After that he made another

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as that direction stood, there could be no surplus income added to the capital so as to increase the residue at the period of distribution. But the first codicil placed matters on a totally different footing. For it expressly recalled the direction to pay the whole annual proceeds to the son during his life; and restricted his claim to an alimentary annuity of L.300, so that the surplus income, not being otherwise specially appropriated, necessarily fell to be disposed of under the residue.

"If the pursuer's construction of the words 'the said residue' in the first codicil were adopted, the rights of John Meiklam, in place of being restricted, would be enlarged contrary to the plain intention of the truster. For, after getting the L.300 a-year, it would be still open to the son and his creditors to claim the surplus annual proceeds as undisposed of. How can this be reconciled with the clause in the codicil recalling the direction to the trustees to pay over the annual proceeds to John Meiklam, and limiting him to an alimentary provision of L.300 a-year, with a careful exclusion of the diligence of creditors?

"Again, it will be observed that in the first codicil the words 'the said residue,' upon which the pursuer lays so much stress, occur only in the clause giving discretionary power to the trustees to make over the residue to John Meiklam on his attaining thirty years of age, while, in the subsequent parts of the same codicil, as well as in the second codicil, the terms used are, 'the residue,' or 'the whole residue and remainder of my means and estate.'

"Nor is it of any consequence that no express direction is given to the trustees to accumulate the surplus income till the period of distribution. For, as regards the question of intermediate profits, there is a great difference between a direction to trustees to make over to a beneficiary a particular estate or subject upon a future contingency, and a direction to make over the residue at a future period. This distinction is well brought out in the case of Turnbull *v.* Cowan, decided in the House of Lords 17th March 1848 (6 Bell's App., 234), where the Lord Chancellor observed—'Where you give the residue of personality, then, from the comprehensive nature of the term "residue," the Court says it is quite immaterial that the intermediate interests are not given; they are not given in terms as intermediate interests, but they are given under the term "residue," and therefore a gift of the residue of personality *de futuro* carries with it all the immediate income.' And he adds that 'a rule having been adopted with regard to personality, it has been considered that, where the gift is mixed, that is an indication of intention that the same rule shall prevail when applied to realty.'

"Reference may also be made to the case of Pursell, 25th November 1856, 19 D. 71, where one of the points decided has an important bearing on the present question."

codicil, by which he revoked the destination of the residue and remainder of his estate provided to his daughter Isabella, and directed the trustees, in the event of the succession opening to her, to hold that residue in trust for payment to her of the whole free annual proceeds during her life, and after her death he directed the estate of Carnbroe to be given to her eldest son, and the rest of his means and estate "to be divided equally among her other children."

Now, it appears to me not difficult to discover the intention of the testator from beginning to end of these arrangements. In the earlier part of it, it was obvious that his intention was to protect his estate against the folly of his son, and to provide him with certain annual means; and it is equally obvious that subsequently he considered it necessary to limit even that which he was to give to him by the first part of the deed. I think that there is difficulty in reading the first part of the deed, so as to see clear and unambiguous words for carrying and giving full effect to what is obviously the intention of the testator. The intention of the testator is the governing matter, but that intention must be expressed in apt words to give effect to it; and I think there is some difficulty in that.

As to the criticism which was made on the terms, and the sort of definition that had been attempted to be found of the word "residue" in the beginning of the deed, I do not think that was very conclusive, because we are here dealing with a general trust-deed, which conveyed the whole means, heritable and moveable, of the party, and dealt with his estate, and with the general residue of his estate. We are not dealing with a particular landed property, for instance, which he appoints to be made over to a certain party, without saying that the trustees are **[1132]** to make over any of the proceeds, or anything else with it; but we are dealing with the general residue of an estate, which is generally considered to carry the whole accessories of that residue.

But, supposing there are difficulties in finding apt words to give full effect to what, I think, is the plain intention of the testator in the earlier part of the deed, I think that when we proceed with it, not only is the intention that I think was plain in the first part of the deed made still more clear and palpable in the latter part of the deed, by the farther restriction imposed upon the son, but I think that there is a change in the phraseology of the deed there, and that we are not to import into that latter part any deficiency of words that may be found in the earlier part. He has given a new direction to the trustees, and, if we do not find in that new direction any words which require or force upon us a limitation similar to what is said to be forced upon us by the words in the earlier part of the deed, I do not think we are so to import it.

It is said that it is the same arrangement that the party had in view from beginning to end. I do not doubt that. My view is, that he had the same thing in view from beginning to end, and that he all along intended what I think he better accomplished at the last, viz., to direct the disposal of the whole proceeds along with the residue. But though he had the same thing in view from beginning to end, it does not follow that he expressed it in equally apt language at the first as at the last. It is not by reason of deficiency of intention, but it is by reason of supposed deficiency in the language in the earlier part of his deed, that the intention is said to be frustrated. I think the intention was the same; because the residue comprehended everything that he had not otherwise specially dealt with. But he having the same intention, it does not follow that when he uses the general words, "the residue in manner specified," he is there stopped in his purpose by the defect or insufficiency of the language which he is said to have used in the earlier part when he talked of the "said residue." I therefore feel here that I am not precluded from giving to this deed the meaning and effect which, I think, it is perfectly plain that the testator intended. Indeed, the effect that is now proposed to be given to the deed is in direct opposition to what I think is the declared purpose of the testator. The declared purpose of the testator in the first codicil was to limit the means that were to be conferred upon his son, and the attempt now made is to give to that codicil a reading which would not limit the interests in the meantime of the son, but, on the contrary, would rather make them more free and large. If we were forced to do that by reason of defect of language, then we must withhold our assent to giving effect to the purpose of the testator. But I think there is not such defect of language here, and that the

purpose of the truster is palpable, and that it should receive effect; and therefore I am for concurring in the interlocutor of the Lord Ordinary.

LORD IVORY.—I have arrived at the same result. As to the mere intention of the testator, there can be no doubt whatever. It appears palpable upon the face of the first deed, and of all the deeds to the end. But of course mere intention, without apt words, will not answer the purpose; and the question is, whether, as these deeds are constructed, there is not enough to enable the Court to follow out the object of the party into full execution. I think, on the whole, there is; I think that any construction but that at which the Lord Ordinary has arrived would be a construction that, in place of carrying out the view of the testator, would be a violence to the view of the testator.

I am not puzzled at all by some of the arguments that were raised in regard to the words "residue" and "remainder." The words "residue" and "remainder" are right enough. They are to be taken as words operative at the time of the death. They show that what the testator was dealing with, under this purpose, was his entire estate after certain preliminary objects had been fulfilled. It would be the same as if it had been "my said above disponed estate," if there had been no such preliminary objects. What is conveyed to the trustees is all of the estate that is over after satisfying certain annuities and other prescribed payments.

The question was said to involve some difficulties in respect of intestacy. That is a total misconception of the case. There is no intestacy here. The residue and remainder comprehend the entire estate. The gift to the trustees is complete, the **[1133]** testacy is equally complete, and the question is as to the execution of the trust. No doubt, in the execution of the trust, if any portion of the estate is not disposed of under the directions given to the trustees, the trustees are not to hold that estate as theirs for the purposes of the trust. But neither does it fall back upon intestacy, for, so far as the profits are concerned, it never did belong to the testator. It belonged to the trustees; and the trustees, in respect of insufficient and defective instructions, become trustees for the party who at law would have been entitled. That is not intestacy. It is a defect in the expression of the direction given by the testator as to the disposal of what he has made over out and out, as the trust-estate, in favour of the trustees. Therefore the term "residue and remainder" is nothing more than "my whole estate, heritable and moveable, above mentioned."

The direction under which the present question arises is in these words, "to pay over the free annual proceeds and profits of the said estate to John Meiklam during the days of his life as an alimentary provision." That does not separate anything from the residue. It is not as a deduction from the residue. It is not out of the residue that that is to be paid. It is the fruits accruing upon the residue that are thus to be disposed of. What the truster gave to the trustees was the estate at a particular time. That estate was an estate bearing fruits, and this is the disposal of the fruits, leaving the estate entire, as it was given, to be dealt with under the directions to be given to the trustees, or, if these are defective, partly with reference to the legal rights of his heirs. Now, if the son had died in the father's lifetime, that disposal of the fruits would have lapsed as a direction to the trustees, for there would have been no party to whom to give them. But would the trustees have had nothing to do with the fruits of the estate which had been vested in them? They must have dealt with them under the deed, if it was possible. Would there have been anything defective as regards the denuding of the trustees with reference to the residue and the fruits, if the son had predeceased his father, and the deed had been executed with reference to that case. Would the sons and daughters of the present Mr. Meiklam, if he had had them, not have taken up the estate given to the trustees, the burden or *quasi* burden attached to it with reference to its fruits having then fallen?—would it not have been incumbent upon them to have made over, in the first instance, to the family of Mr. Meiklam, or, if there was no such family, then to the testator's daughter, and, if she had no family, then to her heirs and assignees whomsoever? would they not have been bound to have disposed of the trust-estate in favour of these parties? What would they have disposed of? If the residue does not carry fruits, they would have had to give over the capital of the estate without fruits. But if residue carries fruits, what they must have disposed of to these beneficiaries would have been the estate *cum omni causa*—the estate with all that had accrued on it, the estate with its fruits up to the moment of its disposal.

Perhaps, however, a better illustration may be to suppose that the son did not predecease his father, but died before the expiration of the thirty years which are allowed before there is any power of disposing of the estate in his favour. He would have reaped under this deed the fruits during his life. But would his sister not have reaped the fruits afterwards? or, if these fruits had been otherwise disposed of, as they were otherwise disposed of here, would she not have reaped all the difference between that portion of the fruits which was given to her brother, and that portion of the fruits which was left as an accessory of the estate? There is no separation between the accessory and the principal on such a construction. It is the estate still carrying its fruits, which go to the party having the right to the estate. The fruits have not been destined to any other party; and, in so far as they have been partially destined, then the destinee, in the first instance, takes his part as a burden, but the first disponee carries the estate with the remainder of its fruits. If this deed, in place of directing the whole proceeds of the estate to be given over to the son, had directed (as the testator afterwards came to direct) that L.300 per annum out of these fruits should be given to the son, then the estate itself, with the rest of the fruits, must have remained over. If the son fell before the thirty years, when it could have been made over to him, then the estate with its fruits would have gone to the destined beneficiary. If the son had survived the thirty years, and the trustees had given him a disposition, they could not have **[1134]** executed their office without giving him a disposition which included the other fruits beyond the L.300 as well as the estate itself. I cannot imagine that it would have been a fair construction of this deed to hold that there was any defect in the direction to dispone to the son. He would not have taken so much by force of the trust-deed, and so much more by force of the operation of any defect in the trust-deed. He would have demanded that the trustees should denude, and when they had denuded, they would have denuded of the estate, and of the fruits as an accessory, and as such, as an integral portion of the estate that was given. The fruits would have been then a postponed portion of the estate given to the trustees, but that would not have affected the amount of interest of the party. And, therefore, I am of opinion that, even if it had rested without any further light in the later portions of the settlements, there is nothing in the construction of this first deed which forces us to refuse effect to the plain purpose of the testator. On the contrary, it seems to me that the purpose is declared, that there are words of direction given to the trustees, and that these words would have carried the entire estate without leaving the fruits of it undisposed of, but would have carried the estate, such as the trustees found it, to the parties who were the beneficiaries. It is plain from beginning to end that he gives the estate to the trustees only for the purpose of being disposed of between these parties, and that there is nothing left to accident or to the chances of this party or the other taking by the inoperative qualities of the deed.

But, whilst that would have been clear to my mind even so far, when I come to the first codicil and read it as well as the second codicil, I think it is impossible to hold that the testator has not given fair expression to his purpose. He recals the direction to his trustees to give over the whole annual proceeds, and appoints them to pay to his son L.300 yearly out of the proceeds and profits. Then he goes on to deal with "the whole residue and remainder of my estate;" that is, the residue and remainder of the estate, not only of the estate proper, but of the estate increased by this time by the profits so far as they have not been disposed of by the payment of the L.300. Beyond the L.300 there is no direction to pay. It is the necessary operation of the deed that there should be accumulation, but it is such an accumulation as occurs in every case where an estate is given subject to a postponed payment. If you give an estate to trustees to be given to certain children when they arrive at majority, or are married, these children get all the fruits that have accrued on the legacy. The trustees do not give them the bare sum at the end, unless there are words which necessarily limit them to that construction. And just so here. There is a change in the phraseology which shows that the residue and remainder of the estate is the residue and remainder of that estate, such as it has now come to accumulate in the hands of the trustees, exhausting the whole fruits. He made a conveyance of the whole. The trustees are directed to dispose of a certain portion of it in a particular way; they were directed to dispose of the income of it to a limited extent in a special way; but it is perfectly clear, when he speaks of "the whole residue and remainder of my estate,"

that he means all that remains in the trustees' hands under the gift which he gave to them, unexhausted by any special directions. And so the deeds go on, and the last codicil of all brings it out in the same way: "I revoke and recal"—(reads second codicil.) He broadens and enlarges the words which he had previously used, limiting the restriction which had been imposed in dealing with the trustees, and leaving the fruits, as parcel of the estate, to go down to the parties who were to be beneficiaries in the estate, but it never being conceived that, if the estate should come to the daughter at a particular time, the daughter was not to carry all, or that anything could be taken by the heirs and successors of the brother which he could not have taken himself under the express directions of the deed. On the whole, therefore, I cannot but concur with the Lord Ordinary and your Lordship.

LORD CURRIEHILL.—The subject of the present claim consists of the free revenue of the late Mr. Meiklam's trust-estate from the time of his death down to the raising of this action, and also of the future free revenue of that estate, until the death of John Meiklam, or until the time come, if it ever come, when the trustees shall make over the capital of that estate to him. That is the subject of the claim. It is made by a party who is admitted, I think, to be in the right of John Meiklam.

[1135] The ground upon which the claim was put at the debate was, that *quoad* this free revenue the late Mr. Meiklam had died intestate; and, as the pursuer's counsel stated it, the claim was made, not under the trust-deed, but independent of it. Now, at the outset, I think there is a fallacy as to the ground of the claim, which requires to be cleared up and kept in view. The revenue, which is the subject of this claim, never belonged to the late Mr. Meiklam. It did not fall into his *hæreditas jacens* at the time of his death, because it did not then exist. His eldest son never could make up a title to it, by serving heir in special as to that revenue. He might do so as to the capital sum, but he never could do it as to what forms the only subject of the present dispute, viz. the revenue. The true ground of the claim, I think, is this:—These revenues are the natural accessories of the estate and effects that were left by Mr. Meiklam, and, unless the contrary has been declared, these accessories go along with the principal. But still they are accessories of the trust-estate, and belong, as such, to the party who is the owner of that estate, if they have not been otherways disposed of by the testator. That party is the testamentary trustees in the first instance. The revenue is, therefore, held by them as part of the trust-estate; and the question is, *for whom* is it held by them? And, accordingly, the action is brought by the pursuer against the trustees, concluding for declarator that these revenues belong to him, and for a personal decerniture against the trustees, *qua* trustees, to account to him for this part of the trust-funds.

Now, that being the true nature of the claim on its merits, it depends entirely on this, whether these revenues have or have not been disposed of in favour of any other party by the truster. Although they arise after the truster's death, unquestionably he had ample power to dispose of them if he thought proper. The question is, has he done so? because I think that if he has not disposed of them in any other way, in favour of any other party, in that case the claim of the heir-at-law will be well founded. I think in that case he would be right in his claim, upon the ground that it was a trust for his behoof; and in that case I think his claim would come within the principle of the case of Cowan and Turnbull, as decided in this Court, and affirmed in the House of Lords. But then the answer which is made to the claim is this, that the truster, in the exercise of the power which unquestionably belonged to him, has otherwise disposed of these revenues. I think that he disposed of them, in the first instance, by the original trust-deed in favour of John Meiklam himself. He was the beneficiary under the trust *quoad* these revenues. But then that provision has been revoked by the codicil, and by that revocation matters are placed on the same footing as if no such provision had ever been made. The question recurs, therefore, have they not been otherwise disposed of? Now, I think that they have. I think that by the codicil, dated 31st May 1853, these revenues have been given to the children of John Meiklam, unless in the event of the trustees during his lifetime making over the property of the estate to him. Except in that contingency I think that they are made over to the children of John Meiklam, if he should leave children, and, failing his doing so, to his sister and her family.

Whether or not I am right in that proposition depends, I think, upon this, what is

the meaning of the word "residue" in that provision, by which, in the event of John Meiklam dying without children, and the trustees not making over the estate to him during his lifetime, they are directed to dispose of the residue in the manner specified in the trust-disposition and settlement—that is to say, in favour of his children, if he have any, and if not, in favour of the sister? What is the residue which is the subject of that provision? The word *residue* there is used without any qualification whatever. Whether or not we are to construe that word by reference to the prior part of the deed is a point which I shall presently advert to; but, as it stands in this provision, it is altogether unqualified. Let us suppose, in the first instance, that the meaning of it is not to be affected by anything in the prior context, either of this deed or the original one, what is the meaning of a provision of residue which is to take effect at some period posterior to the death of the testator? I think that, in such a case, a provision of residue includes not only the subject which is left by the testator in his lifetime, but the accruing revenues derived from that subject during the intermediate period. These **[1136]** revenues are construed as being part of his estate, or of the residue of his estate, just as much as the part which is left by himself. There are numerous decisions to this effect, but the case which is referred to in the conclusion of the Lord Ordinary's note—the case of Pursell, 25th November 1856—is a clear authority on that point. And that that is truly the meaning of this truster comes out very clearly, I think, by attending to the last codicil, where you have this provision so far altered as regards the destination in favour of the daughter and her issue. The same thing is the subject of both provisions, and in the last it is expressed in the clearest manner to be the whole residue of his estate and effects.

But it is said that the word "residue" in these provisions cannot have this meaning, because it has a different meaning both in the original deed and in the prior part of the first codicil. Now, I think, in the original deed, it has a different meaning, because what the testator there says the trustees were to hold during a certain period, what he calls the residue there, was the *corpus* of what he himself should leave, because the revenue arising from it was by the very same clause directed to be given to another party, viz., to John Meiklam himself. So that the revenue is separated from the capital or *corpus* there; and whenever the capital or *corpus* is used in that clause, it was, in my opinion, limited to what the testator himself should leave at the date of his death. But, then, as I said before, that provision, by which the accessory was separated from the principal, was revoked, and the effect of that revocation was to allow the residue, when it was used in the codicil containing that revocation, to have the natural and technical meaning which is usually applied to it in deeds of this kind. I therefore think that the meaning of the word "residue," as used in the operative provision, is not affected by the sense in which it was used in the original deed. But it is said it has also the same meaning in the codicil, because in the context immediately preceding the provision I am founding upon, there is a provision that the trustees may still, if they think proper, make over the residue to John Meiklam during his own lifetime, if, in the exercise of the discretion entrusted to them, they should deem this proper; and the residue which they are to make over is called "the said residue," thereby connecting it with the residue referred to in the original deed, and which is repeated in the recital of that deed in this codicil. Now, if the trustees were in the exercise of this discretion to make over the capital to John Meiklam during his lifetime, this question might arise, whether John Meiklam should take this revenue that has been accumulating in the meantime, as an accessory of what was then to be made over to him, or take it as what had not been disposed of in any way whatever? I think that would be a very nice speculative question, which we need give ourselves no trouble about solving, as it is at present of no practical consequence. But, then, when he comes to the operative provision—the provision that, supposing no such proceeding to take place on the part of the trustees in John's lifetime, they are to make over the residue to his children or his sister, as the case may be,—it is not "the said residue;" there is the change of expression which your Lordship has alluded to, which saves us from any such embarrassment. I think, if the word "said" had been there, it would have been a very unfortunate one, because I have no doubt it would have defeated the actual intention, but as the deed stands he has left us under no such difficulty. The very change of expression indicates that there was at least more care taken in framing the last provision than the first, if they had the same meaning; and

if they had not the same meaning, then we must give effect to the meaning that is expressed. In that way, while I entirely concur in what your Lordship has stated as to the actual intention, I confess I think that there has been no omission to express that intention, and that there is at this moment an existing direction—a contingent one, but a contingent one which precludes the claim which is now made on the trustees to give away this income to John Meiklam, or those in his right, because on his death they may have to account for it to other parties.

I think this case is quite distinguished from that of Turnbull and Cowan, for in that case there was no provision of the residue. There was a direction that, upon the testator's death, the trustees were to convert all his moveable estate into money [1137] for the purchase of land, and they were to hold the lands which belonged to the truster, and all the lands which they should so purchase, until a certain contingency should arise; but that purchase was directed to be made immediately on his death, and therefore, although they did not make it, yet, according to a principle in the construction of trusts, the question must be dealt with as if it had been made; and there was no power to entail anything else than the land that should exist at a certain date; and therefore the revenues of that land were left undisposed of, and it was held that, as to these revenues, the trustees were the trustees for the heir-at-law. I think that case stands quite distinguished from the present.

Lord Deas.—The construction of this deed appears to me to be a question of some nicety and difficulty. There is one view of the question of intention in which it is impossible to differ from your Lordship. I mean that it is impossible to doubt that, if the maker of this deed could be asked the question, whether he meant these annual proceeds to go in the way that is now contended for on the part of the son's creditors, he would answer in the negative. But that is not enough. We must find words in the deed by which the intention is expressed.

There are two things necessary in a deed of this kind in order to convey and dispose of the whole residue; in the first place, that the whole be conveyed to the trustees; and, in the second place, that direction be given to the trustees in regard to the disposal of the whole. It is of comparatively little moment that the whole has been conveyed to the trustees. If there be a portion of it which they are not directed to dispose of, that portion must go to the heir or heirs-at-law. In the question of beneficial interest, it does not much matter whether you call it intestate succession, or whether you call it a resulting trust. The material question is, do the heirs-at-law get the benefit of it or not? Now, it is perfectly clear here that the whole estate is conveyed to the trustees. The trust-deed conveys the whole estate, heritable and moveable, or, at least, it conveys, in the first place, certain heritable estates specially, then the whole heritable estate generally, and then it names the trustees executors. That is the only way in which the residue is given to them, in the outset of the deed. It names them executors, and dispones to them the heritage, so that they have got the whole, undoubtedly, for the purposes of administration. And when you come to the direction marked "lastly," they are directed and appointed to hold "the whole residue and remainder of my trust-estate and effects hereby conveyed."

As to the whole, therefore, being held by, and vested in the trustees, there is no room for doubt. The difficulty is as to the disposal of it; and in the way the argument is put on the part of the reclaimer, the strength of the argument lies in this. It is said that, in directing how the estate is to be disposed of, there is first a direction given for the disposal of the whole annual proceeds during the lifetime of the son, and then there are directions as to what is to be done with the residue. It is said that the annual proceeds being thus separated from the capital, what is called the residue and remainder of the estate in the original trust-deed is necessarily the capital merely of that estate. If that were so, and if the matter stood there, it would be quite indispensable to find a specific disposal of the annual proceeds—I mean, when he recals the way in which he first appointed the trustees to dispose of them, it would be necessary to find some other way pointed out in which the trustees were to dispose of them, in order to prevent them from falling to the heirs-at-law. Now, if that were the sound reading of the original trust-deed, I should have the greatest possible difficulty in holding that that was altered or affected by anything that comes after. If it be, in that original trust-deed, the capital which is there called the residue and remainder which is to go, in the first place, to the son's children, and failing them, to the issue of the daughter,

and so on, I should think it very difficult to say that the residue and remainder throughout the codicils was anything else. That residue and remainder in the original deed is to go in a certain way, and then, when you come to the first codicil, he speaks there of the residue and remainder of the estate, and speaks about how that is to be disposed of. I think it would be very difficult to say that the use of general words there was a substantive disposal of the whole residue and remainder of the estate, and not what is called residue and remainder in the original deed. These general words might show that he thought he had disposed of the whole, but I doubt very much if they would go further. I daresay he thought he had [1138] disposed of the whole. The difficulty here is, whether he actually had done so; whether, he had not omitted to do it; whether, having first appointed the whole annual proceeds to be disposed of in a certain way during his son's life, he (or the writer of the deed for him) did not forget to dispose of the rest of it? And if it stood in that situation, it would go to the heir-at-law undoubtedly.

But what are the terms of the original deed? The trustees are directed, lastly, "to hold the whole residue and remainder of my said trust-estate and effects hereby conveyed, and to pay over the free annual proceeds and profits thereof to John Meiklam, Esq., my only son, during all the days of his life." Then you come to the clause giving special power to the trustees, if the son has conducted himself to their satisfaction, to assign, dispone, and make over "the said residue and remainder of my estate to the said John Meiklam, on his attaining the age of thirty years." The words are, the said residue and remainder. Now, what is the said residue and remainder? Where do you find the antecedents to these words, residue and remainder? You do not find them in the direction to pay the annual proceeds. You find them in the appointment to hold "the whole residue and remainder of my estate hereby conveyed." Now, the appointment to hold, beyond all question, is to hold the whole residue and remainder of my estate and effects; and the first time you come to the words, "the said residue and remainder," you take up, not anything out of the direction to pay, but the words, "the whole residue and remainder of my trust-estate," in the disponing clause. And this reading runs through the whole of the rest of the deed. It is the same residue and remainder which is to be made over to him in a certain event, on his attaining the age of thirty, and to his issue; and failing his issue, to the daughter; and then throughout the codicil you have the same residue and remainder still dealt with.

Thus, when you come to the first codicil in which he recals the direction to pay the annual proceeds to the son, he goes on to direct them to pay to him, in its stead, L.300 as an alimentary provision. And then he says, "I hereby authorise and empower my said trustees to pay the said residue and remainder of my estate to the said John Meiklam," &c. What is the said residue and remainder there but the whole residue and remainder which alone was mentioned in the original deed? So that, when he directs them to dispose of the residue, I do not give any more effect to these words than if they had been "the said residue." But, the said residue is the whole residue. And so I think, in the last codicil, you get no more aid in that respect than you had before.

In the last codicil he revokes and recals "the destination of the residue and remainder of my means and estate provided to my daughter Isabella, and in place thereof, I direct my trustees, in the event of the succession opening to her,"—that is, the succession under the original deed; and if the residue and remainder in the original deed were limited to the capital, I think it would follow that the residue and remainder here, the succession of which was to open to her, was also the capital. And you would then have nothing except that he sometimes uses general words, which might show that he thought he had conveyed the annual proceeds also, but probably would not go further.

The best explanation, however, you have of his meaning from himself is contained in the previous codicil, where he says, "And in respect that I have, by my said deeds of settlement, settled upon my said son the foresaid annuity of L.300, and contingently, the whole residue and remainder of my estate on him or on his lawful issue,"—he therefore considers so and so. Now, I do not regard this as anything more than his interpretation of what he thinks he has done,—viz. that he had contingently settled the whole residue and remainder of his estate on his son, or on his lawful issue. But it is not only his interpretation, but I think it is correct. I think it is what the original deed did. I think the original deed did settle the residue and remainder of his estate

on his son, or his lawful issue; and that, therefore, the testator there, quite correctly, interprets that which he had done before.

In short, my opinion comes to this, that, taking the very words of the original deed, the residue and remainder of the estate dealt with throughout is the whole residue and remainder; and if you take that view of it, the direction to pay something out of the whole is only a burden on the destination of the whole residue and remainder;—the whole residue and remainder are disposed of, subject to the direction to pay either the whole annual proceeds, or, as the case may be, the [1139] L.300. You have, in the original deed, the whole residue and remainder disposed of, and so I think it is throughout all the codicils. Taking that view of it, I think not only is there intention in the broader and more general sense, but that, in words, that intention is sufficiently and aptly expressed to receive effect.

The Court adhered.

[Affd. 3 M. (H.L.) 70.]

No. 164. **XXIII. Dunlop 1139.** 19 June 1861. 2nd Div.—Jury Cause.

Rev. DAVID DOBBIE, Pursuer.—*Macfarlane—Fraser.*

Sir WILLIAM JOHNSTON and GEORGE ELIZA RUSSELL, Defenders.—*Young—Gifford.*

Process—Jury Trial—Challenge—Stat. 55 *Geo. III.* c. 42, *sect.* 21.—*Held*, that where there were two defenders, they had only right to four peremptory challenges altogether.

Process—Jury Trial—Verdict—New Trial—Bill of Exceptions—Affidavits—Stat. 55 *Geo. III. c.* 42, *sect.* 6.—Issues, whether a pursuer had been induced to buy and retain certain bank shares by the false and fraudulent representations of the defenders as directors, were tried by jury. The jury, after being some time enclosed, were told by the presiding Judge that their verdict would be received at his house, whereupon the Judge and the counsel for the pursuer left the Court. The Judge, at the request of the jury, returned to Court a few minutes afterwards, and received a verdict to the effect that the representations made by the defenders were false, but were not fraudulent, and that the jury found for the pursuer. The jury were told that that was a verdict for the defenders, and the verdict was entered up without the general finding for the pursuer. The pursuer's counsel returned to the Court while the verdict was being written by the clerk, and heard the jury assent to it when read over. The pursuer moved for a new trial, on the ground that the verdict was received by the Judge in the absence of the pursuer's counsel; that the whole verdict, as returned by the jury, including a general finding for the pursuer, was not entered up; that the jury intended to find for the pursuer; that, in point of fact, although it was not stated by the foreman, the jury had determined the amount at which the damages should be assessed; and that the verdict was bad, in respect it contained, as entered up, no general finding. The motion was supported by affidavits by the foreman and nine of the jurymen, and by the pursuer's agent and his clerk. *Held*, 1. That affidavits were not admissible to contradict the notes of the presiding Judge of what took place in Court,—which notes therefore, and not the affidavits which here substantially corresponded with them, were referred to as the record of what had occurred. 2. That the pursuer, having failed to instruct any prejudice to his interest resulting from the circumstances in which the verdict was taken, and the verdict, as entered up, being a good verdict for the defenders, there were no grounds for setting it aside, a motion for a new trial ought to be refused. 3. That a bill of exceptions against a judgment refusing a motion for a new trial is incompetent; and 4. That the Court will not pronounce an interlocutor refusing to sign a bill of exceptions.

(See *ante*, vol. xxi. p. 624; and vol. xxii. p. 1113.)

The Rev. David Dobbie, a minister of the Free Church, raised this action against Sir William Johnston and George Eliza Russell, Esq., two of the directors of the

Edinburgh and Glasgow Bank, concluding for the damage sustained by him in respect of his purchasing certain shares in the bank through the false and fraudulent misrepresentations made by the defenders as to the condition of the bank. The case was tried by a jury under the following issues :—

It was admitted that Sir William Johnston was a director and chairman of the directors of the bank from 1851 till June 1858, and that Mr. Russell was a director from February 1857 till June 1858, and chairman of the directors for the time during May 1858 ;—

"1. Whether the pursuer purchased" certain stock, "and whether the pursuer was induced to purchase said stock by false and fraudulent representations made" **[1140]** "by the defender Sir William Johnston, acting by himself, and with others as directors of the said bank," &c. ?

"2. Whether the pursuer purchased the said stock, and was induced to purchase the same by false and fraudulent representations made" "by the defender George Eliza Russell, and others acting along with him, as directors," &c. ?

Then followed a schedule of damages, amounting to L.3211, 1s.

"3. Whether the pursuer was induced to continue a shareholder in said bank in consequence of false and fraudulent representations made in a circular letter issued by the defender George Eliza Russell," &c. ?

"Damages claimed, L.2550."

The case was tried on 26th March 1861 and six following days.

At the trial two jurors were challenged on behalf of each of the defenders, without cause assigned. Sir William Johnston's counsel challenged another juror. The pursuer objected, on the ground that, by the Act 55 Geo. III. c. 42, sect. 21, "each party" was only allowed four peremptory challenges. The 20th, 21st, and 23d sections of the statute showed that the word "party" was intended to apply to the pursuers and defenders, however numerous they might be. It was important to keep in view, that the point concerned peremptory challenges. If it was held that each of several defenders had right to four peremptory challenges, the result might be that the whole jurymen returned were exhausted.[1]

It was answered for Sir William Johnston ;—The pursuer had taken an issue against each of the defenders. Such a thing as a joint challenge was impossible. There were two parties to each issue,—to the first the pursuer and Sir William Johnston ; to the second the pursuer and Mr. Russell. The defender in each issue was entitled to four challenges ; to hold otherwise would be to hold that each defender was only entitled to two challenges, for which there was no warrant in the statute. The case of Wallace *v.* Gray, referred to by the pursuer, was the decision of the Lord President, who was sitting alone, and the exception taken to his ruling never came to be discussed, because the jury found for the defenders ; besides, the case was different, as there was one set of issues which applied to the whole defenders. In the Justiciary Court, every prisoner was allowed the whole number of peremptory challenges.

The Lord Justice-Clerk having consulted the Judges of the First Division (then engaged in the extended session),—

LORD JUSTICE-CLERK.—The Justiciary Act leaves no room for doubt. It says, each person on trial, and the prosecutor. Is there anything more to be said ?

The Lord Advocate, for Sir William Johnston ;—I do not think so. I have looked into the question as to what takes place in the Court of Justiciary, and there is a case mentioned where the diet was deserted *pro loco et tempore.*

LORD JUSTICE-CLERK.—There seemed no alternative there, the prosecutor having put such a number of prisoners under one indictment. I think my proper course here is to disallow this challenge, and follow the case of Wallace *v.* Gray. I do not say it is exactly the same case as the present in its circumstances, but I am quite clear that the presiding Judge there intended to decide the point on the construction of the statute which arises in the present case.

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[1] Wallace *v.* Gray, 17th March 1836, 14 Sh. & D. p. 720.

The challenge was disallowed, and the counsel for both defenders excepted to the ruling.

The Lord Justice-Clerk gave the jury the following direction in point of law, as stated in his Lordship's notes:—

"I charged and told the jury that, to entitle the pursuer to a verdict, the jury must be satisfied on the evidence, (1) that the representations made **[1141]** by the defenders regarding the affairs of the bank were contrary to or inconsistent with fact; (2) that the defenders either knew that the representations were untrue, or believed them to be untrue, or made the representations without believing them to be true; (3) that the representations were made for the purpose of deceit; and (4) that the pursuer was, by means of the said representations, induced to purchase the shares in question.

"2. With regard to the construction of the 2d and 29th sections of the contract of copartnery, authorising the directors to purchase shares of the Edinburgh and Glasgow Bank, I told the jury that the directors had the same powers and discretion in making these purchases, and dealing with the stock when purchased, as they had in purchasing and dealing with any of the other funds or stocks mentioned in the 2d article.

"No exception was taken to these directions."

The counsel for the pursuer asked that the following directions should be given to the jury:—

"1. That if the jury are satisfied that the defenders, along with the other directors of the Edinburgh and Glasgow Bank, recklessly made false representations to the partners thereof at the meetings of said partners, held on the 4th and 5th February 1858, in regard to the affairs of the bank, for the purpose of inducing the public, and the pursuer as one of the public, to purchase stock of the bank, and that the said directors might readily have known, although they did not know, the truth—the pursuer is entitled to a verdict under the first and second issues, if he purchased stock on the faith of said representations, while he had himself no knowledge on the subject.

"2. If the jury are satisfied that the defenders, along with the other directors, made false representations in regard to the affairs of the Edinburgh and Glasgow Bank, in their report to the meetings of the partners thereof on the 4th and 5th February 1858, with the purpose of fraudulently inducing the pursuer, as one of the public, to purchase stock of said bank; and if the jury are satisfied that he did so purchase stock on the faith of such representations, he is entitled to a verdict under the first and second issues, although it may not have been shown that the defenders knew said representations to be untrue.

"3. That if the jury are satisfied that the defender Mr. Russell recklessly made false representations in the circular of 6th May 1858, and that Mr. Russell might readily have known, although he did not know the truth, the pursuer is entitled to a verdict under the third issue, if the jury are satisfied that he was induced to continue a shareholder of said bank on the faith of said representations, while he had himself no knowledge on the subject.

"4. If the jury are satisfied that the defender Mr. Russell made false representations in said circular, and are also satisfied that the pursuer was induced to continue a shareholder of said bank on the faith of such representations, he is entitled to a verdict under the third issue, although it may not have been shown that the defender Mr. Russell knew said representations to be untrue.

"5. That under the contract of copartnery of the Edinburgh and Glasgow Bank, the defenders and other directors were not entitled to employ the funds of the bank in the purchase of its own stock, if they did so out of money borrowed from other banks, and if at the time they required all their available funds for conducting the ordinary business of the bank."

The pursuer's counsel argued that the last direction sought was as to the construction of the bank's contract on the assumption of certain facts.

LORD JUSTICE-CLERK.—The last direction sought does not appear to me to be law at all. However, that will not prevent you from taking an exception to my refusal to state it to the jury. With reference to the other four propositions, I do not know that there is any great difference between you and me on the matter of law; but I confess

I have a natural preference for the way I have stated it myself, **[1142]** and I shall therefore make a note of what I have directed the jury on the matter of law, and I shall take your note of what you propose I should tell them.

The trial resulted in the following verdict being entered up:—"Find that the pursuer purchased the shares mentioned in the first issue: Find that he was induced to make the said purchases by false representations made on or about the 4th and 5th of February 1858, by the defenders, and the other directors of the Edinburgh and Glasgow Bank, but find that said representations were not made fraudulently by the defenders, or either of them: Find, under the third issue, that the pursuer was induced to continue a shareholder of the said bank by false statements contained in a circular issued by the said directors, but that the said statements were not fraudulent."

The pursuer moved the Court for a rule on the defenders to show cause why the verdict should not be set aside and a new trial granted.

Affidavits by the foreman and nine other jurymen, and by the pursuer's agent and his clerk, as to what took place in Court at the reception of the verdict, were put in, in support of the motion.[1]

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[1] I. Affidavit sworn before a justice of the peace on 23d May 1861, by the foreman of the jury.—"That he was chosen foreman of the jury." . . . "That the jury understood that the verdict they gave was one in favour of the pursuer, and that it was to be so entered up. That the deponent stated to the Lord Justice-Clerk that the verdict was for the pursuer, and not for the defenders. That the jury instructed the deponent to state, as part of their verdict, that they found damages due to the pursuer; that in consequence of the conversation which took place between the Lord Justice-Clerk and the jury, after the deponent had stated part of their verdict, the deponent was led to believe that it was not the province of the jury to assess the damage, but that it was the province of the Court; that therefore he did not state to the Lord Justice-Clerk what damage the jury found due in favour of the pursuer; that if the Lord Justice-Clerk had asked whether the jury found any damage due, which he did not, the deponent would have stated the amount of said damages as fixed by the jury. That the deponent and nine other jurymen would not have returned the verdict which they did if they had not thought that the verdict was one in favour of the pursuer, and would have been entered up for him. That the deponent, immediately after the trial, signed a declaration in the terms following, and which declaration is true, viz.:—'We, the parties following, who formed the jury in the action at the instance of the Reverend David Dobbie against Sir William Johnston and George Eliza Russell, hereby declare that we understood that the verdict we gave was in favour of the pursuer. We never would have given the verdict we did had we not in our own minds been convinced that it was one in favour of the pursuer. When the verdict was being taken, we stated to the Lord Justice-Clerk, through our foreman, that it was one in favour of the pursuer, and not of the defenders. We had instructed our foreman to state, as part of the verdict, the amount of damages we found to be due to the pursuer.' That said declaration is signed by the deponent as relative hereto."

II. A declaration subscribed by the foreman and nine of the jurymen:—This declaration was without date. It was in the terms quoted in the preceding affidavit by the foreman of the jury.

III. Affidavit sworn before a justice of the peace on 30th May 1861, by the pursuer's agent, William Fraser, junior, W.S.—"That when the Lord Justice-Clerk stated, after the jury had come into Court on the expiry of three hours from the time when they were first enclosed, that he would go home and receive the verdict at his own house, the counsel and agents for both parties were in Court. That his Lordship then stated that counsel and agents could attend at his house when the jury delivered their verdict. That his Lordship then left the Court. That the counsel and agents for the parties, including the deponent, after the Lord Justice-Clerk had retired from the Court, also then left the Court. That the deponent, as the pursuer's agent, made arrangements for conveying the jury to the house of the Lord Justice-Clerk at the expiry of the six hours, or sooner if they had agreed on their verdict. That the deponent and the counsel for the pursuer left the Court in the belief and understanding that the verdict

[1143] The pursuer's counsel having made reference to these affidavits in the course of his speech in support of the pursuer's motion, doubts were expressed as to the competency of admitting any evidence of what took place in Court at the trial. Counsel stated the import of the affidavits, so far as they detailed the *res gestæ* in Court, and contended that such evidence was admissible, and was admitted in England.[1]

An opinion was indicated that no evidence could be received to contradict the statement of what took place at the trial, set forth in the notes of the presiding Judge. The Lord Justice-Clerk stated that the facts, as stated **[1144]** in the affidavits, were substantially the same as appeared in his notes. He read therefrom the following statement:—

"The jury retired at 2.10 P.M.; and having remained absent till 5.20 P.M., I sent for them and inquired if they had yet agreed on a verdict, either unanimously, or by a majority of not less than nine. The jury having intimated that they had not agreed,

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was to be received by the Lord Justice-Clerk at his house, as stated by his Lordship; and in this belief, and on this understanding, the deponent left Mr. John Scott, one of his clerks, in Court, with instructions to despatch a messenger for him, and for his counsel, whenever it should be announced that the jury were prepared to go to the house of the Lord Justice-Clerk, in order that the deponent and the pursuer's counsel might attend the said Judge and jury at the Judge's house, at the delivery of the verdict. That about a quarter past six o'clock one of the deponent's clerks arrived in a cab at the deponent's residence in Melville Street, and informed him that the jury had been announced as about to come into the court-room, Parliament House. That thereupon the deponent proceeded with all the expedition in his power to the Parliament House, and that he immediately, on his arrival there, entered the court-room. That when the deponent entered the court-room, the clerk of Court was writing out the verdict. That none of the counsel for the pursuer were present until after the clerk of Court had commenced to write the verdict; that while the clerk was so writing the verdict, Mr. Patrick Fraser, one of the pursuer's counsel, arrived in Court, but neither he nor any of the other counsel for the pursuer were present in Court when the deponent arrived there."

IV. Affidavit by John Scott, clerk to the pursuer's agent:—"That shortly before six o'clock the jury were announced, and immediately on learning this the deponent despatched a clerk for Mr. Patrick Fraser, advocate, one of the counsel for the pursuer (who had agreed to be in attendance at the house of the Lord Justice-Clerk when the jury returned their verdict), and another clerk for Mr. William Fraser, junior, writer to the signet, partner of the said firm of Messrs. Jardine, Stodart, and Fraser. That a few minutes after the jury had taken their places in the jury box, the Lord Justice-Clerk entered the court-room. That his lordship asked whether the counsel for the pursuer were present; that Mr. A. B. Shand, advocate, one of the counsel for the defender Johnston, stated to his Lordship that the clerk of the pursuer's agent was present, and that a messenger had been despatched for the pursuer's counsel. That the deponent then explained to the clerk of Court, that the pursuer's counsel would shortly make his appearance, and requested that nothing should be done or said till they arrived; and he urged as the reason for this that it had been intimated that the verdict was to be received at the house of the Lord Justice-Clerk. That the deponent made this statement to the clerk of Court in order that he might make the Lord Justice-Clerk acquainted therewith, and the deponent believes that he did so; and the deponent adds that he strongly urged on the clerk the necessity of waiting till the arrival of the pursuer's counsel. That after waiting for a few minutes, the Lord Justice-Clerk stated it did not much matter whether the pursuer's counsel was present or not, and that he would receive the verdict. Depones further,—That the agent for the pursuer arrived in Court while the clerk was engaged in writing the verdict, and that Mr. Fraser, the counsel for the pursuer, arrived shortly after him; depones that none of the other counsel for the pursuer were present in Court after the Lord Justice-Clerk had intimated that he would take the verdict in his own house."

[1] Harvey *v.* Hewitt, 8 Dowling's Practice Cases, p. 598; Bentley *v.* Fleming (Common Pleas), 14 Law Journal, p. 174; Cogan *v.* Ebden, 1 Burrows, p. 383; Baker *v.* Myles, 7 Bacon's Abridgment, p. 772; Mackintosh *v.* Fraser, 20th Jan. 1860, *ante*, vol. xxii. p. 421.

I directed them to be re-enclosed, announcing to them at the same time, that if, after three hours farther deliberation, they could not agree on a verdict, either unanimously, or by a majority of not less than nine, I should then discharge them. I stated that I should go home and receive them there, either at the lapse of the additional three hours, or so soon as they were agreed on a verdict.

"I then left the Court. But before I had left the robing-room, I received a message from the jury, begging me to remain for five or ten minutes, as they now expected to be able to return a verdict. I remained for about a quarter of an hour or twenty minutes, and the jury having returned into Court, I also resumed my place on the bench; and having asked them if they were agreed, the foreman stated that they were unanimously of opinion that the pursuer was induced to purchase the shares by false representations made by the defenders, but that these representations were not fraudulent. I then said, if that is the substance of your verdict, and applies to the third as well as the first and second issues, you had better simply find for the defenders on all the issues.

"The jury then intimated that they intended the verdict to be in favour of the pursuer. I then said, there can be no verdict for the pursuer, in my opinion, unless you find fraud as well as falsehood against the defenders, in terms of the issues. But I said further, if you desire it, I will take the verdict in the terms in which you offer it, and leave it to the Court to dispose of the question, whether it is a verdict for the pursuer or a verdict for the defenders. The jury, through their foreman, intimated their wish that I should do so. I then wrote the following:"—His Lordship's notes then contained the verdict above quoted.

"I read over this to the jury very slowly and distinctly, and asked them if it correctly represented what they had agreed to find. They intimated that it did.

"I then directed the clerk of Court to write it out in the usual formal style on the interlocutor sheet. He did so; and he read over the verdict again in its formal shape to the jury, and the jury intimated again that they were satisfied that the verdict correctly expressed what they intended to find."

The motion of the pursuer was supported on the following grounds:—1st, Misdirection, in respect the presiding Judge told the jury they might return a verdict in the terms in which they did return it; 2d, Misdirection, in not directing the jury to retire and bring in a verdict for the pursuer, or the defenders; 3d, The verdict should have been entered up as a verdict for the pursuer, accompanied with special findings; 4th, The verdict, regarded as a general verdict, was not an answer to the issue, in respect that it found neither for the pursuer, nor for the defenders; and, viewed as a special verdict, it was bad, in respect that it did not find damages, and conditionally leaving it to the Court to enter it up for the pursuer, or for the defenders, according to their view of the law; 5th, The verdict was ambiguous; 6th, Mistake,—the jury were mistaken in supposing that the verdict could not have been entered up for the pursuer, and also the foreman of the jury did not state to the Court all that the jury directed him to state—that omission arose from mistake on his part; 7th, The verdict was not delivered in open Court; 8th, The verdict was taken in absence of the pursuer, his counsel and agents, when they were legitimately absent, upon an adjournment made by the Court.

The Court granted the rule.

It was argued for the defenders in support of the verdict;—The objections stated to the verdict might be considered as falling under two heads, intrin- **[1145]** -sic and extrinsic. The intrinsic objections being, that the verdict was not such as the Court could receive, or the Judge at the trial ought to have received. The extrinsic objections were,—1st, That the verdict was received, not at the Judge's house as agreed on, but in Court, and in the absence of the pursuer's counsel and agent; and 2d, that the foreman of the jury did not deliver to the Court the verdict upon which the jury had agreed.

The meaning in which the word "misdirection" was used by the pursuer was, that by receiving the verdict, the Judge impliedly directed the jury that the verdict was such as he could legally receive. That might be a ground for a new trial, not on the ground of misdirection, but on the ground that the trial had miscarried, in so far as it resulted in a verdict that was inoperative, being for neither party; but it would be shewn that the verdict was for the defenders. Whether the verdict was for the defenders or the

pursuer was the first question arising on the face of the verdict itself, and required to be first dealt with. It might be assumed that the verdict was not in favour of the pursuer, who was here seeking to have it set aside; and it was also to be assumed that the case was fairly and fully tried, and that the verdict could not be impugned, either as contrary to evidence, or as the result of misdirection, or failure to direct in point of law. If the whole issue was material, which a well constructed issue ought to be, every part of it required to be affirmed; and the converse of that proposition was equally true, that if any material part of the issue was negatived, the verdict was of necessity for the defenders. The duty of the jury was to assess damages if the whole issue was affirmed; but here material parts of the issue were not affirmed, and any finding of damages would be useless. The issues put it to the jury whether the pursuer was induced to purchase the stock in question by the false and fraudulent representations of the defenders; the verdict stated that these representations were false, but negatived the averment that they were fraudulent. Such a verdict was certainly such as the presiding Judge was bound to receive. The jury were not bound to find a verdict for the pursuer or for the defenders; a verdict which exhausted the issue was sufficient. It was said that the jury were under a mistake, that they intended to find for the pursuer; but they were told by the Judge that it was essential to the verdict being in favour of the pursuer that they should find fraud. The averment of mistake amounted to this, that the jury were mistaken in supposing that the law laid down to them as to fraud was erroneous. The affidavit of the jury, therefore, came to this, that they desired the verdict should be in favour of the pursuer, and so desirous were they to favour the pursuer, that although they found on their oaths that the defenders were not guilty of fraud, they would have found fraud, to have enabled the pursuer to win his case. The jury were well instructed as to the meaning of the words "false" and "fraudulent." It was not complained that they misunderstood these words, but having had it well explained to them, that unless they found fraud their verdict would be fatal to the pursuer, they differed from the presiding Judge, and considered that they should find for the pursuer, although of opinion that there was no fraud. The verdict they would have returned would have been a "slump" verdict for the pursuer. That would be a statement that they found both falsehood and fraud in point of fact, as clearly as if that was stated in the verdict. The contention of the pursuer was, that the jury being mistaken in a matter of law, dealt with a matter of fact as they would not have done had they been better informed as to the law. A motion for a new trial, founded on such a mistake, was entirely unprecedented.

The argument founded on the presiding Judge having adjourned the Court to his own house was easily met. The pursuer's junior counsel and the clerk of the pursuer's agent were present while the jury were returning their verdict, and the counsel and agents on both sides were present when **[1146]** the verdict, as recorded, was read to the jury by the clerk, and was assented to by them. Though the jury had fixed on a certain amount of damages as due, it was needless to state that to the Court, as the verdict, as entered up, was for the defender. The verdict was read to the jury in the presence of counsel and agents for both parties, and no exception taken to it.

It was argued for the pursuer;—The argument for the defenders proceeded as if the motion to be disposed of was for the application of the verdict, when a final verdict could not be interfered with.[1] Misdirection was, by the leading Jury Court Act,[2] a good ground on which to move for a new trial. The statement to the jury that there could be no verdict for the pursuer, unless both falsehood and fraud were found, and that the verdict would be received as returned, leaving it to the Court to decide whether it was for the pursuer or defenders, was calculated to mislead the jury, and, had the pursuer's counsel been present when it was made, would have been excepted to. It was not pleaded here that the verdict was for the pursuer; that could not be argued where an issue sought damages, and none were found due. In an application for a new trial, a party, who was not present when the direction complained of was given, was clearly entitled to state any exception to the law laid down to the jury. The pursuer's counsel, had either of them been present when the verdict was

[1] Magistrates of Campbelton *v.* Galbraith, 21st December 1844, *ante*, vol. vii. p. 255; Cleland *v.* Weir, 7 Bell's Apps. p. 402.

[2] Stat. 55 Geo. III., cap. 42.

returned, would certainly have craved the Judge to ask the jury whether the verdict was for the pursuer or not, and, having been told that it was, would have also craved that he should ask at what amount they had assessed the damages. It appeared from the affidavit that the reply to both questions would have been favourable for the pursuer. By receiving the verdict in absence of the pursuer's counsel, and by refusing to receive the exception now, the pursuer was deprived of the privilege of an appeal against an adverse judgment. The proper course was to have asked the jury whether they found for the pursuer or for the defenders. The issues were settled by the parties for the purpose of having a direct answer to them; no other verdict was anticipated by any of the parties, and the parties left the Court on the footing that the verdict was to be either for the pursuer or for the defenders.

The verdict was not conform to the findings of the jury. As appears from the notes of the presiding Judge they were prepared to find for the pursuer. They should have been directed to retire and reconsider their verdict, or the whole verdict as returned should have been taken from them. To take from them only a part of it was calculated to lead to injustice. Though read to them, and assented to by them in presence of the pursuer's counsel, it was taken in the absence of the pursuer; and its being taken would have been objected to, unless all that was said by the jury along with it was likewise taken. The jury had nothing to do with what was entered as their verdict, it being the province of the Court and of the parties to see that whatever verdict was returned was properly entered up. The jury might suppose that it was unnecessary to assess the damages, and that the amount claimed in the issues would naturally be awarded. Had the finding for the pursuer, and assessing the damages, been entered up, the pursuer would have had this advantage, that although the verdict could not stand, it could never be entered up as a verdict for the defenders.

There was no ground for the imputation put upon the jury that they were prepared to commit perjury, for the argument nearly amounted to that; the jury may have misunderstood the meaning or misapplied the word "fraud."

The admissibility of the affidavit put in by the pursuer was undoubted, [1147] as it was put in not to convict the jury of gross impropriety or misconduct,[1] or to impugn the report of the presiding Judge. Although there was no Scotch case where affidavits, to prove mistake, had been admitted, such had been frequently received in England.[2]

If affidavits were not admitted, the receiving of the verdict in the absence of the pursuer and his counsel was a much more serious objection. The statute required the verdict to be returned in open court, which certainly meant that the parties as well as the Judge should be present. It was not necessary to prove that the verdict would have been different had the pursuer's counsel been present. It was sufficient if it was shewn that it was taken behind the back of one of the parties, and might have been different. In England a verdict was not entered up if the pursuer absented himself; and in Scotland it had been held that where the pursuer's counsel was necessarily absent, and a motion to adjourn the trial was refused, that that was a ground for a new trial.[3] It could not be said now that a verdict, taken in the excusable and legitimate absence of one of the parties, could be allowed to stand.

Lord Wood.—The Court has now to dispose of the motion of the pursuer, that a new trial should be granted, founded on the ground of the objections stated, which were branched out into several heads, but which were well divided by Mr. Young into objections intrinsic and extrinsic of the verdict; and in respect of which objections it was insisted that the verdict cannot be sustained as a verdict in the cause, on the trial of which it was returned.

In supporting the motion, it was not contended that the verdict, as it stands, was a verdict for the pursuer. On the contrary, it was made a prominent point in aid of

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[1] Stewart *v.* Fraser, 10th March 1830, 5 Murray, p. 166.

[2] Cogan *v.* Ebden, 1757, 1 Burrows, p. 383; Baker *v.* Myles, 7 Bacon's Abridgement, p. 772; Neilson *v.* Hayward, 1821, 9 Price, p. 134; M'Whir *v.* Maxwell, 20th Dec. 1836, 15 Sh. & D., p. 299; M'Intosh *v.* Fraser, 20th Jan. 1860, *ante*, vol. xxii. p. 421.

[3] Doig and Stirling's Trustees *v.* Cuninghame, 5th July 1843, *ante*, vol. v. p. 1329.

the objections, that, as it stands, the verdict was necessarily not a verdict for the pursuer. But that being conceded by the pursuer, the question is, has any reason been stated why it should not be held to be a verdict for the defenders—liable, although it might be, to be set aside as being contrary to evidence, or upon exception, in respect of misdirection or want of necessary direction, but with none of which grounds of challenge of the verdict has the Court now anything to do—and which, therefore, for the present, it is to be assumed are not in the case.

Now, apart for the present from any objection in respect of the place where the verdict was returned, and holding the findings which the verdict contains, to set forth the result in point of fact at which the jury had arrived upon the evidence,—that so far it was truly the verdict of the jury, and that there was no mistake on their part in returning it, I think it was shown by the defenders beyond all dispute that, as it stands, it is a verdict for the defenders, open, in point of form, to no objection which could prevent its being applied as such on the proper motion being made for that purpose.

The issues put two matters of fact to the jury. To have made the verdict to be returned a verdict for the pursuer, it was necessary that on both these matters of fact the jury should return an answer in the affirmative. The verdict returned affirms the first and negatives the second, finding falsehood against the defenders, but negativing fraud. It thus exhausts the issue by a specific but simple answer, in point of fact, to all the questions it contains, and this without any findings of particular facts which might be within or be comprehended by these questions. That being the case, I apprehend it is not a special verdict, or liable to objection, in respect of any alleged defect in form as a special verdict, and on that ground, a verdict which ought not to have been taken from the jury. On the other hand, as a general verdict, I think it equally free from any objection in form. It was said **[1148]** that it ought either to have been merely a verdict finding for the defenders, or that, after setting forth the findings it embodies, these should have been followed up by—"and therefore find for the defenders." I am not aware that either the one or the other was necessary to make it a good verdict in point of form. No doubt the jury might have taken the course first indicated, and which, in truth, would have been nothing more than a short-hand way of stating the result from the facts which they had made up their minds to find, without embodying them in specific findings. But if they chose to set out in their verdict, in specific findings, the facts they held to be proved by the evidence adduced —or, in other words, specific answers to the questions put to them—and to leave the verdict there without any addition, that was also a perfectly competent course, so that the verdict shall be a verdict either for the pursuer or defenders, according to the answer made to the issues by the specific findings. Having done that, the function of the jury is discharged. Any addition of finding for the defenders or pursuer is mere surplusage as regards the jury, for that is an inference or result to be derived from the specific findings, and hence there was no omission or miscarriage in receiving the verdict without its bearing an express finding for the defenders. Therefore, the verdict in the present case being in the form of specific answers to the questions in the issues, and being upon its terms clearly a verdict for the defenders, I am of opinion that so far it is liable to no objection as a good verdict for the defenders, although it does not bear in express words to be a verdict for them. The point may be held to have been decided in Cleland *v.* Weir, 10th March 1848, and Kyle *v.* M'Pherson, 14th June 1856.

If I am right so far, it also disposes of the objection to the verdict that it is ambiguous. Indeed, that is just part and parcel of the objections, or of the last objection to which I have adverted. Consequently, having regard only to the verdict as it is worded, and not going beyond it, there was no miscarriage in receiving it as a verdict in the cause.

But then it is contended, on grounds extrinsic to the verdict, that it ought not to have been recorded as it stands, and for this different reasons are assigned, arising out of the procedure which took place when the verdict was returned, and afterwards recorded as the verdict of the jury. Of that which did then take place, the Court have been informed by your Lordship, who presided at the trial. And thence it appears,—that the jury, having been absent for upwards of three hours, and having, when sent for, intimated that they had not then agreed on their verdict, an arrangement was made (but not as stated by the pursuer, an adjournment of the Court) for the jury being received at your Lordship's house, where they could, if agreed, return their

verdict, or, if they had not agreed by the expiry of the necessary time, they would be discharged; but that, before your Lordship had left the robing-room, a message came from the jury that they expected to be able in five or ten minutes to return a verdict: —That the jury in about twenty minutes came again into Court, and your Lordship resumed your seat on the bench, when certain communications took place between the Judge and the jury in relation to their verdict, to be more particularly noticed immediately, and which resulted in this,—that the verdict, as offered by the jury, having been taken down by your Lordship, it was read over very slowly and distinctly to the jury, and accepted by them as correctly representing what they had agreed to find; and having then been written out in the usual formal shape by the clerk of Court, and again read over to the jury in that shape, they again intimated that they were satisfied that the verdict correctly expressed what they intended to find. It further appears that, down till the time when the clerk was in the act of writing out the verdict, the counsel and agent for the pursuer were not present, but that at that stage of the proceedings they came into Court and heard what subsequently occurred.

In this state of the facts, it is manifest that the counsel for the pursuer had perfect knowledge of the terms of the verdict, as written out and read over to the jury by the clerk, and of its being acquiesced in by the jury as correctly expressing what they intended to find as matter of fact; and that they thus had an opportunity of interposing if they considered they had ground for doing so. They might then have objected that the verdict was bad, whether viewed as a special or a general verdict, and this for the reasons I have just adverted to. But they did not. Therefore, apart from these objections, which I have already noticed and **[1149]** disposed of, and the objection that the proceedings were not had in open Court —of which afterwards—it does not appear that there would be room (nor am I aware that it was so contended) for any objection to the verdict as not being the verdict of the jury, and not a good verdict, were it not for what took place preceding the return of the pursuer's counsel into Court. But then it was said, that by what then took place a misunderstanding was created in the minds of the jury in relation to the verdict, by which any acquiescence in it which they signified was influenced or produced; and that the pursuer's counsel, not being informed of what had passed during their absence between the jury and the Judge, they were not in a condition to act for the pursuer as they would otherwise have done, when the proceedings might either have taken a different course from what they did, and which might have had a material effect upon the pursuer's interests, or the pursuer might have had some means of redress open to him, of the benefit of which he is now deprived, and that thus the pursuer has sustained injury occasioned by the manner in which the verdict of the jury was received and recorded.

After anxiously considering the able argument addressed to the Court for the pursuer, I have come to the conclusion that no reason has been assigned sufficient to impeach the validity of the verdict.

I learn from your Lordship's report, that when the jury returned into Court, the foreman, on being asked if they were agreed, announced that they were unanimously of opinion that the pursuer was induced to purchase the shares by false representations made by the defenders, but that these representations were not fraudulent, and that the jury were then told by your Lordship that if that was the substance of their verdict, and applied to the third as well as to the first and second issues, they had better simply find for the defenders on all the issues; but that the jury then intimated that they intended the verdict to be in favour of the pursuer, upon which your Lordship said,— "There can be no verdict for the pursuer, in my opinion, unless you find fraud as well as falsehood against the defenders, in terms of the issues." Now this was confessedly in perfect accordance with the explanations previously given to the jury, in your Lordship's charge, of the nature of the case they were trying, and with the full exposition of the law as there laid down. And, accordingly, it was stated by the senior counsel for the pursuer, that so far nothing had passed between the jury and the Court that could well be the subject of observation. It is in what followed, as connected, I suppose, with the jury's intimation, that they intended the verdict to be a verdict for the pursuer, that any ground for objection is to be found. What did follow, as we have been informed by your Lordship, was, that you said you would take the verdict—if the jury wished it—in the terms in which they offered it, and leave it to the Court to

dispose of the question whether it is a verdict for the pursuer or a verdict for the defenders; that the jury, through their foreman, intimated their wish that you should do so; that you then wrote it down, and there then took place the proceedings already mentioned.

Now, as it strikes me, nothing could be more proper or reasonable to the jury, or more just with reference to the interests of the parties to the action, than what was thus stated by the presiding Judge, and proposed by him to be done—and which accordingly was done—the jury still adhering to the result in point of fact to which they had come—any deviation from which on their part was never so much as hinted at. But then the position taken by the pursuer appears to be, that somehow or other, had his counsel been present, something might have been done that might have averted the consequence that would attend a verdict, which, it is certain, expressed in point of fact the opinion of the jury upon the evidence, and have given effect to the intimation of the jury that their intention—or perhaps I may rather say their wish—was that their verdict should be a verdict for the pursuer. And how was this to be accomplished? Not, as far as I am able to comprehend, with any observance of the duty which a jury is called on to perform, but as it appears to me by a manifest dereliction of it.

It seemed to be said that, although the presiding Judge had informed the jury that in order to make their verdict a verdict in favour of the pursuer, it was necessary that fraud should be affirmed, and not negatived—still, as they had intimated that they intended it to be a verdict for the pursuer, some explanation ought to have been submitted to the jury that might have led to an immediate solution of **[1150]** the difficulty arising from the verdict and the intention of the jury happening not to exactly harmonise, and should that not have been the result, then it was stated that the Judge would have been asked to order the jury to be re-enclosed to reconsider their verdict, and to instruct the jury that at all events, and supposing the verdict in its substance was not to be altered, they (as they intended their verdict to be a verdict for the pursuer) should assess or estimate the damages they desired to be found due to the pursuer:—And it was added, that if what might and would thus have been asked was not acceded to but refused by the presiding Judge, exception would have been taken to it as a misdirection. Now, as to the excepting to anything the Judge might have done in reference to the suggestions submitted to his consideration, I am clearly of opinion that it would not have been competent to except to it as an opinion or direction of the presiding Judge in any matter in reference to which it is competent for exception to be taken, and the presiding Judge could not have been required to sign a bill of exceptions.

Then as to the objections themselves. In so far as it may have been meant to be an element in support of any of the objections founded on (and whether it is so or not was not made clear in the argument for the pursuer), that there was a want of full instructions to the jury as to the nature of the case, and what, in order to their verdict being a verdict for the pursuer, it was necessary they should be agreed upon, in point of fact, and wherein the verdict as they had offered it failed to be so—there is certainly no ground on which anything of the kind can be rested. Indeed, it must lose even the semblance of plausibility, when it is kept in view that it was not alleged that the jury were under any misconception as to what the Judge had told them, not only when their verdict was offered, but in his previous charge; and that even in the affidavits by nine of the jurymen and the foreman of the jury—holding that these can be looked at (of which in the sequel)—nothing of the kind is averred. It was not from *that* that any difficulty arose, but from its having been the pleasure of the jury, stepping out of their own province—to state and insist—notwithstanding what they had been informed was the legal import of their verdict—that they intended the verdict—or, in other words, the facts they were agreed to find established by the evidence—to be a verdict for the pursuer. But unless the jury were not only to rule the facts of the case, but to dictate the law, what, it may be asked, had that which they intended to be the result of the facts, on which they were unanimously agreed, to do with the matter, or with the justice of the case? Their function was to come to an opinion upon the questions, in point of fact, contained in the issues. But the legal consequence resulting from that opinion was entirely out of their province; and in going beyond it they encroached upon matter with which they had no concern. This,

however, was just what the jury in the present instance did, when they intimated that their intention was not to return a different verdict in matter of fact, but that the verdict, as they had agreed upon it, should be a verdict for the pursuer—the jury, on the one hand, adhering with unwavering constancy to the opinion they had expressed on the facts—and, on the other, adhering with equal pertinacity to the idea they had chosen to adopt, that their verdict, as returned, was one for the pursuer.

What, then, does all that has been set forth as grounds of objection to the verdict amount to? Keeping in view the explicit manner in which the jury were informed that their verdict was a verdict for the defenders, and that to be a verdict for the pursuer they must, instead of negativing fraud on the part of the defenders, affirm it, is it anything but this—that the presiding Judge should have taken a course which might have enabled the jury to withdraw from the answer which they had deliberately announced they had unanimously agreed to return to the questions put to them in the issues, and to which they unqualifiedly adhered throughout all that took place—either by expressly doing it, or doing it covertly by returning a verdict in general terms for the pursuer—or if their consciences would not permit them to do that, then to have enabled them either to add to their verdict an assessment of damages, or by remaining enclosed till the time had expired when they would be discharged without returning any verdict, to deprive the defenders of the benefit of the verdict they had previously agreed to return—and which, being so agreed, there was nothing to preclude their returning, except their resolution (although they had sworn to give a true verdict on the issues) not to give a verdict for the defenders? It would, I think, be difficult to say which of the **[1151]** alternatives, had they been put in their power, it would have been most discreditable to the jury to adopt. And I cannot imagine anything that could have been done by the presiding Judge more disrespectful and improper towards them than to have followed the course which it is suggested might have been proposed. Observe, it was not a case of a defective verdict which the jury had signified they had agreed upon, and which it might have been proper to re-enclose them to reconsider. The verdict was a perfect verdict, inasmuch as it gave an explicit answer to the questions of fact put in the issues. As to that, there was no difficulty to remove, or defect to correct. Not only so, but there was no intimation that the jury had intended to find differently, in point of fact, from what they had signified they had unanimously agreed to, or entertained any idea that that was possible—all that was intimated having been that they intended their verdict, as they gave it, to be a verdict for the pursuer: But the whole matter thus resolving, not into any mistake on the part of the jury as to what they had signified to be their answer upon the facts, of which it was their exclusive province to judge, and upon which no hesitation on their part was so much as suggested, but into a mistake on the part of the jury as to the legal effect of the verdict they had so agreed upon, which was entirely out of their province. Why should they have been re-enclosed? Certainly not to promote any object which can be represented to have been calculated to forward the ends of justice, although it might have enabled them to be defeated had the jury been disposed (but which I cannot imagine they would have been) to take advantage of the opportunity.

It is right, however, that I should advert more particularly to one view, in which the objection—founded on the counsel of the pursuer not having had it in their power to move that the jury should be desired to assess the damages to be found due to the pursuer—was insisted in. The objection, of course, proceeds upon the footing that the verdict in its substance, as regards the facts found by it, was to remain unchanged. But if so, and the presiding Judge having explicitly told the jury that such a verdict was a verdict for the defenders, and not for the pursuer, he would, I apprehend, have been quite justified in refusing to accede to any proposal of the kind—or rather it would have been a complete error on his part had he done otherwise, or had he received a verdict in substance such as was offered, with an assessment of damages added to it. An assessment of damages would have been an addition totally inapplicable to and inconsistent with such a verdict, and could have been of no possible utility, and certainly the jury were not to be instructed to do what they could not effectually do. It could not in any way alter the legal import of the verdict. If in its substance it was not a verdict for the pursuer (and that it was not so was admitted by the pursuer's counsel), it could not be converted into it by damages being assessed. The pursuer, therefore,

suffered no injury by the want of opportunity to make the motion which it is said would have been made, or by damages not having been assessed; unless, indeed, it could be alleged to be an injury that the jury had not been instructed and allowed to add to their verdict that which, with reference to its legal import and effect, would have been, as I have already observed, an inapplicable and inconsistent addition, and that the Judge did wrong by subjecting him to it. But that, I apprehend, is entirely out of the question. Nor is there, as I conceive, any ground for alleging that—by anything that was stated by your Lordship, as previously adverted to, in proposing to the jury to take the verdict in the terms in which they had offered it, and leave it to the Court to dispose of the question whether it was a verdict for the pursuer or a verdict for the defenders—and which the jury intimated their wish should be done—the jury were led to believe that the verdict might be found by the Court to be a good and effectual verdict in favour of the pursuer, while in reality it could not be so found when the damages had not been assessed. For entertaining any belief of the kind, the jury had no reason whatever. It must always be recollected that immediately before the proposal from the Court to the jury to take their verdict as they had offered it, they had been told by your Lordship that in your opinion there could be no verdict for the pursuer unless the jury found fraud (which by the verdict offered was negatived), as well as falsehood (which by the verdict was affirmed), against the defenders in terms of the issues. In that position, and the verdict being to be taken in the terms in which it had been offered, it is perfectly manifest that all that was to **[1152]** be left to the Court was the legal import and construction of a verdict in these terms—that is, did it admit, contrary to the opinion which the Court had announced in unmistakeable language, of being held in its substance to be, not a verdict for the defenders, but a verdict for the pursuer? I consider it impossible that the pursuer can be heard to say that there was any misunderstanding by the jury upon that point. They could be in no error about it, but the misfortune was, that the jury were indisposed to believe the correctness of what was told them by the presiding Judge, while they were resolved to believe in their own idea of the legal effect of their verdict—a matter which, agreed as they were on the facts to be found in answer to the issues, was quite out of their province. It was in that that there was a mistake, and in nothing else. And what is the result? Assuming your Lordships to take the same view I have taken, it is this—That, in conformity to the decided opinion given to the jury, the verdict is a verdict for the defenders. That being the case, the pursuer has manifestly lost nothing by damages not having been assessed. If, indeed, the result were supposed to be different, then the consequence of the Court arriving at that conclusion would be that the pursuer would have the benefit of it to this extent, that there must be a new trial. This I conceive was all that was intended to be saved—all the pursuer could in the circumstances have in reason desired, and all that the Judge could be expected to have acceded to as a concession to the jury's intimation that they intended their verdict as offered to be a verdict in favour of the pursuer.

So much for the objections to the verdict, apart from the affidavit of the foreman, and declaration by nine of the jury narrated in that affidavit (which affidavit is dated 23d May 1861, being seven weeks subsequent to the 3d of April, the date of the verdict), and on which the pursuer has founded in aid of his objections to impugn the validity of the verdict.

Now, in so far as these affidavits are contradictory of, or in any respect at variance with, the report by the presiding Judge of what took place in Court, I am of opinion that they are inadmissible. This, I think, is clear generally; and it is obvious that, if the Judge's report were not of over-ruling authority in the matter, consequences most injurious to the administration of justice as respects trials by jury might arise. At the same time, I do not say circumstances may not be figured in which affidavits by the jury might be receivable. But I am clear that even taking the case as it is represented in the affidavits in the present instance, it is not one of the description to which I refer. I find it, however, unnecessary to canvass with any anxiety the admissibility or not of the affidavits here founded on, or to give any opinion upon the point, because it appears to me that the statements in these affidavits are such as to render it quite immaterial whether they are admitted or not.

As to what is there stated with regard to the assessment of damages—the want

of opportunity formally to move the Judge upon the matter, and damages having *de facto* not been assessed, I have already submitted the view I take of it, which I shall not resume. Nor does the statement that the jury had considered the amount of damages due to the pursuer, and had agreed upon it, and that the foreman was instructed to state, as part of the verdict, that they found damages due to the pursuer, alter the case farther than that if it was so, it rendered any re-enclosing of the jury to assess the damages unnecessary. But any intimation to the Court to the above effect could not change the import of the verdict the jury had agreed to return upon the facts; and, if so, nothing was omitted by the foreman in delivering it which could legitimately have been made a part of the verdict. To have made it a part of the verdict would have been a piece, not of innocent, but of perverse inutility. But the truth is, that when examined, the real substance of the affidavits amounts to no more than what the foreman stated in Court—namely, that the jury intended the verdict to be in favour of the pursuer; and that, although they had not proposed to vary their answer to the issues in point of fact, effect was somehow or other to be given to this intention, or if not, that then it was not their verdict.

I observe, indeed, that it is set forth in the affidavits that—"We never would have given the verdict we did, had we not in our minds been convinced that it was one in favour of the pursuer. When the verdict was being taken, we stated to the **[1153]** Lord Justice-Clerk, through our foreman, that it was one in favour of the pursuer, and not of the defenders." If I am to read this as meaning that the jury would have returned a different verdict upon the facts, as, for instance, to affirm fraud—which they deliberately, and after full consideration, had negatived—so as to render it a verdict for the pursuer, all I shall remark is, that any jurymen who could make such a declaration by affidavit, are, as I conceive, not to be envied. But if the declaration in these words was only meant to give intensity to their intimation that they intended the verdict as returned to be a verdict for the pursuer (and I could not read it otherwise unless the opposite had been more explicitly expressed), then I shall only say that I am unable to follow or appreciate the ingenuity which—the mind of the jury remaining unchanged upon the facts—would have enabled them conscientiously to return, by any form of verdict to which they might resort, a verdict which would have been one for the pursuer—or to withhold a verdict altogether, although agreed upon the facts, because the facts, which they were satisfied were proved by the evidence, happened not to be capable of being construed so as to give effect to their intention that any verdict they returned should be a verdict for the pursuer.

I have only a word to add in regard to the objection to the verdict in respect of the place where it was received, after the arrangement for receiving it in the Judge's house. In disposing of this objection, the case of a verdict so received and finally recorded all outwith the presence of the pursuer's counsel and agents, does not require to be considered. That, as already explained, was not the fact; and, as the facts stand, I am of opinion that there is nothing in them which can render the verdict a nullity, as was maintained by the pursuer. All I apprehend that the circumstances could give rise to, or open to the pursuer to go into, in impeachment of the verdict, was to show, if he could, that he had suffered loss or detriment—that his interests had been prejudiced by the course the proceedings took. It may be that he is to be allowed to say now, in objection to the verdict, all that could have been said had counsel been present during the period for which they were absent. Accordingly, he has been heard upon all the points it has been suggested would then have been submitted to the presiding Judge; and, in my opinion, he has failed to show that, had they been then brought forward, the trial would have issued in a different result; or consequently that he has suffered loss or detriment by anything that occurred at the receiving and recording of the verdict, except, indeed, upon the supposition (and holding it to be one on which the pursuer could be allowed to rely) that the jury had adopted a course which, to their credit (as I understand their statement), they have not signified they would have resorted to in order—either by altering their verdict in matter of fact, or, while at one upon the facts, by giving no verdict—to defeat the ends of justice, by depriving the defenders of the benefit of the verdict they had unanimously agreed to return.

fraud was not, his Lordship observed that this being so, they might simply find for the defenders, which led to the jury stating that they intended their verdict to be for the pursuer; (2.) that upon this statement his Lordship stated, that while in his opinion there could be no verdict for the pursuer unless fraud was affirmed as well as falsehood, yet if they desired it he would take their verdict and leave it to the Court to dispose of the question whether it was a verdict for the pursuer or for the defenders; and (3.) that the jury acquiesced in this proposal, and thereupon the verdict was recorded as we now have it, with their unanimous concurrence.

The question is, and it is the only part of the discussion that has appeared to me attended with embarrassment, whether in this way, and from this procedure, prejudice was suffered by the pursuer, or rather whether the verdict on the facts returned by the jury was influenced or affected prejudicially for his interest.

Certain it is that, so far as regards the actual findings in the verdict on the matters of fact submitted to them in the issues, there is no room for the slightest doubt, that those findings embody the mind of the jury upon the import of the proof, and this is the all-important consideration touching the verity and truthfulness of the findings by the jury. Falsehood established, but fraud not established, was their repeated declaration as to the import of the evidence. To [1156] this they adhered throughout all the communings that took place between them and the Judge. No doubt, then, we have embodied in the verdict the matured views of the jury upon the facts put in issue before them.

Although this cannot be disputed, it is, however, equally clear that the jury were impressed with the idea that their findings in fact on the proof were tantamount to a verdict for the pursuer. For when the Judge, with perfect propriety, told them that, with their views of the proof, they might as well find simply for the defenders, they stated that their verdict was considered by them to be for the pursuer. But in this they manifestly laboured under entire error. Their findings in fact were incapable of construction as leading to any other result than that the verdict must be entered for the defenders, upon those findings being reported to the Court. And they were plainly told so. Still they abided by their views of the facts proved before them, notwithstanding of the opinion indicated by the presiding Judge as to the effect of their verdict.

Had matters stood here, there could not be any difficulty. It was not the province of the jury, after finding on the facts specifically in issue, to draw an inference of their own in regard to the necessary legal result to which those facts led. That was the province of the Court. And it will not do to say that, after the specific findings in fact, the general view of their effect (being favourable to the pursuer) taken up by the jury should have been incorporated in the verdict. The Judge could not, consistently with his duty, have taken a verdict so framed from their hands. Such a verdict would have been suicidal. It could not with any propriety have been received. And as to the jury having had the power to find generally for the pursuer, without any specific findings on the facts in issue, no doubt it was within their power, if, consistently with their duty as sworn to try the truth of the case upon the evidence, they could take that view of the proof led before them. But with the views indicated by them as to the import of the proof, with the conviction on their minds that fraud was not established against either defender, and under any of the issues, the jury could not have conscientiously found a general verdict for the pursuer. They discharged their duty by finding specifically on the facts. They no doubt seem to have thought that this was finding for the pursuer. But their error in this was not upon a matter within their province as jurymen. It was legal inference, which it was not for them but for the Court to draw from the specific findings in fact embodied in their verdict.

The observation by the presiding Judge, that, while his own opinion was clear to the effect now stated, he would, if the jury wished it, take the verdict as they had put it, leaving it to the Court to dispose of the question whether it was a verdict for the pursuer or defenders, did not and could not by possibility affect the result of the deliberation of the jury, assuming them to act conscientiously in the matter. Let it be that they persevered in taking a different view from that indicated by the presiding Judge, and still abided by that view up to the moment of their verdict being recorded, still the verdict, as returned by them, embodying as it did a complete answer to the matters of fact put in issue, was properly received as their return on the issues. It

was for the Court to consider its effect, and to declare it to be a verdict for the defenders. The presiding Judge at the trial could only state his own opinion that such was the character and effect of the declared views of the jury on the evidence. And all that was said was in truth no more than that the Court was the proper tribunal for deciding whether the view entertained by the jury, in conflict with that which his Lordship entertained and stated to be the effect of their specific findings in fact, was correct or not.

But it was strongly urged that the jury were, by the statement now under review, led into the belief that it would be within the power of the Court to apply the verdict as for the pursuer, if they saw cause to do so; whereas the verdict could not by possibility have been entered up for the pursuer when reported to the Court, there being no finding with regard to the amount of damage in that view to be awarded. The observation is perfectly just. Had the verdict been capable of being construed as for the pursuer, it was indisputably defective, and there must have been a new trial. But when it is certainly one for the defenders—and such was the well-grounded opinion of the presiding Judge—**[1157]** there was no necessity, and there would have been no propriety, in any finding by the jury as to the amount of damages. The fact of the verdict not containing such finding is conclusive evidence of the Judge's opinion that the verdict could not be construed as for the pursuer. And all that he told the jury was really no more than that it would be for the Court to say whether he was right in the legal view he took of the effect of their verdict on the issues, or whether the view indicated by them could be adopted as the more correct. It does not seem to me at all probable that the jury could by this be in any respect misled in the discharge of their duty.

Upon the affidavits by the foreman of the jury, and by the agent and his clerk—in none of which does it appear to me that there is anything which may not, in perfect consistency with the views I have indicated on the question as to the admissibility of such evidence, be taken into consideration by the Court—observations were made by the pursuer's counsel, especially in reference to what has been last adverted to, which it is proper now to notice.

From the foreman's affidavit it is said to appear that the jury would not have returned the verdict which they did, had they not thought that it was one in favour of the pursuer, and that they were convinced in their own minds that such was its character. It is difficult to understand this statement. It cannot be imagined that they would have altered their declared conviction as to the import of the evidence, and withdraw their finding that fraud was not proved, so as to make their findings in fact quadrate with their wish that the pursuer should be successful, and have the verdict entered up for him. Yet there is room for that construction on the statement and declaration. I am rather inclined, however, to hold that what is meant is, that they would not have returned any verdict, but have gone back to the jury room to complete the six hours, and so be discharged without a verdict. But the Court cannot give any sanction to what, having regard to the avowed conviction of the jury as to the import of the facts in evidence before them, would have been a plain dereliction of duty. The only conscientious course for the jury to adopt was that which they followed. And it will not do for jurymen after the trial, by such statements, even on affidavit, to destroy the effect of that verdict which was delivered by them in open Court. Very disastrous consequences might follow, if the affidavits of jurymen were permitted to have such effect. Their verdict delivered in open Court must be taken as their deliberate and final deliverance on the facts in evidence before them. It cannot be tolerated that, *ex intervallo*, that deliverance should be set aside in the manner here attempted.

But it is urged that, taking what passed between the jury and the Judge as reported to the Court by his Lordship, and without regard to the foreman's affidavit, the objection to what then occurred is fortified by the fact that the counsel and agent for the pursuer were not in Court, but were legitimately absent, on the understanding come to, that the verdict was to be received by the Judge at his own house. How it arose that it was returned, notwithstanding, in the Court room, has been explained by the Judge. I do not enter into the question, whether all the counsel of the pursuer and his agent were quite justified in leaving the Court as they did. It was a very natural occurrence to happen. And there might be ground of complaint if prejudice arose to the pursuer, in the actual circumstances, from the absence of his counsel and

agent. But, in the first place, his agent and junior counsel were *de facto* present before the verdict was finally recorded, heard it read over to the jury for their concurrence in its accurracy, and might have objected either to the place where the verdict was received, or to the want of any general finding by the jury for one or other of the parties. In the second place, although not in Court, and therefore not hearing what passed between the Judge and the jury, it is impossible, on conjectural views as to what the counsel could or might have proposed for the consideration of the Judge in the circumstances, to set aside a verdict otherwise unobjectionable in its terms. And, in the third place, it does not appear to me that, though the counsel had been present throughout, anything could have been done by them, the want of opportunity to do which can be legitimately founded on as prejudicial to the interests of the pursuer.

This motion for a new trial has been made in the exercise of the undoubted right of the pursuer to do so under the 6th section of the Jury Court Act of 1815; but not one of the grounds for granting the motion therein recognised has been [1158] established. It has not been shown, nor attempted to be shown, that the verdict is contrary to evidence. It has not been shown that there was any misdirection on the part of the Judge, for which indeed there is no pretence, as that which has been dwelt on in the argument is not misdirection, but rather alleged miscarriage or misconduct in the procedure at the reception of the verdict. Nor has there been any complaint of undue admission or rejection of evidence, and this, I may observe, is a very remarkable feature of this trial, lasting, as it did, for so many as seven days. There is no case of *res noviter veniens*, another ground for such a motion as the present. And having the clear views which I have explained of the special grounds for setting aside the verdict, so ably contended for and pressed on the Court by the pursuer's counsel, I cannot hold that any solid cause exists for granting the motion on any ground essential to the justice of the case. But this exhausts all the statutory grounds on which the verdict can be impugned, or be legitimately set aside. For we have nothing to do in this discussion with the directions sought from the presiding Judge by the pursuer's counsel, and refused to be given, as these were the subject of exception at the trial; and, if insisted in, may be brought before us by bill of exceptions. On the matter which is now exclusively for the judgment of the Court, I am of opinion that the rule should be discharged.

LORD BENHOLME.—I am of opinion that a new trial ought not to be granted in this case. The grounds upon which the verdict of the jury has been impeached have been divided into various objections by the pursuer, or rather have been set in various points of view by the ingenuity of his counsel. But after all, the simple division of these objections by the counsel for the defenders into intrinsic and extrinsic appears to me to be convenient and satisfactory, and I shall adopt it in delivering my opinion.

I. It is contended that the verdict, as it stands, is on its face essentially imperfect or objectionable. In receiving such a verdict, and in not sending back the jury until they found either for the pursuer or the defenders, the learned Judge is alleged to have miscarried in his proper functions. The verdict, it is said, is a legal anomaly, being neither a general nor a special verdict. A somewhat more definite objection is, that it constitutes no complete answer to the issue.

An attempt was made to extract from these grounds of impeachment the elements of a misdirection on the part of the Judge. But, certainly, whatever may be thought of the learned Judge's conduct in receiving this verdict, it seems impossible to say that he misled or misdirected the jury.

Whether the verdict is in itself defective, is a totally different question. And, first, it may be asked whether the verdict labours under a fatal objection in not finding either for the one party or the other; and, secondly, whether it does not contain a complete answer to the issue. I conceive that the proper function of a jury is to ascertain the facts. By a general verdict for the pursuer or defender, the jury, in a short-hand way, affirm or negative the question of fact remitted to them. But the essence of such a verdict is still a finding in fact. In case of an action of damages, the jury, when they find generally for the pursuer, also assess the damages, which is an ascertainment of the compensation due to him from the defender, in respect of the facts found. But a complete answer to the issue may well be entertained in a verdict which contains nothing but findings of facts. For if all the facts put in issue are found either positively or negatively, the proper function of the jury is performed. How these

findings are to operate on the parties may be matter of question; but such question it is for the Court to determine.

The distinction between a general and a special verdict has, I think, been somewhat misunderstood. A general verdict exhausts the facts put in issue, without introducing findings of fact of a special kind; whereas a special verdict sets forth special facts which, though not so brought out in the issue, are considered to be suitable to the circumstances of the case as they appear in evidence, and sufficient for the decision of the case, although raising a question of law for the Court. The present case appears to me to present an instance of a general verdict—a verdict which finds only the facts specially put in issue, but finds them in this way, that some are affirmed and others negatived.

Such a finding of the facts is exhaustive of the issue; and exhaustive by [1159] inevitable consequence against the pursuer, who has failed to make out the case he undertook to prove.

It is too clear to require any argument; and indeed this was admitted by his counsel, that such a verdict could not be entered up for the pursuer, and that, to all intents and purposes, it was a verdict for the defenders.

That such a verdict should contain a finding for one or other of the parties, besides a finding exhaustive of the facts, seems to me either superfluous or contradictory. The verdict, by such addition, might have been rendered suicidal or contradictory, but could not have been rendered more perfect or efficient. It may be that such a style of verdict as occurs in this case is unfrequent, but it is certainly not unprecedented. And, in particular, reference was made at the debate to the cases of Cleland *v.* Weir, 10th March 1848, and Kyle *v.* M'Pherson, 14th June 1856.

In the case of Cleland *v.* Weir, the issue put the question as to the defender's wrongful actings during a period from January 1829 till 24th May 1834. The jury, in their verdict, divided this period into different parts. During the first part, they found for the defender. During the second period, viz., from September 1831 till March 1832, they found that the defender acted blameably, but they did not accompany that with a finding either expressly for the pursuer or defender; nor did they expressly leave it to the Court to say in favour of which party that finding should operate. Yet, as the jury explained that they used the word "blameably" as something short of the term "wrongfully" contained in the issue, the Court held this part of the verdict to be in favour of the defender.

In the case of Kyle *v.* M'Pherson, 14th June 1856, the verdict of the jury was neither for the pursuer nor defender. It merely found affirmatively the facts put in issue, with an additional fact not put in issue, but bearing upon the case as it appeared in evidence. The verdict did not specially leave it to the Court to determine in whose favour the verdict ought to be entered up. The result of the findings in fact was very similar to what occurs in the present case. The pursuer's case in point of fact was not fully made out, or rather it was in one material point negatived by the jury; and, in consequence, the Court held the verdict to be one for the defender.

II. Several objections have been made to the verdict, arising from circumstances external to its own terms.

And, first, it is said that it was not given in open Court, by which I understand to be meant, in absence of the pursuer's counsel. The short answer to this objection is, that although the pursuer's counsel was not present when the jury came into Court and announced their verdict, yet he had come into Court before that verdict, after being recorded, was read over and assented to by the jury.

The circumstances connected with the return of the jury from their re-enclosure, their conference with the learned Judge, and ultimate approval of the verdict which they originally announced, have been stated to us by that learned Judge himself. I can see no ground whatever for setting aside the verdict in respect of any of these circumstances. The learned Judge, upon hearing the findings announced by the jury, suggested to them that they might as well give their verdict simply for the defenders, and stated to them distinctly that the verdict they had announced was, in his opinion, a verdict in favour of the defenders. It was intimated by the jury that they intended the verdict to be for the pursuer. But they did not propose that the verdict should so bear in express terms. Had they proposed so absurd a verdict, I cannot suppose the learned Judge would have received it. For that, in my opinion, would indeed have

amounted to a miscarriage on his part. The last objections I shall consider are founded upon certain affidavits of the jurymen and the agents for the pursuer.

In so far as these relate to anything that took place in Court I lay them aside, in respect that we have received a statement from the learned Judge touching all that took place in his presence, which carries full authority. With regard to the affidavits of the jury as to what took place during their enclosure, and as to their actual intention of giving their verdict, and their probable intentions had they foreseen what they came afterwards to know, I must observe, that had these affidavits been intended directly to impeach the verdict to which they had assented in open Court as not being their true verdict, I should have hesitated to admit the [1160] competency of such documents. For, as a general principle, I consider it would be a dangerous example to admit of such *ex post facto* impeachment by the jury of their own solemn and public declaration on oath. But I am relieved from the necessity of considering such a question; for admitting all that the jurymen say, I see no reason to disturb the verdict. I cannot altogether reconcile the declaration of the jury made in these documents with what I conceive to be the proper and conscientious duty of a jury in giving their verdict. But whilst I say this, I do not mean to infer that the jury who made these declarations were actuated by any dishonest intention. I only mean to affirm that they have altogether mistaken their proper functions. I think their mistake consists in supposing that they were masters of the law in the case as well as judges of the facts, and were entitled to shape their verdict according to their own view of what the law was, or rather of what it ought to be.

The jury declare that they never would have given the verdict they did, unless they had thought it was one in favour of the pursuer. This declaration, in the first place, shows that they disregarded the distinct opinion of the learned Judge upon the subject. But further, what inference can be drawn from the declaration itself, except that the jury, having an intention of giving the pursuer success, would have made an alteration upon their verdict in order to attain that object? I mean an alteration upon their findings in point of fact—upon their finding as to fraud. Until and unless such alteration were made, the verdict must remain inevitably a verdict for the defenders. What then could the jury have done had they been sent back to revise their verdict so as to satisfy their own views of the justice of the case? Did they mean to say that they would have found, in the face of their previously declared finding, that there was no fraud? Or is it meant that they would have withheld any finding as to fraud, although they had sworn truly to try the issue which put to them the question of fraud, and although, in their consciences, they thought there was no fraud, and so declared in open Court? I confess I can put no construction upon the declaration of the jury in regard to their contingent intentions, such as to make me regret that these intentions were defeated. The jury further declared that they had instructed their foreman to state the sum of damages they found due to the pursuer, which by a mistake or misconception he failed to do. But such an addition to a verdict essentially in favour of the defenders would have been useless and even absurd; and to have received a verdict so contradictory, would, in my opinion, have stultified the whole proceeding. Upon the whole, I am of opinion that the rule ought to be discharged, and the motion for a new trial to be refused.

Lord Justice-Clerk.—I agree with all your Lordships, that this rule should be discharged, and the grounds of my judgment have been already so fully explained by your Lordships, that I think it quite unnecessary to add anything to what has been said.

The Court discharged the rule, and found the pursuer liable in the expense of the discussion.

The pursuer's counsel then stated that they tendered an exception against the judgment of the Court discharging the rule.

It was argued in support of the admissibility of the exception;—The ground on which, in previous cases, exceptions tendered at this stage had been refused was, that the parties tendering them had been present at the trial, and had neglected the opportunity of then tendering their exceptions.[1] Under the Jury Court

[1] Cuthbertson *v.* Young, 27th January 1852, *ante*, vol. xiv. p. 375; Fleming *v.* Robertson, 17th June 1859, *ante*, vol. xxi. p. 982.

Act,[1] such a bill of exceptions was admissible, and had never been refused when the facts were similar to those of the present case.

LORD JUSTICE-CLERK.—There is nothing before the Court. The rule is discharged, and there is no case before the Court, and no motion has been made to the Court. It might be sufficient that we should say this and no more. But as [1161] Mr. Macfarlane has indicated a purpose of presenting a bill of exceptions for the signature either of the president of this Court, or of all the Judges of this Court, I do not know which, I shall take this opportunity of announcing, so far as I am concerned, that I will not sign such a bill, either as the president of the Court, or as one of the Judges of the Court; and I shall also state my reasons for refusing.

This renders it necessary to examine the different provisions of the Acts of Parliament regarding the mode of procedure in jury causes, after verdict; and the first of these that is of importance is the sixth section of the first Act of 1815, 55 Geo. III., c. 42, under which section the pursuer of this action has made his motion for a new trial, upon which your Lordships first granted and then discharged a rule. Now, what are the terms of that section? "That in all cases in which an issue or issues shall have been directed to be tried by a jury, it shall be lawful and competent for the party who is dissatisfied with the verdict, to apply to the Division of the Court of Session which directed the issue, for a new trial, on the ground of the verdict being contrary to evidence, on the ground of misdirection of the Judge, on the ground of the undue admission or rejection of evidence, on the ground of excess of damages, or of *res noviter veniens ad notitiam*, or for such other cause as is essential to the justice of the case: Provided also, that such interlocutor granting or refusing a new trial shall not be subject to review, by reclaiming petition or by appeal to the House of Lords." Now, I should suppose that, in so far as that section is concerned, there is no room for construction at all. Whatever may be the ground for an application for a new trial, whether misdirection or anything else, the interlocutor pronounced by the Division of the Court is to be final, and subject to no kind of review. The same statute makes a provision for the manner in which bills of exceptions are to be dealt with. But these are exceptions taken at the trial of the cause, and no other; and the provision with reference to them is in the next section, that "after the trial of every such issue or issues, the Judge who presided shall forthwith present the said exceptions, with the order or interlocutor directing such issue or issues, and a copy of the verdict of the jury indorsed thereon, to the Division by which the said issue or issues were directed, which Division shall thereupon order the said exception to be heard in presence;" and then the Court is directed to dispose of the exceptions, and an appeal is expressly given against the judgment of the Court disposing of the exception, which appeal is entitled to extraordinary privileges of early hearing in the House of Lords and otherwise, which it is needless to specify. Now that is the whole scheme of the Act of 1815 with regard to the mode of challenging the verdict of a jury.

But in the Act of 1819 there is a change made upon this. The matter of exceptions taken at the trial remains as before. There is no change made in that respect. The exceptions are still to be returned along with the issue and the verdict to the Division of the Court which sent the issue to be tried. But then, in the 16th section of that statute, it is enacted "That in all cases in which general verdicts are found by a jury, all motions for setting aside the verdict and granting a new trial shall henceforth be made in the Jury Court, and not in the Court of Session; and the order for granting or refusing a new trial by the Jury Court shall be final, and not subject to review by petition, representation, appeal to the House of Lords, or otherwise, and there shall be at least two Judges in Court when a motion is made for a new trial, or an order is pronounced granting or refusing the same." Then the 17th section is, "That if the motion for setting aside the verdict be founded on the misdirection of the Judge at the trial in matter of law, or on the undue admission or rejection of evidence, it shall be competent to the party against whom judgment is given by the Jury Court, to tender a bill of exceptions to such judgment in the same manner as at a trial; and the proceedings on such bills of exceptions shall be conformable in all respects to the provisions

[1] 59 Geo. III. cap. 65. sec. 17.

of the Act of the 55th year of the reign of his present Majesty, hereinbefore recited, regarding bills of exception: Provided always, that in all causes remitted by the Court of Admiralty to the Jury Court, the bills of exception shall be presented by the Judge of the Jury Court to the Divisions of the Court of Session alternately, beginning with the First Division; provided further, that motions for new trials on a special verdict, or special findings, shall be made in the Division of the Court of Session [1162] from which the proceedings were sent to the Jury Court, in manner directed by the said recited Act of the 55th year of the reign of his present Majesty: Provided nevertheless, that the interlocutor to be pronounced on such motions shall be final, and shall not be subject to review by petition, representation, appeal to the House of Lords, or otherwise."

Now, the alteration which this Act of 1819 introduced, was just this, that a certain class of motions for new trial were to be heard in the Jury Court, instead of being heard in the Division of the Court of Session as provided by the 6th section of the Act of 1815. These were motions for new trials where a general verdict was returned. In all motions for new trials where a special verdict was returned, or special findings, the motion was still to be made in the Division of the Court under the authority of the 6th section of the Act 1815, and of course the judgment of the Division of the Court of Session remained as before final, without any mode of review being competent of any kind whatever; and that provision, indeed, is repeated by this very 17th section which I have read.

But then, as regards those motions which were to be heard in the Jury Court, the legislature thought fit to give a review; and a very natural provision it was. Instead of bringing the motion direct to the Court of Session at once, it was thought a more expedient thing to make the motion, in the first place, in the Jury Court, and if the Jury Court gave a judgment which involved a question as to the direction of the Judge at the trial, or a question as to the admission or rejection of evidence, it was then to be competent to the party to have a bill of exceptions for the purpose of bringing the case to the Court of Session, just as if the misdirection of the Judge or the admission or rejection of evidence had been made matter of exception at the trial. That was the object of the provision, and accordingly this clause expressly provides, that the proceedings in such bills of exception shall be conformable in all respects to the provisions of the Act of the 55th year of the reign of his present Majesty.

What, then, was done with such a bill of exceptions? It was brought here by the president of the Jury Court under the machinery of the 7th section of the Act of 1815, and was dealt with by the Division of the Court of Session exactly as if the exceptions had been taken at the trial. Now that was a very particular provision, and a provision which could be carried out only while the two Courts subsisted—the Jury Court and the Court of Session, from the one to the other of which this process of review was to take place in the form of a bill of exceptions.

But what has happened since? We have, in the first place, the Judicature Act of 6 Geo. IV., which has a material bearing on this question, the 37th section of which provides: "In order to prevent doubts which have been raised on the provisions of the foresaid Act of the 59th year of his late Majesty, relating to motions for new trials, be it enacted, that in all cases where issues have been prepared, and are sent from the Court of Session for the ascertainment of matter of fact, and the verdict is made returnable to that Court, all motions for new trial shall be made in the Inner-House of that Division of the Court from which the issue or issues has or have been sent; and motions for new trials shall in all other cases be made in the Jury Court." This was a further limitation in the class of motions that could be made in the Jury Court for a new trial. They were not to be made in cases that had been sent for trial from the Court of Session, thereby limiting very materially the motions that could be made there. But under this 37th section of the Judicature Act, supposing the whole requisite machinery for this review by bill of exceptions to be still in existence, the proposal of the pursuer here is entirely excluded; because this is a case sent to be tried by the Court of Session, and sent by this Division to be tried, and by the express words of this 37th section the motion for a new trial can be made nowhere but here. And if made here, how is it to be regulated? Of course by the provisions of the previous Acts of Parliament, relating to motions for new trials, which are made in the Division of the Court of Session, and not those provisions which are applicable to motions made in the Jury Court—the Jury

Court, still subsisting at this date, in 1825, and being still open to entertain motions for new trials in that limited class of cases to which it was now restricted.

Then, when we get on further to the abolition of the Jury Court, we have a section of the Act 1830, 1 Will. IV., c. 69 (the 7th section), which enacts, "That **[1163]** all proceedings for the correction of errors or injustice alleged to have been committed in the trial of a cause, and all questions reserved for decision after a trial, and all questions relating to the application of the verdict, or the rights and interests arising therefrom, and all questions of expenses, shall proceed before the Division of the Court to which the cause belongs: Provided always that such Division shall have power to order a hearing before the whole Court of Session, or to require the opinions of the other Judges on such points or questions as such Division may deem proper."

Now, then, upon this review of the statutes, what is the history of this matter? The legislature began in 1815 by appointing that all such motions should be heard in the Court of Session. Then in 1819 it was thought advisable that in a limited class of cases the motion for a new trial should be heard before the Jury Court, but with power to the Court of Session to review, in the form of a bill of exceptions, the judgment of the Jury Court, when it related to a matter of direction at the trial, or the admission of evidence. That class of cases so left to be considered by the Jury Court, in the first instance, was still further restricted by the 6th of Geo. IV., which excluded from the consideration of that tribunal motions for new trials in cases where issues were settled in and sent from the Court of Session, and left these entirely to the Court of Session; and lastly, the Act of 1830, putting an end to the Jury Court altogether as a separate tribunal, seems to me to restore matters to the position in which they stood under the Act of 1815, in regard to motions for new trial. While the Jury Court subsisted, it was allowed to hear a limited class of motions for new trial, with a certain power of review in the Court of Session, but the idea of a judgment of a Division of the Court of Session, upon a motion for a new trial, being subject to any review, is not to be traced in any one of these Acts of Parliament. And, therefore, on that ground I shall certainly decline, as far as I am individually concerned, to put my hand to any bill of exceptions against a judgment of this Court discharging a rule, or refusing the motion for a new trial.

The other Judges concurred.

The pursuer's counsel craved the Court to sign an interlocutor refusing the bill of exceptions.

LORD JUSTICE-CLERK.—I refuse to do that; there is no such thing as an interlocutor refusing to sign a bill of exceptions.

The pursuer subsequently, by minute, abandoned the exception taken to the refusal of the presiding Judge to lay down the law craved by the pursuer at the trial.

No. 165. **XXIII. Dunlop 1163.** 21 June 1861. 2nd Div.—Sheriff of Dumfriesshire.

MARGARET BEATTIE and Others, Pursuers.—*Johnstone.*

MARY LAIDLAW or THOMSON, Defender.—*Moir—Ross.*

Testament—Double legacy.—A testator left two deeds, each disposing of her whole estate; the first disponed it under burden of certain legacies, *inter alia*, one of L.300 to A, B, and C, and the survivor; the second deed specially disponed certain additional lands, which would have fallen under the general conveyance in the first deed, repeated the legacy to A, B, and C, and bequeathed additional legacies;—*Held* that the second must be treated as the regulating deed, and that there was no intention of conferring a double legacy of L.300.

Mrs. Jane Beattie or Laidlaw, a widow, died, leaving two testamentary writings, the one dated 8th July 1854, and the other 23d March 1855. The first contained a

conveyance of the testator's whole estate, including an heritable property, to Mrs. Thomson, the daughter of the testator's husband, and the children of her body and their heirs, whom failing, the testator's nearest lawful heirs whomsoever, under burden —"First, of the payment of all my just and lawful debts, and death-bed and funeral expenses; secondly, of the payment of a legacy of L.50 sterling to John Beattie, shepherd in Shield, in the parish of Westerkirk, whom failing, his children, or survivors **[1164]** or survivor, equally amongst them, share and share alike, if more than one; and, thirdly, of the payment of a legacy of L.300 sterling to Helen Beattie, Margaret Beattie, and William Beattie, the daughters and son of Andrew Beattie, in Fingland, in the parish of Eskdalemuir, or to the survivors or survivor of them, equally amongst them, share and share alike, if more than one: which legacies shall be payable by my said disponees at the end of twelve months from the period of my death, with interest thereafter until paid."

The second deed contained a conveyance to Mrs. Thomson, and the children of her body, whom failing, to the testator's own nearest lawful heirs whomsoever, of the testator's whole estate. It differed from the former deed, in respect certain additional lands were conveyed. The second conveyance was under burden—"First, of the payment of all my just and lawful debts and death-bed and funeral expenses; secondly, of the payment of a legacy of L.50 sterling to John Beattie, shepherd in Shield, in the parish of Westerkirk, whom failing, to his children, or survivors or survivor, equally amongst them, share and share alike, if more than one; and, thirdly, of the payment of a legacy of L.300 sterling to Helen Beattie, Margaret Beattie, and William Beattie, the daughters and son of Andrew Beattie, in Fingland, in the parish of Eskdalemuir, or to the survivors or survivor of them, equally amongst them, share and share alike, if more than one; fourth, of the payment of a legacy of L.100 sterling to Jessie Laidlaw, residing at Pengain, in the parish of Eskdalemuir, illegitimate daughter of my late husband Robert Laidlaw, of Craikhaugh: which legacies shall be payable by my said disponees at the end of twelve months from the period of my death, with interest thereafter until paid."

Helen, Margaret, and William Beattie raised this action in the Sheriff-Court of Dumfriesshire for payment of the legacy of L.300, bequeathed by the deed of 1854.

In defence it was maintained that the deed of 1855 superseded the one of 1854, and that the legacy of L.300, bequeathed by the deed of 1855, had been paid to the Beatties. The pursuers admitted receipt of that legacy, but contended that they were entitled to the legacy under the deed of 1854 also.

The Sheriff, on appeal, pronounced this interlocutor:—"Finds that the disposition and settlement executed by the late Mrs. Laidlaw, of her whole means and estate, shortly before her death, and bearing date of the 3d March 1855 (No. 6 of process), was not intended as an exercise of her power to revoke, which had been expressly reserved in a previous disposition and settlement, executed by her, of her whole means and estate, bearing date 8th July 1854 (No. 2 of process), but was merely a repetition and recapitulation of the same, with all the burdens therein expressed *ipsissimis verbis*, but with the variation of a special disposition of certain lands mentioned *nominatim* in the said settlement of 1855, which had been only generally disponed in the previous settlement of 1854, and also with the addition of a legacy of L.100 bequeathed to a party who had not been mentioned in the settlement of 1854: Finds that the burdens of special legacies imposed upon the said succession, general and special, in terms of the said settlement of 1855, do not import a duplication of the said burdens or legacies imposed, in like manner and *ipsissimis verbis*, by the previous settlement of 1854, nor yet a substitution therefor, but are merely a repetition and recapitulation of the same (with the variation and addition foresaid), as contained in the said settlement of 1854, and import, not double burdens and legacies upon the succession in question, but merely that such as were imposed by the settlement of 1854 are not recalled or revoked, but recapitulated in the settlement of 1855: Finds that the special legacy of L.300 therein bequeathed to the pursuers was fully paid and discharged in **[1165]** terms of the deed of discharge, No. 11 of process, and that the said succession was thereby fully disburdened thereof: Finds that there was no other legacy burdening the said succession in favour of the pursuers, over and above the single special legacy of L.300: Therefore repels the pursuers' plea of double or cumulative legacy in this case:

Sustains the counter plea for the defenders: Assoilzies them from the conclusions of the summons: Finds the pursuers liable in the expenses of process."[1]

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[1] "NOTE.—This question is important, both as regards the pecuniary interest involved, and the principles of law. Whether two separate deeds or writings, each containing a bequest to the same person of the like amount in the same or similar terms, are to be read as cumulative, that is, a double legacy, or merely as a recapitulation of one and the same legacy, is a question which has undergone much legal discussion in many important cases, and is always one of nicety and difficulty. From former judgments, and high authority on the subject, some rules may be gathered, although every case of the kind must be judged mainly by its own circumstances. Three propositions, however, may be considered as sufficiently established. 1st. Two separate writings, each containing a bequest to the same individual, import two separate bequests, whether similar or not. This may be taken as the general rule. 2d. But the question must always be regarded as one of the intention or will of the deceased; and if the intention or will be manifest to confer only one and the same legacy, and not two, although mentioned in two separate writings, the bequest must be read as single, and not cumulative. 3d. In order, however, to redargue the general rule of two writings two legacies, the manifestation of will and intention, that they be read as single and not cumulative, must be gathered from the writings themselves, and not from other extrinsic evidence.

"Lord Thurlow, long ago, in the case of Moggridge, announced principles on the subject which may be considered as the best guide still. He stated intention as the governing principle, and that to ascertain the actual will of the testator in each case must always be the object, although the general rule is, that separate writings import separate bequests. But Lord Thurlow also said, that 'The rule is checked by this,—that if there is evidence that, instead of addition, it was intended simply as repetition, it is not additional; and simple repetition, when it is exact and punctual, has been regarded as sufficient proof that it is only intended for repetition.'

"To apply these rules in ascertaining the actual will and intention, so as to clear any given case where the will is expressed in various writings, is the great difficulty. But it does not appear to the Sheriff that this is a difficult case of the kind. It is not the case of an original deed of settlement, complicated by separate codicils. It is rather a case of two copies of one and the same general disposition and settlement *ipsissimis verbis*, with this exception, that the copy last made has imported into it two new clauses, neither revoking nor modifying any of the bequests contained in the original copy, but simply additive thereto, as regards a new legatee not mentioned in the original copy. As regards the legacy of L.300 in question, there seems to be little difficulty in arriving at the actual will and intention of the testatrix, and, in doing so, upon a consideration and rational reading of the writings themselves. The fact that, as regards the legacy in question, the testatrix has said twice over that three hundred pounds is to be the full measure of that particular burden upon her general and special disposition and settlement, can never be rationally read to import that she thereby intended that burden to amount to six hundred. The legacy in question is announced by her under the term of a burden; and when, in 1855, she declared, as a positive and specific fact, that the whole amount, or the precise amount, of that burden was three hundred pounds, it would be a most irrational reading of that declaration of the amount of a particular burden, that it must be understood to import six hundred pounds, merely because the burden in question had been previously declared, in a similar settlement, to be just three hundred pounds, and no more. As well might the whole burdens and legacies declared in the settlement of 1855, including the payment of debts, be regarded as cumulative,—*i.e.*, in addition to, and over and above the like burdens declared in the settlement of 1854 as that burden of three hundred pounds, constituted in favour of the pursuers by the deed of 1854, and recapitulated in the deed of 1855 *ipsissimis verbis*. If the manifestation of the will and intention of this testatrix to impose a burden of L.300, and no more, in favour of the pursuers, be quite distinct, and to be distinctly gathered from her own settlements, which the Sheriff thinks is the case, it does not appear to me that the manner in which the defenders have made up their titles can affect the question of the amount of the burdens upon the succession in question."

[1166] The pursuers advocated, and the Lord Ordinary reported the case under the statute.

It was argued for the advocators;—Where the two legacies were bequeathed to the same legatee by different deeds, the onus of proving that it was only intended to make one bequest lay upon the party alleging that, the presumption being that it was intended to leave two legacies.[1]

Lord Justice-Clerk.—It is unnecessary to call for an answer. I am satisfied that the judgment of the Sheriff is well founded. This case differs from that of Horsburgh cited by the advocator, because in that case it was apparent that both the testamentary writings founded on were intended to receive full effect, and the remarks of all the Judges were applicable to a case of that nature. But in this case both deeds are intended to apply to the whole property of the testator;—each of them contains a universal conveyance. As by each of them the entire estate is conveyed and divided it is obvious they cannot both receive effect, or both be taken as parts of one settlement; and it is perfectly clear that the latest deed must be taken as the testator's settlement. The last deed contains a conveyance of the estate to the same parties; it contains, besides, one bequest, and a special conveyance of lands which, under the previous deed, would have fallen under the general conveyance. There is the additional legacy which we must give effect to. But the second and third burdens on the bequest in the second deed come in, as in the former deed, immediately after the direction as to the payment of debts. I cannot hold that there was an intention by these deeds to constitute a double legacy.

Lord Wood.—I am of the same opinion. Cases like the present are frequently attended with difficulty. But the present case appears to be entirely free from it. I am unable to see any ground for differing from the view taken of it by the Sheriff. The second deed of March 1855 appears to me to be a mere repetition of the first deed of July 1854, and to be intended to be substituted for it. They are both general dispositions and settlements of the testator's entire estate; and the last is an exact repetition of the first, with the exception only of the disponing clause in the last specifying particularly certain lands which in the first would have fallen under the general conveyance, and of the last containing a legacy of L.50 which is not in the first. In both there is a legacy of L.300; and by both the subjects conveyed are, with the addition of the L.50 legacy in the last, conveyed under precisely the same burdens. The case, therefore, I apprehend, is clearly one not of a double legacy, but of the same legacy left by two different deeds not meant to have any separate and independent operation; as may be maintained where a legacy of the like amount is given by the principal deed, and by a codicil, or by two distinct codicils, which may each be said to be independent of each other, and intended each to receive effect *per se*. If additional subjects had been conveyed by the second deed, perhaps some room might have been given for contending that an additional legacy was meant to be bequeathed, although it was in amount precisely the same as that left by the first. Even then I should have thought the contention more plausible than well founded. But, as the case stands, it does not afford that ground for the pursuers' demand; for, as I have already observed, the subjects which in both deeds are burdened with the legacy to the pursuers are one and the same—the deeds so far differing only in this, that in the first a part of them would have passed by the general conveyance of all the testator's property, heritable and moveable, while, by the last, that portion of them is specially conveyed; and as the subjects burdened are the same, so I conceive the legacy with which they are in each deed burdened is one and the same.

I am therefore of opinion that the legacy of L.300, as left by the deed of 1855, [1167] having been paid and discharged, there is no other legacy left to the pursuers remaining unpaid, and which they are entitled to claim.

Lords Cowan and Benholme concurred.

The Court repelled the reasons of advocation, remitted *simpliciter* to the Sheriff, and found the respondents entitled to expenses.

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[1] Horsburgh *v.* Horsburgh, 12th Jan. 1847, *ante*, vol. ix., p. 329.

No. 166. **XXIII. Dunlop 1167.** 21 June 1861. 2nd Div.—Sheriff of Lanarkshire.

The MONKLANDS RAILWAY COMPANY, Advocators and Defenders.—*Young—Mackenzie.*

JAMES WADDELL, Respondent and Pursuer.—*Patton—Gloag.*

Reparation—Railway—Trespass.—Cattle having strayed upon a railway, from a farm not immediately adjoining to it, but separated thereform by other fields occupied by different tenants, and having got upon the railway through these fields (to which they obtained access through a gap in the fence between these and the farm on which they were grazing) by means of a branch line of railway, made by the tenant of the minerals therein, under special powers in the Railway Company's Act, were killed by a locomotive engine passing along the line;—*Held* that the railway company was not liable in damages for the loss of the cattle, there being, in the opinion of a majority of the Court, no obligation upon the railway company, either at common law or under the Railway Acts, in which the public, or the owners or occupants of lands not adjoining the railway, were creditors, to fence the line.

Clause—Construction—Statutes 5 & 6 *Will. IV., c.* 55; 5 & 6 *Vict., c.* 55.—*Held*, by a majority (1), That the provisions of a statute authorising the construction of a railway which imposed upon the company an obligation to erect fences, were in favour only of the owners and occupiers of the lands intersected by the railway; and (2), That an enactment relative to fences upon railways, contained in an Act for the better regulation of railways, and passed "for the safety of the public," applied to the public travelling on the railways, and not to the public generally.

James Waddell, farmer at Rashiehill, sued the Monklands Railway Company in the Sheriff-court at Airdrie for the sum of L.67, 12s., as the amount of loss and damage sustained by him in consequence of a locomotive-engine and train of waggons, while proceeding upon the line of railway from Rawyards to Slamannan, coming into collision with a herd of fourteen cattle belonging to him, on 24th November 1859, whereby three of the cattle were killed, and others injured.

The accident was alleged to have been caused through the insufficiency of the fences along the line of railway to prevent cattle straying thereon, or through the negligence of the defenders' servants.

The defence was a denial that the accident was caused by any such insufficiency or negligence, and an explanation that the accident was caused by the pursuer, or others in his employment, not properly fencing the field in which the cattle were grazing, and which was at a considerable distance from the railway (some other fields intervening), or not properly herding the cattle, or by other carelessness or negligence on the part of the pursuer allowing the cattle to trespass upon the railway.

The Slamannan Railway, being that part of the Monklands Railway on which the accident occurred, was formed under the Act 5 and 6 Will. IV., c. 55. The provisions of that Act, with respect to gates and fences on the railway, were as follows:—Sect. 79. "That the said company of proprietors shall, at their own proper costs and charges, after any part of the said railway shall be laid out and formed, make, erect, and set up, and from time to time maintain and support such and so many convenient gates in and upon the said railway, and also all bridges, arches, culverts, ditches, drains, and passages, over and by the side of the said railway, of **[1168]** such dimensions, and in such manner, as the Sheriff-depute or substitute of the county in which the lands are situate shall direct (unless the owners and occupiers of such lands shall agree with the said company thereanent), for the use of the owners and occupiers of the lands and grounds through which such railway shall be made, or for protecting the said lands and grounds from trespass, or the cattle or other property of the owners or occupiers thereof from escaping and straying thereout, by reason of such railway, or any other matter or thing to be done in pursuance of this Act; and all such gates, bridges, arches, ditches, drains, and passages, so to be made as aforesaid, shall from time to time, and at all times thereafter, be supported, maintained, and kept in sufficient repair and condition by the said company of proprietors; and in case the said company of proprietors shall refuse or neglect to make, erect, and set up such gates," &c., or to maintain them when erected, for twenty days next after being required by the owners

[1166] The pursuers advocated, and the Lord Ordinary reported the case under the statute.

It was argued for the advocators;—Where the two legacies were bequeathed to the same legatee by different deeds, the onus of proving that it was only intended to make one bequest lay upon the party alleging that, the presumption being that it was intended to leave two legacies.[1]

Lord Justice-Clerk.—It is unnecessary to call for an answer. I am satisfied that the judgment of the Sheriff is well founded. This case differs from that of Horsburgh cited by the advocator, because in that case it was apparent that both the testamentary writings founded on were intended to receive full effect, and the remarks of all the Judges were applicable to a case of that nature. But in this case both deeds are intended to apply to the whole property of the testator;—each of them contains a universal conveyance. As by each of them the entire estate is conveyed and divided it is obvious they cannot both receive effect, or both be taken as parts of one settlement; and it is perfectly clear that the latest deed must be taken as the testator's settlement. The last deed contains a conveyance of the estate to the same parties; it contains, besides, one bequest, and a special conveyance of lands which, under the previous deed, would have fallen under the general conveyance. There is the additional legacy which we must give effect to. But the second and third burdens on the bequest in the second deed come in, as in the former deed, immediately after the direction as to the payment of debts. I cannot hold that there was an intention by these deeds to constitute a double legacy.

Lord Wood.—I am of the same opinion. Cases like the present are frequently attended with difficulty. But the present case appears to be entirely free from it. I am unable to see any ground for differing from the view taken of it by the Sheriff. The second deed of March 1855 appears to me to be a mere repetition of the first deed of July 1854, and to be intended to be substituted for it. They are both general dispositions and settlements of the testator's entire estate; and the last is an exact repetition of the first, with the exception only of the disponing clause in the last specifying particularly certain lands which in the first would have fallen under the general conveyance, and of the last containing a legacy of L.50 which is not in the first. In both there is a legacy of L.300; and by both the subjects conveyed are, with the addition of the L.50 legacy in the last, conveyed under precisely the same burdens. The case, therefore, I apprehend, is clearly one not of a double legacy, but of the same legacy left by two different deeds not meant to have any separate and independent operation; as may be maintained where a legacy of the like amount is given by the principal deed, and by a codicil, or by two distinct codicils, which may each be said to be independent of each other, and intended each to receive effect *per se*. If additional subjects had been conveyed by the second deed, perhaps some room might have been given for contending that an additional legacy was meant to be bequeathed, although it was in amount precisely the same as that left by the first. Even then I should have thought the contention more plausible than well founded. But, as the case stands, it does not afford that ground for the pursuers' demand; for, as I have already observed, the subjects which in both deeds are burdened with the legacy to the pursuers are one and the same—the deeds so far differing only in this, that in the first a part of them would have passed by the general conveyance of all the testator's property, heritable and moveable, while, by the last, that portion of them is specially conveyed; and as the subjects burdened are the same, so I conceive the legacy with which they are in each deed burdened is one and the same.

I am therefore of opinion that the legacy of L.300, as left by the deed of 1855, **[1167]** having been paid and discharged, there is no other legacy left to the pursuers remaining unpaid, and which they are entitled to claim.

Lords Cowan and Benholme concurred.

The Court repelled the reasons of advocation, remitted *simpliciter* to the Sheriff, and found the respondents entitled to expenses.

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[1] Horsburgh *v.* Horsburgh, 12th Jan. 1847, *ante*, vol. ix., p. 329.

No. 166. **XXIII. Dunlop 1167.** 21 June 1861. 2nd Div.—Sheriff of Lanarkshire.

The MONKLANDS RAILWAY COMPANY, Advocators and Defenders.—*Young—Mackenzie.*

JAMES WADDELL, Respondent and Pursuer.—*Patton—Gloag.*

Reparation—Railway—Trespass.—Cattle having strayed upon a railway, from a farm not immediately adjoining to it, but separated thereform by other fields occupied by different tenants, and having got upon the railway through these fields (to which they obtained access through a gap in the fence between these and the farm on which they were grazing) by means of a branch line of railway, made by the tenant of the minerals therein, under special powers in the Railway Company's Act, were killed by a locomotive engine passing along the line;—*Held* that the railway company was not liable in damages for the loss of the cattle, there being, in the opinion of a majority of the Court, no obligation upon the railway company, either at common law or under the Railway Acts, in which the public, or the owners or occupants of lands not adjoining the railway, were creditors, to fence the line.

Clause—Construction—Statutes 5 & 6 *Will. IV., c.* 55; 5 & 6 *Vict., c.* 55.—*Held*, by a majority (1), That the provisions of a statute authorising the construction of a railway which imposed upon the company an obligation to erect fences, were in favour only of the owners and occupiers of the lands intersected by the railway; and (2), That an enactment relative to fences upon railways, contained in an Act for the better regulation of railways, and passed "for the safety of the public," applied to the public travelling on the railways, and not to the public generally.

James Waddell, farmer at Rashiehill, sued the Monklands Railway Company in the Sheriff-court at Airdrie for the sum of L.67, 12s., as the amount of loss and damage sustained by him in consequence of a locomotive-engine and train of waggons, while proceeding upon the line of railway from Rawyards to Slamannan, coming into collision with a herd of fourteen cattle belonging to him, on 24th November 1859, whereby three of the cattle were killed, and others injured.

The accident was alleged to have been caused through the insufficiency of the fences along the line of railway to prevent cattle straying thereon, or through the negligence of the defenders' servants.

The defence was a denial that the accident was caused by any such insufficiency or negligence, and an explanation that the accident was caused by the pursuer, or others in his employment, not properly fencing the field in which the cattle were grazing, and which was at a considerable distance from the railway (some other fields intervening), or not properly herding the cattle, or by other carelessness or negligence on the part of the pursuer allowing the cattle to trespass upon the railway.

The Slamannan Railway, being that part of the Monklands Railway on which the accident occurred, was formed under the Act 5 and 6 Will. IV., c. 55. The provisions of that Act, with respect to gates and fences on the railway, were as follows:—Sect. 79. "That the said company of proprietors shall, at their own proper costs and charges, after any part of the said railway shall be laid out and formed, make, erect, and set up, and from time to time maintain and support such and so many convenient gates in and upon the said railway, and also all bridges, arches, culverts, ditches, drains, and passages, over and by the side of the said railway, of **[1168]** such dimensions, and in such manner, as the Sheriff-depute or substitute of the county in which the lands are situate shall direct (unless the owners and occupiers of such lands shall agree with the said company thereanent), for the use of the owners and occupiers of the lands and grounds through which such railway shall be made, or for protecting the said lands and grounds from trespass, or the cattle or other property of the owners or occupiers thereof from escaping and straying thereout, by reason of such railway, or any other matter or thing to be done in pursuance of this Act; and all such gates, bridges, arches, ditches, drains, and passages, so to be made as aforesaid, shall from time to time, and at all times thereafter, be supported, maintained, and kept in sufficient repair and condition by the said company of proprietors; and in case the said company of proprietors shall refuse or neglect to make, erect, and set up such gates," &c., or to maintain them when erected, for twenty days next after being required by the owners

and occupiers of the contiguous lands and grounds, then such owners or occupiers, may make and maintain such gates, &c., at the expense of the railway company, such expense to be recovered from the railway company by summary procedure before a Justice of the Peace.

Sect. 80. "Provided that if the said owners or occupiers apprehend that any of the gates, &c., made by the company are insufficient in number or situation for the commodious use and occupation of the respective lands or heritages through which the railway passes, it shall be lawful for any such owners or occupiers, with the consent and approbation of the company, or in case of their refusal for the space of twenty days next after such request made, then to make and maintain, at their own costs and charges, any such other gates," &c.

Sect. 81. "Provided also, and be it further enacted, that the said company of proprietors shall, and they are hereby empowered and required, at their own proper charges, after any land shall be taken for the use of the said railway, to divide and separate, and keep constantly divided and separated, the same from the lands or grounds adjoining to such railway, with good and sufficient posts, rails, hedges, ditches, mounds, or other fences, and at their own proper costs and charges, from time to time to maintain and support the said posts, rails, hedges, ditches, mounds, or other fences so to be made as aforesaid, in case the owners or owner of such lands and grounds adjoining to such railway, or any of them respectively, shall at any time desire the same to be fenced off, or in case the said company of proprietors shall think proper to fence off the same, instead of the gates being erected as aforesaid; and the said company of proprietors shall also make and maintain all necessary gates in all such fences to be made as aforesaid, all such gates being made to open towards such lands and grounds; then, and in every such case, the powers, provisions, directions, and regulations hereinbefore contained with respect to the gates and other works as aforesaid, shall extend and apply, and be applicable to the making and maintaining of such fences, as fully and effectually, to all intents and purposes, as if the said powers, provisions, directions, and regulations were now repeated and re-enacted with respect to such fences."

Sect. 82. "Provided also, and be it enacted, that where fences shall be made by the said company of proprietors, the same shall be made on the lands of the adjacent owners of lands, and not upon the space allowed for the breadth of the said railway and other works."

Sect. 83. "And be it further enacted, that if the owners of inclosed lands or grounds taken for the use of the said railway shall so require it, the said company of proprietors are hereby required, over and above the value of the land occupied by the said railway, to pay to the respective owners of such inclosed lands as aforesaid, such sums of money as the said company of proprietors shall judge reasonable, for the purpose of making and erect- **[1169]** -ing proper and sufficient fences, and keeping the same in repair on the side of the said railway, for the whole length of the inclosed lands or grounds of such owners, over and along which the said railway shall be made;" (the sum to be paid for that purpose to be ascertained, in case of difference, by a jury): "Provided also, that in case of the money being so paid for erecting fences to such owners of inclosed lands or grounds, such owners shall, and they are hereby required to make and erect such fences in a good and sufficient manner, within twelve months after such money shall have been paid to them by the said company of proprietors, and thereafter to keep and maintain the same in proper and sufficient repair; and if such fences shall not be so made within such time, or if the same be thereafter allowed to fall into disrepair, it shall and may be lawful for the said company of proprietors to make and erect and repair such fences at the expense of such owner or owners to whom such money shall have been so paid, to be levied and recovered from such owner or owners, and their successors in the said lands, in the same manner as is hereinafter directed with regard to the recovery of penalties or forfeitures."

Sect. 85 provided for the junction and communication of branch lines with the Slamannan Railway, which the proprietors of such branch lines were authorised to effect.

By the 10th section of the Act 5 & 6 Vict. c. 55 (being an Act for the better regulation of railways, to be construed together with 3 & 4 Vict. c. 97, an Act passed for regulating railways, on the preamble that "it is expedient for the safety of the public to provide for the due supervision of railways"), it is provided that,—"Whereas

it is expedient that further provision be made for the safety of the public, in respect of the fences of railways: Be it enacted, that all railway companies shall be under the same liability of obligation to erect and to maintain and repair good and sufficient fences throughout the whole of their respective lines, as they would have been if every part of such fences had been originally ordered to be made under an order of justices, by virtue of the provisions to that effect in the Acts of Parliament relating to such railways respectively."

A proof having been led, the Sheriff-substitute, on 6th July 1860, pronounced the following interlocutor:—"Having heard parties' procurators on the import of the concluded proof and whole cause, and made avizandum, Finds that the pursuer, a farmer, cattle-dealer, and grazier, residing at Rashiehill, in the parish of Slamannan, purchased fourteen Highland stots, about a year and a-half old or thereby, at Doune fair, in the beginning of November 1859: Finds that the pursuer made an arrangement with James Scott, tenant of Meadowfield, his son-in-law, for the wintering of said animals, at a slump sum of L.17, 10s. for the whole: Finds that the said animals were accordingly, in terms of this arrangement, sent to Mr. Scott's lands of Meadowfield, within a few days after their purchase by the pursuer as aforesaid: Finds that, on the 24th day of November thereafter, the pursuer's said cattle strayed from the said lands of Meadowfield, and got upon the defenders' line of railway at a point where a private railway leading from Roughrig Colliery, belonging to Mr. Cross, unites with the defenders' main line of railway on the lands and farm of Longrig, tenanted by Robert Main: Finds that said cattle, after getting upon the main line of railway, appear to have wandered along the line in an easterly direction for a distance of a few hundred yards, until they were overtaken by one of the defenders' engines, about six o'clock in the morning, when three of the cattle were killed, and three others more or less injured: Finds it proved by various witnesses, who traced the footprints of the animals, that in order to get upon the defenders' line, the cattle passed from their grazing-ground at Meadowfield, first into the lands of Roughrig, of which Mr. Watt is owner and occupier, at a gap in the fence which divides the said lands of Meadow-**[1170]**-field from those of Roughrig, at the point marked A on the plan, No. 5 of process; that they then traversed said field to the point marked B on said plan, at which point they crossed the march ditch, which divides the lands of Roughrig from those of Longrig, the property of Mr. Ranken of Auchengray, and occupied by the said Robert Main; that they then proceeded along the west side of Mr. Cross's private railway, where it passes through the lands of Longrig, until they came to the point at which said railway joins the defenders' line, where, from the want of a gate at the point of junction, they got upon the main line, and thereafter received the injuries above referred to: Finds it proved that the private railway before mentioned was not made by the defenders, and does not belong to them, but is used solely by Mr. Cross and his tenants; and that a gate—the want of which allowed the cattle to get upon the defenders' line of railway—was put up at the point of junction by Mr. Cross, within a day or two after the accident: Finds that the carcases of the animals which were killed were taken possession of by the servants of the defenders and sold by them; and that the price received by them for said carcases, including the hides of the animals, realised the sum of L.3, 17s., which has been consigned in the hands of the clerk of Court by the defenders, subject to the orders of Court: Finds that, by the original Act for making this part of the defenders' line (Slamannan Railway Act, 5 & 6 William IV. cap. 54, 3d July 1835), it is enacted, section 81, that the company shall, 'and they are hereby empowered and required, at their own proper charges, after any land shall be taken for the use of the said railway, to divide and separate, and keep constantly divided and separated, the same from the lands or grounds adjoining to such railway, with good and sufficient posts, rails, hedges, ditches, mounds, or other fences, and at their own proper costs and charges from time to time to maintain and support the said posts, rails, hedges, ditches, mounds, or other fences, so to be made as aforesaid, in case the owners or owner of such lands and grounds adjoining to such railway, or any of them respectively, shall at any time desire the same to be fenced off, or in case the said company of proprietors shall think proper to fence off the same,' &c.: That, by sect. 82, it is enacted, 'That where fences shall be made by the company, the same shall be made on the lands of the adjacent owners, and not upon the space allowed for the breadth of the railway, and other works;' and, by sect. 83, 'That if the owners of

enclosed lands or grounds taken for the use of the said railway shall so require it,' the company shall, over and above the value of the land occupied by the railway, 'pay to the respective owners of such enclosed lands as aforesaid, such sums of money as the said company of proprietors shall judge reasonable, for the purpose of making and erecting proper and sufficient fences, and keeping the same in repair, on the side of the said railway, for the whole length of the enclosed lands or grounds of such owner, over and along which the said railway shall be made;' and failing the company and the proprietors agreeing as to the amount to be paid to such owner or owners, that the amount shall be ascertained by a jury, whereupon the owners of the land are to be bound, within twelve months after the money has been paid to them, to make and erect sufficient fences, and thereafter to keep and maintain them so; and if such fences are not made within the time allowed, the company shall have power to do so at the owner's expense: Finds that, by the Act 11 & 12 Vict. cap. 134, 14th August 1848, the Slamannan and certain other railway companies were united and incorporated into one company, under the name and style of 'The Monkland Railways Company:' Finds that, by the 4th section of the said Amalgamation Act, it is enacted, 'That, so far as regards those portions of the said railways and works already executed, such portions of the said Railways Clauses Consolidation (Scotland) Act, 1845, as relate to the carrying of passengers and **[1171]** goods upon the said railways, and the tolls to be taken thereon; to the regulations of the use of the railways; to the engines and carriages to be brought on the railways; to the settlement of disputes by arbitration; to the recovery of damages not specially provided for; and to the determination of any other matter referred to the Sheriff or Justices; and to the provision to be made for affording access to the special Act by all parties interested, shall be incorporated with and form part of this Act:' Finds that sect. 5th of the Railways Clauses (Scotland) Act above referred to proceeds on the narrative, that it may be convenient in some cases to incorporate with Acts thereafter to be passed, some portions only of the provisions of said Act, and enacts, 'That, for the purpose of making any such incorporation, it shall be sufficient in any such Act to enact that the clauses of this Act, with respect to the matter so proposed to be incorporated (describing such matter as it is described in this Act, in the words introductory to the enactment with respect to such matter) shall be incorporated with such Act, and thereupon all the clauses and provisions of this Act, with respect to the matter so incorporated, shall, save so far as they shall be expressly varied or excepted by such Act, form part of such Act, and such Act shall be construed as if the substance of such clauses and provisions were set forth therein with reference to the matter to which such Act shall relate:' Finds that, with the view of carrying out the above enactment, the different provisions in the General Railway Act are divided into various heads or 'introductory' words, applicable to each of the matters dealt with by the Act; and, *inter alia*, as regards accommodation works, 'the words introductory to the enactment' are 'and with respect to works for the accommodation of lands adjoining the railway, be it enacted as follows;'—(then follow the clauses relating to accommodation works), and, *inter alia*, it is enacted by sect. 60, that 'the company shall make, and, at all times thereafter, maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway, that is to say,' 'sufficient posts, rails, hedges, ditches, mounds, or other fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout by reason of the railway:' From the above findings in fact, and from the clauses in the Acts above quoted, Finds, in point of law, that whether the obligation to fence is governed by the defenders' own Act, or by the General Railway Act, both before referred to, such obligation is one in favour of the owners and occupiers of the lands adjoining the railway only, and does not impose on the railway company the duty of fencing as in a question with the whole world: Finds, further, that the pursuer being neither an owner nor an occupier adjoining the railway, in the sense of the Act of Parliament, and his cattle having only got upon the line of the defenders' railway in consequence of their having trespassed from their own grazing ground through the lands of other proprietors and occupiers interposed between them and the railway, that there are no relevant grounds of action at his instance against the defenders: Therefore sustains the defences, and assoilzies the defenders from the conclusions thereof: Ordains the clerk of Court to pay over to the pursuer the said sum of L.3, 17*s.*,

consigned by the defenders in the hands of the clerk of Court as aforesaid, reserving to the pursuer all competent action of accounting against the defenders, or other parties responsible, if such there be, for the value of the carcases and hides sold and disposed of by the defenders or their servants, in the event of their having been disposed of at an undervalue, or the price not fully or duly accounted for to the pursuer, and to the defenders and others their defences there-against: Finds the defenders entitled to expenses, allows an account thereof [1172] to be given in, and, when lodged, remits the same to the depute-clerk of Court, as Auditor, to tax and report, and decerns."

On appeal the Sheriff, upon 16th October 1860, pronounced the following interlocutor:—"Adheres to the interlocutor appealed against, in so far as the findings in point of fact are concerned; but, upon the findings in point of law, in respect the defenders, as the owners of a line of railway, necessarily dangerous, passing through the country, were bound, both at common law and under the statute under which the line was formed, 5 and 6 Will. IV. cap. 54, and also under the Amalgamation Act, 11 and 12 Vict. cap. 134, as well as the Railway Clauses Consolidation (Scotland) Act, to have their line of railway properly fenced, so as to prevent any animals from getting thereon,—in respect it is proved that the accident to the pursuer's cattle in question arose through the negligence of the defenders, in not having the railway fenced at the point where the lateral railway joins it,—Alters the interlocutor complained of, and, for the reasons stated in the following note, finds that the defenders are liable for the loss sustained by the pursuer, notwithstanding that the cattle strayed from a field not immediately adjoining the railway, and to repair the damage done to the cattle from the want of fences on the line of railway; but, in respect the discussion hitherto has been chiefly, if not entirely, on the question of the defenders' liability to repair the loss generally, and no judgment has yet been pronounced by the Sheriff-substitute on the special items claimed, remits to the Sheriff-substitute to hear parties thereon, and do therewith as to him may seem just, and consistently with these findings."[1]

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[1] "NOTE.—This is a very important case in point of precedent, and has been very ably argued on both sides; and the Sheriff is not at all surprised that the Sheriff-substitute pronounced the judgment that he has done, as the English cases quoted, and relied on by him, appear at first sight to be extremely applicable to the present.

"The view which the Sheriff takes of the case is this:—It is a general rule of the Scotch law, derived from that great fountain of juridical wisdom, the civil, that *culpa tenet suos actores*, and that without any regard to the locality from whence the sufferer comes, or where his domicile is placed. As trains passing on a railway are imminently hazardous to persons or animals who may stray thereon when the trains are passing, it is incumbent on the owners of the railway at common law, and irrespective of any statutory enactment, to have the railway properly fenced, in order to prevent persons or cattle in the neighbourhood from straying on the line. This common law obligation is recognised and still farther enforced by the Railway Acts referred to in the interlocutor under review. As the accident to the cattle here was clearly owing to the want of a gate at the point where the cross railway enters the defenders' line, and could not have happened had there been a gate there, and as there is no fault whatever attributable to the pursuer for the misfortune which followed, the defenders would have been clearly liable for the loss thereby sustained by the pursuer if his cattle had been in the field next the line of railway, and had strayed upon the line through an aperture in the fence therefrom. But the Sheriff-substitute has arrived at the conclusion, on the authority of the English law, that such an action as the present is competent only to the owner of the field—or messuage, as they call it—immediately adjoining the railway, and cannot be maintained by one farther off. This is the import of the two English cases of Ricketts *v.* The East and West Docks and Birmingham Junction Railway Company, 28th April 1852, and the Manchester, Sheffield, and Lincolnshire Railway Company *v.* Wallis, &c., 11th November 1853 and 23d January 1854, referred to by the Sheriff-substitute. But it appears to the Sheriff that the English law on this point has no application in Scotland, for the following reasons:—1. The Scotch law is embarrassed with no technical difficulties such as the English, as to action of reparation being competent only to the owner of the field immediately adjoining the railway. On the contrary, it holds distinctly that

[1173] Thereafter the amount of damage was determined and decerned for with expenses, and the railway company presented a note of advocation, which was reported to the Inner-House in terms of the statute.

The advocators stated the following additional pleas:—(2.) The railway company is not liable in the loss sustained by the respondent, in respect that the statements made as to the cause of injury are untrue, and that the respondent's cattle were not injured in consequence of the insufficiency of the railway fences, or any fault or negligence on the part of the company. (3.) The respondent's claims are groundless and untenable, in respect that at the time of the injury his cattle were not pasturing in a field or lands adjoining the railway; and that they were then wrongfully and unlawfully trespassing upon the lands and private railway adjoining the advocators' railway, and the place where they entered upon it, and also upon the advocators' railway itself. (4.) Even supposing that the respondent's cattle had got upon the advocators' railway through the insufficiency of the railway fences, the advocators are not responsible for the injury complained of, in respect that the respondent was not the owner or occupier of lands adjoining the advocators' railway, and did not derive right through either of these parties to such land, and that there was no obligation or duty on the part of the advocators as a railway company, either at common law or under their statutes, to fence their line for the respondent's benefit, or against his cattle. (5.) The respondent's cattle having got upon the advocators' line of railway, in consequence of the want or insufficiency of the fences of the field and farm on which they were being pastured, and also of the fences of the lands and private railway belonging to other proprietors, and situated between the advocators' railway and the said field and farm, and of want of due care on the part of the person in charge of said cattle, the advocators are not liable.

The respondent put in the following additional pleas:—(1.) The advo- **[1174]** -cators, at common law, as well as under their statutes, and statutes incorporated therewith, were bound, by making good and sufficient gates or fences along their railway, to separate and divide the railway from the lands adjoining, so as to prevent cattle from straying on the railway; and after such gates or fences were made, they were bound to maintain them, or see them maintained, in good and sufficient condition.

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railway owners, like all other persons, must repair loss or damage occasioned by their culpable carelessness or neglect, whether the sufferers under it are from one field or a hundred fields off. 2dly. In the English cases above quoted, where it was held that action could only be maintained by the sufferer from the field immediately adjoining the railway, the important element entered into them, that in both the plaintiff was the owner or lessee of the field beyond the one immediately adjoining the railway, and was himself in fault from not having his field properly fenced, so as to prevent his cattle straying. This is a most important and vital difference; because it is a settled principle of both the Scotch and English law, that where two parties are to blame, and mischief accrues to one of them from their joint negligence, neither has a claim for reparation against the other. But here the pursuer was absolutely blameless, so far as the catastrophe in question is concerned; for he merely put his cattle to graze in the remote field, and was no way responsible for any gaps or apertures in the fences round that field through which the cattle might get out and into another, and stray upon the line of railway; nor had he any title to make such reparation of fences. In these circumstances it clearly appears to the Sheriff that the defenders, as the owners of the railway on which the mischief to the cattle was done, are responsible for the loss thereby occasioned; for this plain and simple reason, that if they had done what the law required of them, the mischief would not have happened. Their liability in the present instance seems as clear as it would be to repair damage sustained by cattle straying on the railway through an aperture of a fence and the want of a gate, which they should have had, even from the most distant quarters. Whether, after having repaired the damage, the defenders may have a claim of relief, in whole or in part, against the proprietor of the field between the one where the pursuer's cattle were placed and the railway, upon the ground of his fences having been defective, and the pursuer's cattle having in consequence got through upon the line of railway, is not before the Court in the present case; but it can be reserved in any decree which may be pronounced in this action."

(2.) The advocators having failed to make sufficient gates or fences along their railway, or to maintain them in good and sufficient condition, and having failed to use due precautions to prevent cattle from straying on their railway, and the respondent's cattle having, in consequence of the railway being insufficiently fenced, strayed thereon, and suffered the injury complained of, the advocators are liable for the loss thereby sustained by the respondent. (3.) The injury complained of having happened in consequence of the negligence and *culpa* of the advocators, and the respondent having been in no respect to blame, the advocators are liable for the loss sustained by the respondent. (4.) In respect three of the respondent's cattle were killed by the collision with the advocators' engine, and in respect the advocators took possession of and sold their carcases, they are bound to pay to the respondent the full value of these cattle.

Argued for the advocators;—The provisions of the special Act as to fences was in favour of the owners of adjoining lands merely, and the owners might, if they chose, dispense with the fulfilment of that obligation. A railway company was not bound to erect fences, unless required to do so by the owner or occupier of the adjoining lands,—at least they were not liable, except to such owner or occupier, for the consequences arising from such fences not being erected. The provisions of the Act of 5 and 6 Vict. did not apply, there being no power given in the special Act to Justices to order fences; and no power given even to the Sheriff to order fences; and even if it did apply, it merely put the railway company under an obligation to the owners and occupiers of the adjoining lands. The pursuer was not in the position, and had not the rights, of the occupier of lands adjoining the railway. His cattle were straying when they entered the ground of the railway company, and the railway company were not bound to provide against cattle straying entering on the railway, but only against cattle entering on the railway which were legally on the adjoining fields. The pursuer was in the wrong, in so far as he did not prevent his cattle from so straying. They had no right to be in the position of danger in which they were. The pursuer's own fault, or the fault of those who represented him, contributed to the accident, and therefore he could not recover. The English decisions were clear, and exactly in point. There was truly no difference between the law of England and that of Scotland on the point. In both, the law was, that if a man sunk a pit, or created a similar source of danger near or in a place of public resort, he was bound to fence his pit so as to prevent accident. That was the nature of the cases of Black *v.* Caddell and of Mack *v.* Allan. The case of Hyslop *v.* Durham was not law. It seemed to be there laid down, that, even though the accident had been caused wholly by the fault of the person killed, the owner of the pit in question was liable, which could not be maintained. The owner of property in a dangerous condition was not liable on account of injury happening to trespassers. If a proprietor brought a path along a precipitous bank, and a man trespassed on the path and fell over the precipice, the proprietor would not be liable. Further, here the cattle got on the railway through the want of a gate across Cross's branch railway. Cross was entitled to insist on joining the defender's line, and was bound, if there was an obligation to fence at all, to fence his line himself. If cattle got on one railway which was unfenced, and went from that to another, with which it communicated, and were killed on the latter, the owners of the latter could not be made liable. **[1175]** There was no statutory obligation on railway companies to put gates across branch railways which joined their railway. The Railway Clauses Act did not apply. But even if it did, it required fences only for the accommodation of the adjoining lands. The whole obligations of a railway company to provide against danger were to be found in their statutes.[1]

Argued for the respondent;—A railway company having, in constructing a railway, made their property a source of danger, and being parties who, for their own benefit, were conducting a dangerous traffic, were bound at common law to fence their railway,

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[1] Ricketts *v.* East and West India Docks and Birmingham Junction Railway, 28th April 1852, 7 Railway Cases, 298; Manchester, Sheffield, and Lincolnshire Railway *v.* Wallis, 23d January 1854, 7 Railway Cases, 298; Davidson *v.* Monkland Railways Company, 5th July 1855, *ante*, vol. xvii. p. 1038; Lumsden *v.* Russell and Son, 6th February 1856, *ante*, vol. xviii. p. 468; Balfour *v.* Baird and Brown, 5th December 1857, *ante*, vol. xx. p. 238.

so as to prevent danger.[1] The cases were decided on the general principle, that, when a man turns his property to dangerous uses, he is bound to provide against accident, and not on any specialty as to proximity to highways.[2] The law of England in reference to property in a dangerous condition was wholly different from that of Scotland; and the decisions in England could not be reconciled with the cases of Black, Hyslop, and Durham.[3] The English decisions, therefore, could not be followed. That a railway was property in a dangerous condition, or turned to a dangerous use in the eye of the law, was clear from 5 and 6 Vict. c. 55, sect. 10.

If a railway company were liable at common law, that common law liability could not be lessened by statute, unless by express provision. Railway Acts were not passed for the purpose of legalising a dangerous traffic, but for the purpose of taking property compulsorily.

But the railway company were under a statutory obligation to fence; they were so under the provisions of their own Act 5 and 6 Will. IV., cap. 55, sects. 79, 80, 81. The neighbouring proprietor could not take money instead of fences, because, if the railway company had paid him money instead of erecting fences, he was bound to expend that money in the erection of fences. But here the railway company had put up fences, and the question was as to their obligation to maintain them. That was an unqualified and unconditional obligation. It was of some importance that Meadowfield belonged to the same proprietor as Longrig (from which the cattle strayed) did, so that the pursuer had the rights of the owner of Longrig; and the railway company had no right to plead the defective nature of the fences on Mr. Rankine's property.

It was admitted that the Railway Clauses Act did not apply, but the Act 5 and 6 Vict., cap. 55, sect. 10, did apply. That section required fences along a railway for the benefit of the public. There was no reason or warrant for limiting the meaning of the word "public," in that Act, so as to read it as meaning the public travelling along the railway. These, besides, were in the other clauses of that Act always called passengers. That Act was applicable to Scotland; and it must be held to apply not only to the orders of Justices, but to the order of the Judge, who was, under the Act, entitled to order fences. Now the Sheriff was, by the Slamannan Act, sect. 79, entitled to order gates; and, by sect. 81, the same regulation as applied to gates were made applicable to fences. The Act 5 and 6 Vict. did not appear to have [1176] been pleaded in the case of Ricketts. It was pleaded, however, in the case of the Manchester, Sheffield, and Lincolnshire Railway Company, but it was held in that case to be superseded by the provisions as to fences in the English Railways Clauses Act; but the provisions of the Scotch Railways Clauses Act as to fences were not incorporated with the Monkland Railways Acts. These cases, therefore, were no authorities in the present. If, therefore, the railway fences were deficient, the railway was, both at common law and under statute, in an illegal condition, and the case was substantially a case of deficiency of fences, because the mere fact that the railway was joined by a private branch line, belonging to Mr. Cross, could not detract from the protection afforded to the public by the common law, and provided by statute. A gate at the junction would, as regarded the public, be a fence along the line.

If the railway was in an illegal condition, the circumstance that the cattle were trespassing could not deprive the pursuer of his right of action. His negligence did not contribute to cause the accident, or did so in so remote and indirect a manner as not to affect the liability of the railway company. The railway company had no right to object to the cattle being on another farm than that on which they were sent to graze, as the tenant of that farm had taken no objection. The fact that a man who was injured through the fault of another was trespassing at the time,

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[1] Black *v.* Caddell, 9th February 1804, M. 13,905; Mack *v.* Allan, 17th February 1832, 10 S. & D. 349; Hyslop *v.* Durham, 14th March 1842, 4 D. 1168.

[2] Gilchrist *v.* Ballochney Railway Company, 8th June 1850, *ante*, vol. xii. p. 979.

[3] Addison on Wrongs and Remedies, chap. iii. sect. 1; Black *v.* Topham, Cooke's Rep. Jac. i. p. 158; Hardcastle *v.* South Yorkshire Railway and River Dun Company, 21st January 1859, 4 Hurl. and Gord. p. 64.

afforded no good defence in an action of damages, was clear law both in England and Scotland.[1]

LORD JUSTICE-CLERK.—The pursuer of the present action claims damages for injury done to his cattle on the line of the defenders' railway, on the allegation that the cattle strayed upon the railway, through the negligence of the defenders in not having their fences along the railway sufficient and complete. The railway company maintain, that the pursuer has no right of action against them, because his cattle were not pasturing on lands adjoining the railway, and because their obligation to fence their railway is conceived entirely in favour of the proprietors of such adjoining lands.

This is a case of considerable general importance, because though it depends on the provisions of the Act of Parliament under which this railway was made, still there is nothing so peculiar in that Act as to lead to a result different from that which we may arrive at in similar questions between other railway companies and proprietors of lands not adjoining the railway, whose cattle may stray on the line through deficiency in the railway fences.

This railway company was incorporated under the Act 5 and 6 Will. IV. cap. 55, and they were authorised to take land without the consent of the owners, to enable them to make their railway. A railway company, after the purchase of lands, would stand to the owners of adjoining lands in the ordinary relation of a coterminous proprietor, if there were no statutory regulations with reference to the railway fences. In that case, both parties would probably be subject to the Act of Charles II., in reference to fences. But it is unnecessary to consider that case, because, when compulsory powers to take lands are given to railway companies, they are always given under conditions in favour of the owners and occupiers of the adjoining lands; and in this case the matter of fences is regulated by the Railway Act.

The leading clause is the 79th, which deals with the matter in this way: When the railway is made through lands, the railway company are put under an obligation to provide against the consequences by putting up gates—that is to say, where the railway breaks through a fence, the gap is to be filled up with a gate. **[1177]** That is an obligation imposed on the railway company, and a right given to the owner of the land through which the railway passes, and no one can imagine that by that provision any obligation is constituted in favour of anybody else. There is no trace of an obligation in favour of any one but the owner or occupier of the enclosure through which the railway passes; and that is made still more clear from the words of the clause, which further enables the owners and occupiers to dispense with gates, and leaves the matter of the erection of gates to be settled between the railway company and the owners and occupiers of the adjoining lands, as the only parties interested, and if they differ, to be settled by the Sheriff.

The 81st section is still more important in this case, because it is the section which is founded on; but, in reading it, it is necessary to keep in view the terms and the object of section 79. The 81st section provides—(see *ante*, p. 1168.) Thus, under this section, it is in the power of either party to substitute for gates across the railway, fences along the side of the railway, and it was contemplated that the effect of putting up fences would be the same as the effect of making gates across the railway, at least as regarded the owners and occupiers of the adjoining lands, viz., to make those enclosures complete, the integrity of which, in respect of fences, was interfered with by the formation of the railway.

The railway company erected fences according to the provisions of the 81st section, and they thus came under a permanent obligation to maintain the fences for the

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[1] M'Naughton *v.* Caledonian Railway Company, 17th December 1858, *ante*, vol. xxi. p. 160, per Lord Wood; Bird *v.* Holbrook, 9th May 1828, 4 Bingham's Rep. 628; Sharrod *v.* London and North-Western Railway Company, 10th December 1849, 4 Welsb., Hurl., and Gord., 580; Barnes *v.* Warde, 25th February 1850, 9 C.B. 421; Manchester and Sheffield Railway Company *v.* Wallis, *ut supra;* Fawcett *v.* North and Yorkshire Midland Railway Company, 1857, 16 Ad. and Ellis, Q.B., 610.

purpose for which the provisions about fences in the 81st section were enacted, but for no other purpose so far as we have seen hitherto.

Now, the purpose for which fences under the 81st section were to be erected, is the same as that for which gates were to be put up under the 79th section,—that is for the use of the owners and occupiers of the lands through which the railway passes, and for preventing their cattle from escaping out of their enclosures.

I am of opinion, that the only creditors in the obligations imposed by these clauses are the owner and occupier of the lands through which the railway is made, including every person who, for the time, is in the right of the owner, and that it was not intended to create, by means of these clauses, any obligation in favour of the public, or of the owners of lands that are not intersected by the railway or do not adjoin it.

Now what, with reference to these views, is, in this case, the state of facts? The pursuer's cattle were sent under an agreement to pasture in a farm called Meadowfield, tenanted by Mr. James Scott, and belonging to Mr. Rankine, and so the pursuer was, in a limited sense, the occupier of that ground, and it would make no difference in the case, whether the cattle belonged to the pursuer or to Mr. Scott, or to Mr. Rankine. They were lawfully pasturing on a field in that farm of Meadowfield. Now that farm and field do not adjoin the railway; the railway does not pass through the farm, and has not interfered with its fences. They are as complete and as independent of the railway, as if the railway had never been heard of. And so, when the cattle strayed, they strayed into the adjoining lands of Roughrig, belonging to and occupied by Mr. Watt, in consequence of some imperfection in the march fences between Meadowfield and Roughrig. And when in Watt's fields, they were in the condition of trespassers. I do not mean that in being there they were wrongdoers, but only that they were not there in virtue of any legal title. It appears further that they passed from Roughrig into another farm, or into an enclosure in the farm of Longrig, and they had as little right to be on that enclosure as on the enclosure occupied by Watt. It is said that this farm was the property of Mr. Rankine, from whose property the cattle came, but that circumstance can make no difference as to their right to be there. From the farm of Longrig they passed to the property of the railway company, and they were enabled to do so in consequence of the insufficiency of the fence separating the railway from the farm of Longrig. It appears to me that the sufficiency or insufficiency of that fence was a matter with which only the railway company and the owner and occupier of Longrig were concerned, and that, as the pursuer of this action had no right in reference to these fences from the occupier or the owner of Longrig, the railway company were not under any obligation to him as regards the fences, nor liable to him at all under the 79th and 81st sections. I am not at present inquiring whether anything depends on the nature of the gap through which the cattle went, or on the question, whether the railway company should have closed [1178] that gap with a gate. I am assuming that the state of the facts is, that the railway fence was defective, and that the railway company would have been answerable for the defect of that fence to the owner and occupier of Longrig.

We next come to the 10th section of the 5 and 6 Vict., and that is a section which, at first sight, it is not easy to construe in connection with the provisions of this special Act, or of the special Acts generally which are referred to in the section. But I have at length arrived at a clear view of the meaning of that section. There are two sections in this Act, the 9th and 10th, which it is necessary to compare. The 9th section regulates the manner in which the railway fence is to be kept up between a railway and a highway, which is limited to the case of the highway crossing the railway on the level. It had been provided by the 2d and 3d Victoria, that when such a crossing took place, the gates were to be kept constantly shut across the railway, except when a train was passing. And the object of the 9th section of the Act 5 and 6 Vict. is to invert that provision, and to provide, that the gates shall be kept constantly shut across the road, except when horses, cattle, carts, or carriages have to cross the railway. That is a provision intended for the benefit of the public, and not of any private person. No person is protected by that clause except those on the highway or the railway.

But the 10th section is in these terms, omitting consideration of the preamble in the meantime—"Be it enacted that all railway companies shall be under the same liability of obligation to erect and to maintain and repair good and sufficient fences

throughout the whole of their respective lines as they would have been if every part of such fences had been originally ordered to be made under an order of Justices by virtue of the provisions to that effect in the Acts of Parliament relating to such railways respectively." Now, we are bound to read this section in combination with the provisions of the Slamannan Railway Act, and I throw out of view the difficulty, though it is not to be despised, that there is no power given to Justices in that Act to make any order as to the fences. I assume that the 10th section of the Act of Victoria is to be read so as to apply to orders made by the Sheriff as well as by Justices; and reading the Act so, the provision is, that if, in the special Act of Parliament, power is given to the Sheriff to order fences to be erected, the obligation on the railway company, and its liability, shall be held to be the same as if that order had been pronounced. Now, suppose the Sheriff had pronounced an order in terms of the 81st section of the special Act, what then would be the obligation on the railway company and the liability of the company? The obligation and liability of the company are not altered by the general Act. The amount of obligation and liability is the same under that Act as under the special Act. And that is a liability of obligation in which the company are the debtors, and in which the only creditors are the owners and occupiers of the lands through which the railway passes, or which adjoin the railway. But then it is set forth in the preamble, that the enactment is intended for the safety of the public, which, at first sight, it is difficult to account for. But the difficulty vanishes at once, when you consider that the consequence of making fences along the lands adjoining the railway, is, that the cattle of the owners of the adjoining lands are prevented from getting on the railway. But is the circumstance of cattle straying on the railway attended with risk only to the cattle and their owners? Is it not attended with risk also to the public travelling on the railway? The benefit caused by the erection of fences is a benefit to the railway company and the travellers by the railway, as well as to the owners of the adjoining lands. But it is not necessary to give the public the power of enforcing the obligation in favour of the adjoining lands; the consequence of the fulfilment of that obligation will be the greater safety of the public, because the safety of the public is better provided for by an obligation which may be enforced by a private party. I do not think the arrangement is varied by this 10th section of the general Act, or that it makes the public the creditors in the obligation, although it may be for their benefit.

But it is said that a great peculiarity arises from the circumstance that the gap through which the cattle, in point of fact, got on the railway should have been stopped by a gate across the branch railway; and the contention of the defender was, that assuming the pursuer to be in a position to enforce against the railway company the obligation to fence, yet as this gap in the fence was caused by an operation by Cross, the obligation of putting up a gate lay on Cross, and not on the **[1179]** railway company, and that therefore the pursuer had no action against the railway company. That defence raised a different and a much more difficult question than that which I have disposed of. And I am not satisfied to rest my judgment on that ground. I do not doubt that Cross would be liable to relieve the company from any damage that might happen in consequence of the want of a gate, and I am not disposed to raise doubts as to Cross's liability to the owner of the adjoining lands. But the doubt which prevents me from resting on this circumstance as a ground of judgment is, whether this operation by Cross has relieved the railway company of their obligation to the owners of the adjoining lands, or whether the owner might not have recourse against the railway company with relief to the railway company against Cross. I cannot arrive at the conclusion, that the railway company are relieved from their liability, or that, although Cross, the mineral tenant, has made his branch line through Roughrig and Longrig, that Main of Longrig has discharged the railway company from their liability to him to maintain the fences along the line; and if Main's cattle strayed along the railway through this opening, I should have great difficulty in saying, that he would have no recourse against the railway company, although he might have an action against Cross also.

It is only necessary further to refer to the argument of the pursuer, that the railway company are liable at common law. The pursuer says that the railway company were carrying on a dangerous traffic, and that that involves an obligation fully to provide against the danger. That is stating the common law too broadly. But even

if the common law were sufficient for the pursuer's case, I think that when the Legislature authorises a traffic which must be dangerous, but which is important and necessary, it must be held that the Legislature provides all the protection which is conceived to be necessary for the public and the neighbourhood; and when we find the Legislature making such provisions, it seems very doubtful whether the statutory enactments do not supersede the common law obligation. But supposing that were not so, I have no difficulty in saying that there is no common law in virtue of which this party could come against the railway company. He is not, either as an occupant adjoining the railway, or as one of the public, protected by the common law. I think the case of Black and the other cases quoted inapplicable. If you create a danger in the vicinity of a highway or place of public resort, it is necessary and reasonable that you shall make provision against accident in consequence. At what distance from such highway or place of public resort you shall be held to be in the vicinity of it, is a different question. And, accordingly, we see that in the cases cited the pits which occasioned the injury were sometimes very near a highway, and sometimes at a greater distance; but these cases all proceeded on the circumstance that the danger was in the proximity of a highway or place of public resort.

I am sorry to have detained your Lordships so long in expressing the grounds on which I arrive at the conclusion that the Sheriff's interlocutor should be altered, but the question has appeared to me important.

I have felt no necessity, in forming my opinion, to resort to the doctrines or cases in the law of England. But I should have availed myself, if necessary, of the light which they might afford with little hesitation, because I do not understand that the rules of construction, applicable to statutes of the kind I have been considering, are different in England from what they are in Scotland.

Lord Wood.—I am sure my brethren will concur in thinking that we are much indebted to your Lordship for the exposition you have given of the provisions of the local Act of the Slamannan Railway Company, now, by amalgamation of the defenders, the Monkland Railways Company, and of the general Act of 5 and 6 Vict., as bearing on those of the local Act. I shall only say that I might have been disposed to take a more favourable view of the defence by the railway company, founded on the defect in the fences of the railway, by which the pursuer's cattle got on the railway, viz., a defect caused by the opening made to enable Cross's private railway to communicate with the Slamannan Railway, and the obligation being on Cross to keep a gate at the opening so made, and not on the company, so that thus it was not by any failure in duty on the part of the railway company that the injury was caused, on which the claim of the pursuer is founded.

But I do not feel so clear upon the point as to desire that it should be made a [1180] ground of judgment. And I shall abstain from dwelling on it, because I entirely concur in the ground which your Lordship has so clearly expounded, and which, in my opinion, affords a complete defence to the pursuer's claim, independent altogether of any defence that might arise out of the way in which, by the opening at the junction between the private railway and the defenders' railway, the cattle were enabled to get on the latter.

Lord Cowan.—I concur in the judgment which your Lordship has proposed. The Sheriff-substitute's interlocutor contains the facts established by the proof, on which the legal question of responsibility depends. And on that question, being of opinion that the Sheriff-substitute's view is the more accurate and better founded, I think the Sheriff's interlocutor ought to be recalled, and that of his substitute confirmed.

In arriving at that conclusion, I would have had more difficulty, had it been clearly shown that there was a statutory obligation incumbent on the railway company to erect and maintain a gate at the point of junction of Cross's private railway with that of the Ballochney Company. It appears to me to have been essential for the pursuer's success to establish this.

Taking the fact to be that the cattle got on the railway by means of Cross's branch line, the existence of any obligation on the company as to fences which they have neglected to perform depends on a combined view of the provisions in the private Act and in the General Regulations Act 5 and 6 Vict. sect. 10. That is a very important statutory provision, and is not to be laid aside in questions as to the liability of a railway company to have proper fences along their line, so as to separate it from the

adjoining ground. It is an important question whether that provision does not confer on the public a right to insist on the performance of the obligation of the railway company as regards fences, which the public had not under the private Act. This 10th section begins with the narrative, that it is expedient that further provision be made for the safety of the public as regards the fences on railways. And it rather seems to me that the public have an interest to enforce that obligation. But supposing this to be well founded, it does not follow that there is thereby created an obligation on the Slamannan Company to have a fence or rather a gateway at the point of junction of Cross's railway with their line. The peculiarity of the case is, that this railway was well fenced, for we are entitled to assume that it was well fenced throughout its whole course, the contrary not having been shown, prior to the formation of this side line of rails. But the fence was removed at the point of junction to permit of Cross's rails being connected with the railway. No gates were erected, and hence access to the line was obtained by the cattle. Was the erection of such gates incumbent on the Slamannan Company? Under the statute, the company were obliged to allow this branch to be connected with their line and their proper fences to be removed, that this object might be effected. The 85th section of the private Act imposes that obligation in favour of adjoining owners and occupants of lands, but in doing so it does not provide for the erection by the company of gates at the point of junction. No obligation is laid on them in that way to fence their line from the branch line; and I am the more impressed with this, from finding in the 12th section of the general Act, 5 & 6 Vict., c. 55, regulations as to branch railways in which nothing is said about gates. We have no information with reference to the formation of Cross's railway. It is said that gates have, since the occurrence, been erected by the proprietors or occupants of the branch line. That cannot affect the present question. It must be shown that there existed on the Slamannan Company an obligation to enclose their railway in that manner upon the formation of this side line. As the case is presented to us, I am unable to arrive at the conclusion that, assuming, as we are entitled to do, the fences to have been sufficient except at that particular part, there existed as against the company an obligation to put up gates. I do not think that it has been made out by the pursuers that there was such an obligation. Yet that was an indispensable part of their case; for, as already said, the fact is clearly proved that the cattle got on the railway solely at the junction of Cross's side line of rails.

LORD BENHOLME.—I should have been well pleased to have simply stated my entire concurrence with your Lordship; but as there is some difference of opinion upon the bench, I think it right to state distinctly the grounds on which my opinion **[1181]** rests. I felt at first the same difficulty that has been stated by Lord Cowan. Had I been of opinion that the public were the creditors in the obligation to fence imposed on the railway company, I would have had difficulty in holding that they fully discharged that obligation by merely satisfying the neighbouring proprietor as to the matter of fencing. In deciding as to the effect of the 10th section of the statute 5 & 6 Vict. c. 55, for the better regulation of railways, we can take no assistance from decisions in England, because, as I understand, the provisions of that section have been held to be repeated, or rather absorbed, in the regulations of the subsequent enactment, 8 & 9 Vict. c. 33. But as this last enactment does not apply to the Monkland Railways, we require to give such effect to this 10th section of the former Act as its terms require. I was very much moved by the mention in that section of the safety of the public, and if I had been of opinion that a reference was here intended to all the public, and not merely to the public using the railway, I do not know how far I might have held that its provisions extended, perhaps even so far as to apply to the protection of cattle of distant proprietors. But I cannot take that view. I think the safety of the public provided for is the safety of the public on the railway, who have a lawful right to be there, and while using it are protected by the provisions of that clause. Thus, for instance, had an accident to life or limb happened on this railway in consequence of the fences being open, and cattle straying on the line, so as to come in contact with a train so causing the accident, there would have been good ground of action against the company, to whom, in the face of this 10th section, it would not have been a sufficient defence that it was a mere accident. The safety of the travelling public being the inducing cause of that section, I do not, as at present advised, see how the railway company could escape liability to the travelling public for the consequences of an

accident caused by a defect of their fences. To that limited extent I think that the public are entitled to take advantage of the clause, and I do not think that the railway company would have been relieved in respect of any additional obligation upon a neighbouring proprietor. Suppose cattle had strayed along Cross's railway, and from the want of a gate had got upon the railway, and had upset a passenger train by coming in contact with it, Cross might have been liable, but I am not prepared to say that the railway company would have been relieved. I rather think that, under the 10th section of the statute in question, they would have been liable. But I am not inclined to hold that the interest protected by that 10th section is other than the interest of the travelling public. I am inclined to adopt entirely the grounds of your Lordship's judgment where the injury is not to the travelling public, but to cattle which have strayed upon the line of railway.

The Court pronounced the following interlocutor:—"Advocate the cause: Alter the interlocutor of the Sheriff, dated 16th October 1860, and the subsequent interlocutors complained of: Find in fact that the cattle belonging to the pursuer, in respect of injury to which this action is brought, were run down, when on the defenders' railway, by an engine belonging to the defenders, whereby three of them were killed, and three others were more or less injured; that the said cattle had been grazing on a field on the farm of Meadowfield, of which James Scott was tenant and occupant; that this farm did not adjoin the defenders' railway, but was separated therefrom by the intervening lands and farm of Roughrig, occupied by William Watt, which are separated from the said railway by the also intervening lands of Longrig, occupied by Robert Main; that the cattle strayed from the lands of Meadowfield, in which they were pasturing, through a fence between Meadowfield and Roughrig, which was insufficient and defective at the point A on the plan in process: Find that the minerals of said lands of Roughrig were in the occupation of Mr. Cross, and from a colliery in said lands a branch railway has been laid down, running through the lands of Roughrig and Longrig, and connected with the main railway belonging to the defenders: Find that said branch or private railway was not made [1182] by the defenders, and does not belong to them, but was used solely by the occupants of the minerals on the lands of Roughrig aforesaid, having been formed under the powers conferred by the defenders' special Act upon the owners and occupants of adjoining lands, to make private or branch lines to connect with the main line of railway belonging to the defenders: Find that the said cattle, having strayed from Meadowfield in consequence of the defective fence at the point A, got on the lands of Roughrig; that they then traversed said field to the point marked B on said plan, at which point they crossed the march ditch, which divides the lands of Roughrig, occupied by William Watt, from those of Longrig, occupied by Robert Main; that they then proceeded along the west side of Cross's private railway, where it passes through the lands of Longrig, until they came to the point at which said railway joins the defenders' line, where, in consequence of there being no gate or fence across the private railway at the point of junction, they got upon the main line, and thereafter received the injuries above found: Find, in this state of the facts, that no legal liability attaches to the defenders for said injury to the pursuer's cattle: Therefore, of new assoilzie the defenders from the conclusions of the summons: Ordain the clerk of the Sheriff-court to pay over to the pursuer the said sum of L.3, 17s. consigned by the defenders in the hands of the clerk of Court as aforesaid, reserving to the pursuer all competent action of accounting against the defenders or other parties responsible, if such there be, for the value of the carcases and hides sold and disposed of by the defenders, or their servants, in the event of their having been disposed of at an undervalue, or the price not being fully or duly accounted for to the pursuer, and to the defenders and others their defences thereagainst: Find the defenders entitled to expenses, both in the inferior Court and in this Court, and remit," &c.

[Cf. *Matson* v. *Baird & Co.*, 5 R. 94, 95.]

No. 167. **XXIII. Dunlop 1182.** 26 June 1861. 1st Div.—Lord Kinloch.

JOHN CAMPBELL, Esq. of Possil, Complainer.—*Patton—W. Ivory.*

The EDINBURGH AND GLASGOW RAILWAY COMPANY, and the GLASGOW, DUMBARTONSHIRE, AND HELENSBURGH RAILWAY COMPANY, Respondents. —*A. R. Clark—Anderson.*

[4 Macq. 570; 10 S.R.R. (H.L.) 623.]

No. 168. **XXIII. Dunlop 1201.** 26 June 1861. 2nd Div.—Lord Jerviswoode.

JOHN MACKENZIE, and the TRUSTEE on his Sequestrated Estate, Pursuers.—*Gordon—Thoms.*

ALEXANDER SMITH and Others, Defenders.—*Young—Shand.*

Process—Title to Sue—Bankrupt.—Held (by the Lord Ordinary, and acquiesced in), that a party whose estates are sequestrated has an inherent interest in his property, entitling him to sue actions relating to it, but that, although he had obtained a discharge, which, however, did not reinvest him in his estate, the trustee in the sequestration ought to be sisted.

Process—Decree by Default—Decree in Foro—Mora—Reduction.—Held (1.) That decree by default against a defender, for failure to lodge a revised paper, is a decree *in foro;* (2.) That it is matter of discretion for the Court to permit or not that a reduction be insisted in—delay in bringing the reduction barring the right to bring it, if not sufficiently explained; (3.) That a delay of fourteen years was not sufficiently explained by the poverty of the party against whom the decree was taken, he having immediately become bankrupt, and the trustee on his estate having taken no steps towards having the decree opened up.

Roderick Mackenzie, a farm-servant in Ross-shire, having succeeded to some money on the death of an uncle in Essiquibo, was prevailed upon to execute a trust-deed and deed of interdiction in favour of certain trustees, by which he conveyed his whole property to them. These trustees received Roderick's share of his uncle's succession, amounting in all to about L.6400. His trustees were found to be misapplying his funds. By the advice of the late Thomas Mackenzie of Applecross, W.S., Roderick granted a commission and factory to him for the management of his affairs. Mr. Mackenzie raised an action of count, reckoning, and payment against Roderick's trustees, and ultimately succeeded in recovering a part of Roderick's property, though a considerable portion of it—having been applied by his trustees to their own uses, and they having become bankrupt—was irrecoverably lost. With L.1520 of the money recovered Mr. Mackenzie purchased for Roderick the small properties called Brucefield and Muirhouse in the parish of Midcalder and county of Edinburgh, which he entered upon the possession and management of. Roderick employed another professional man, who prepared a disposition of the whole lands of Brucefield and Muirhouse in favour of John Mackenzie, with entry at Martinmas 1843, and John Mackenzie was infeft on 15th December 1843. In April 1844 John reconveyed to Roderick a part of the property. Roderick Mackenzie in 1844 purchased, through Mr. Mackenzie of Applecross, the lands of Annatscroft, adjoining the lands previously **[1202]** acquired by him. In February or March 1845 George Mackenzie and Roderick's wife presented a petition for the appointment of a *curator bonis* to Roderick, on the ground that he had become addicted to intemperance, and was, owing to his mental faculties having become impaired, unable to manage his own affairs. Mr. David Wight, W.S., was appointed *curator bonis.* Mr. Wight raised an action against John Mackenzie, concluding for reduction of the conveyance to him in 1843, on the ground—1st, that the disposition and sasine thereon were vitiated and erased *in substantialibus*, that the notaries by whom the disposition was subscribed for the pursuer were not legally qualified or

licensed to act as notaries; and, 2d, that the disposition had been impetrated through gross fraud and circumvention on the part of John Mackenzie (the disponee), and through facility and fear on the part of the disponer, and without any real ground for the alleged cause of "love, favour, and affection." John Mackenzie satisfied production, and gave in defences. Having failed to obtemper an order to lodge revised defences, the pursuer took decree by default on 5th December 1845, the day after the paper was due. The interlocutor of the Lord Ordinary pronouncing decree contained a warrant for marking the decreet upon the Register of Sasines. Roderick Mackenzie died in August 1847; his estate was sequestrated after his death. In December 1854 his whole property was sold by the trustee in the sequestration, including the property conveyed by the disposition in favour of John Mackenzie, which had been reduced. Alexander Weir Robertson was afterwards appointed trustee in Roderick's sequestration.

In January 1859 John Mackenzie raised this action, concluding for reduction of the decree by default obtained against him in 1845. There were called as defenders—Mr. Robertson, as trustee in the sequestration of Roderick's estates, Thomas Mackenzie, Roderick's son, and Alexander Smith, who had purchased the property at the sale under the sequestration. The pursuer averred that it was by his advice Roderick Mackenzie had come to Edinburgh and sought the assistance of a man of business, and that in the course of the action against the trustees the pursuer had been of great service in seeking evidence, &c., for all of which Roderick expressed himself as much indebted to the pursuer, and desired to make him some reward. The pursuer explained that the decree by default had been allowed to go out against him because he had been in embarrassed circumstances, and his agent had declined to proceed; that decree was taken the day after the paper became due, and before he could get a new agent; and that in the same month in which the decree was taken he had become bankrupt, and his estates had been sequestrated. He admitted that possession had followed on the decree, even of the property not included in the reconveyance of 1844, and of a cottage he had built upon it, and he admitted also that possession had been had by the purchaser at the sale of Roderick Mackenzie's sequestrated property, but he averred that the whole proceedings in R. Mackenzie's sequestration were open to objection, and that he had "appeared at the said sale and intimated that he meant to challenge the decree pronounced against him, and claim restitution of his property, so wrongfully taken from him."

The pursuer, John Mackenzie, had now obtained a discharge, but without payment of a composition, or of any dividend, and was not reinvested in his estates.

The defender Robertson allowed decree in absence to be taken against him.

Defences were given in for Smith. He pleaded;—"(1.) That, the pursuer having been sequestrated, and not having been reinvested in his estates, had neither title nor interest to sue the present action."

After the record was closed parties were heard by the Lord Ordinary, who [1203] pronounced this interlocutor on 5th March 1860:—"Having heard counsel on the first plea stated on record for the defender, and made avizandum, and considered the process and productions, in respect of the sequestration of the estates of the pursuer, and that the discharge which he has obtained, and of which No. 25 of process is a certified copy, does not reinvest him in the said estates, finds that the pursuer has not established any sufficient present right to insist in this action; and with this finding appoints the case to be put to the roll, that parties may be further heard thereon with reference to the foregoing finding."

The trustee on the pursuer's sequestrated estates having lodged a minute craving that he should be sisted as a party, the Lord Ordinary on 13th March 1860 pronounced this interlocutor:—"Having resumed consideration of the process, and of the renewed debate on the preliminary plea stated for the defender, with the minute of compearance for Donald Macrae, trustee on the sequestrated estate of the pursuer, allows the said trustee to sist himself as a party pursuer in the present action, and holds him sisted accordingly; and finds that, on condition of payment being first made to the defenders by the original pursuer of the expenses incurred by them in the discussion of the said preliminary plea, previous to the lodging of the said minute, this action may be allowed to proceed."[1]

[1] "NOTE.—The Lord Ordinary considers the question with which he has now to

The other pleas stated for the defender Smith were—(2.) The decree now sought to be reduced, being a decree *in foro*, cannot be set aside by the pursuer, and no relevant grounds of reduction thereof have been set forth by him. (3.) The present action is barred by *mora* on the pursuer's part; and, at all events, the pursuer is not entitled to be heard upon the merits of the present action, until payment by him of the amount of the pursuer's expenses, incurred as aforesaid in the former action of reduction. (4.) The defender is entitled to absolvitor, in respect the pursuer's averments are unfounded in fact. (5.) The decree sought to be reduced ought not to be set aside, in respect not only that the same is a decree *in foro*, but—1, In respect [1204] the deeds thereby reduced were wanting in the solemnities of law, and vitiated and erased *in substantialibus*; and 2. In respect the disposition of 1843, in the pursuer's favour, was not the deed of the said Roderick Mackenzie, or, at all events, was impetrated from him by facility on his part, and fraud and circumvention on the part of the present pursuer.

On 13th December 1860 the Lord Ordinary pronounced this interlocutor:—"Finds that the facts set forth on the part of the pursuer are not relevant to support the conclusions of the summons for reduction of the decree, or extract decree therein referred to; and farther, that the facts so set forth suffice to establish that the pursuer is barred by *mora* from insisting in the said conclusions: Therefore assoilzies the defender Smith from the conclusions of the action, and decerns, and finds him entitled to the expenses of process against the pursuer, and against the compearer, Donald Macrae, as trustee on the sequestrated estate of the pursuer; of which allows an account," &c.[1]

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deal to be one of much nicety. His first impression certainly was, looking to the comprehensive terms of the Bankrupt Acts, under which the estates of the pursuer are conveyed absolutely to the trustee for his creditors, while provision is at the same time made in certain circumstances for the reinvestment of the bankrupt, that there was no sufficient title in the pursuer of this action to insist therein.

"But after attending to the very lucid and logical opinion of Lord Fullerton in the cause of Gavin *v.* Greig, June 10, 1843, the Lord Ordinary has come to be of opinion that the doctrine of law there expounded, and on which the judgment proceeded, warrants him in holding that there is in the bankrupt a radical interest in his own estate, entitling him to sue the present action; and that the only valid ground of defence against such an action is, that while the trustee for the pursuer's creditors is no party to it, the defender runs the risk of a subsequent claim at the instance of the trustee, against whom a judgment, as in a question with the bankrupt alone, would not form *res judicata*.

"The Lord Ordinary is well aware that the case of Gavin was one in which the question arose under a disposition in a process of *cessio*. But, nevertheless, the principles laid down by Lord Fullerton are stated in broad and general terms; and the Lord Ordinary is himself inclined to hold that, as a general rule, the Court will look beyond the mere form of a disposition, and will inquire whether or not it be truly absolute. The statutory conveyance to a trustee under the law of bankruptcy is *ex facie* absolute; but, after all, it is a conveyance for the limited purpose of paying the bankrupt's own debts. It thus in reality only operates as removing from him, for a special purpose, the control of what is still radically his own.

"The circumstances of this case have led the Lord Ordinary to the conclusion, that it would not be just to the defender to allow the pursuer now to proceed, without reimbursing the former of those expenses incurred by the discussion of the preliminary defences, of the nature of which there was ample warning."

[1] "NOTE.—This case appears to the Lord Ordinary to be one of considerable importance, especially with reference to the extent to which various judgments of the Court, in previous reported cases, may be held to be available to the pursuer in support of the leading pleas which have here been maintained on his behalf.

"It will be seen, from the revised condescendence for the pursuer, that, in the year 1843, a disposition was executed by the now deceased Roderick Mackenzie, in favour of the pursuer, of certain small properties, called Brucefield and Muirhouse, which, as stated in the 9th article of the revised condescendence, Roderick Mackenzie had purchased in the same year for a sum of L.1520. It is stated by the pursuer, and the Lord Ordinary assumes the fact to be so, that this disposition was executed by Roderick Mackenzie, partly for the purpose of conveying a portion of the

[1205] The pursuers reclaimed, and prayed the Court to recal the Lord Ordinary's interlocutor, "to repel the defender's pleas going to exclude the **[1206]** action, or at

subject to the pursuer in consideration of services rendered by him to the disponer, and partly for the purpose of creating a trust, *quoad* the remainder of the subjects, in the person of the pursuer, for behoof of the disponer; and that when, as stated in the 14th article of the condescendence, the pursuer reconveyed the latter portion of the subjects to Roderick Mackenzie, he retained the former portion as his own. The Lord Ordinary assumes also that the pursuer's entry to the subjects thus acquired by him took place at Martinmas 1843, and that he thereafter erected a cottage or dwelling-house thereon, in the circumstances stated in the 15th article of the said condescendence.

"It appears, however (revised condescendence, articles 17 and 18), that, in the month of February or of March 1845, a petition was presented to the Court of Session, by a person named George Mackenzie, and by the wife of Roderick Mackenzie, under which Mr. David Wight, W.S., was appointed *curator bonis* to the said Roderick Mackenzie, and that, on the 1st of April of that year (1845), an action of reduction of the disposition above referred to, in favour of the pursuer, and of the sasine which had followed thereon, was brought in name of Roderick Mackenzie and his said *curator bonis*. The terms and conclusions of this action are fully narrated in the 18th and 19th articles of the condescendence; and in the 20th article it is set forth that the pursuer appeared in that action, satisfied the production, and thereafter lodged defences; and that, on or about the 18th November 1845, an order for condescendence and answers was taken by the pursuer. It is then stated, that, in obedience to this order, a condescendence was lodged; 'but the present pursuer having, meanwhile, become embarrassed in his circumstances, and his agents having refused to continue their services, decree in absence, by default to lodge answers to the condescendence, was taken by the pursuers on the 5th December 1845, one day only after the answers were due, and before the defender (pursuer in this action) could obtain the services of another agent, and extract thereof was obtained, as aftermentioned. On or about the 18th December thereafter, the estates of the pursuer were sequestrated under the Bankrupt Statutes.'

"It is set forth in article 20th, that the decree thus taken against the pursuer was in terms of the conclusions of the summons, and that it was extracted on the 25th February 1846; and the statement proceeds, that 'the said *curator bonis* entered into possession, not only of the subjects of which the said Roderick Mackenzie had been in possession all along, but also of the small portion thereof which had been given and conveyed to the present pursuer, and on which he had erected the cottage and made the improvements foresaid.'

"In the 22d article, it is stated that the *curator bonis* continued to act until the death of Roderick Mackenzie, on or about the 11th August 1847. The 23d and 24th articles bear that the estates of Roderick Mackenzie were sequestrated in January 1848, under the Bankrupt Statute, although, as it is stated, he was not then, and is not insolvent, on the application of Mr. Lauchlan Macintosh, who alleged himself to be a creditor, and that Macintosh was appointed trustee in manner therein set forth. In the 25th article, it is stated that Mr. Macintosh, 'as trustee foresaid, entered into possession of the whole heritable and moveable property of the said bankrupt, including that part of said heritable property which had been disponed by the said Roderick Mackenzie to the pursuer as foresaid:' That he afterwards proceeded to dispose of the heritable estate; and that, in December 1854, he exposed to public roup and sale 'the lands of Muirhouse and Annatscroft:' That at this sale the defender Smith was preferred to the purchase; and that 'the lands so sold to him included that part belonging to the pursuer, to which he had right, under the beforementioned disposition in his favour, described as part of the lands of Muirhouse.'

"The said defender is called on, in the said 23d article, to produce the articles of roup and disposition in his favour; and from the 26th article it appears that the pursuer is aware that the purchaser had paid the price of the property to Mr. Macintosh, as trustee on the estate of Roderick Mackenzie.

"The object of the present action is to reduce and set aside the decree of reduction obtained, as abovementioned, against the present pursuer, at the instance of Roderick

least to find that the pursuers have stated a relevant case for inquiry," and to remit to his Lordship to proceed with the cause. It was [1207] argued in support of the

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Mackenzie and his *curator bonis*, which bears to have been pronounced, 'in respect the defender has failed to lodge answers in terms of the interlocutor of 18th November last (1845).' The first plea in law stated for the defender was to the effect that the pursuer having been sequestrated, and not reinvested in his estates, he had neither title nor interest to sue; and under it a discussion took place before the Lord Ordinary. By interlocutor, dated 6th March 1860, it was found, that, in 'respect of the sequestration of the estates of the pursuer, and that the discharge which he has obtained, and of which No. 25 of process is a certified copy, does not reinvest him in said estates, finds that the pursuer has not established any sufficient present right to insist in this action.'

"Thereafter compearance was made by minute for the trustee on the pursuer's estates; and the Lord Ordinary, by interlocutor dated 13th March, allowed the trustee on the pursuer's estate to sist himself; and found that on payment of the expenses incurred in the discussion of the preliminary plea before the date of the said minute, the action might proceed. These expenses were subsequently paid, and the case has been fully debated before the Lord Ordinary—the debate having chiefly, if not altogether, had reference to the question, whether or not the pursuer had right, in the circumstances set forth by him, to open up the decree of reduction obtained against him in 1845. The Lord Ordinary has decided this matter against the pursuer; and as the whole case of the pursuer, as stated in record, appears to be dependent on his success in that point, the Lord Ordinary has assoilzied the defender, with expenses.

"The ground upon which the Lord Ordinary has thus proceeded, is, that the decree challenged is truly a decree *in foro;* and that, even supposing there may be, and admitting that there have been, cases in which a decree of that character has been opened up, the circumstances here set forth by the pursuer himself are insufficient to warrant such a course.

"That the decree was truly pronounced *in foro* the Lord Ordinary does not understand to be disputed; at all events, the terms of the statute 1672, cap. 16, sec. 9, appear to be alone sufficient to stamp it with that character.

"It is, no doubt, a decree *in foro*, obtained by default; but a decree so obtained has always been, and must be dealt with as differing materially from a decree in an action where no appearance has been entered and no pleading made for the defender, and which is thus technically and truly obtained in absence.

"The Lord Ordinary proceeds, therefore, on the assumption that those cases in which ordinary decrees in absence have been opened up, are not those upon which the pursuer can at all rest; but it is important to observe, that, even as respects such decrees, it is now fixed, as the Lord Ordinary understands, that it is competent to inquire, where a decree in absence is challenged, whether or not, in the whole circumstances of the case, such a decree ought or ought not to be reduced. This was determined in the case of Sinclair *v.* Brown, March 9, 1837, to which the Lord Ordinary will have occasion more fully to advert in the sequel.

"Looking, then, in particular, to those cases in which decrees which have passed, after appearance made, by default, the Lord Ordinary is of opinion that the pursuer can adduce no case sufficient as an authority to warrant the reduction of the decree here challenged; although the Lord Ordinary must grant to the pursuer, that instances may be given in which the Court has, in special circumstances, in a process of reduction, set aside decrees which, after appearance for the party, had been obtained by default. Such is the case of Millie *v.* Millie, 27th November 1801, M.D., 12,176. There the pursuer, Elizabeth Millie, daughter of David Millie, with concurrence of her husband, raised two actions against her brother, also named David Millie—the first being a process of reduction of a general disposition executed by her father, the other being an action for sums to which she claimed to be entitled, as next of kin of her mother. These processes came before the Lord Ordinary, and the defender was assoilzied, 6th June 1797, from the first ground of reduction; with respect to the other, the Lord Ordinary before answer appointed the pursuer to give in special condescendence of the facts they averred. The appointment was never complied with, nor any appearance made for the pursuer

reclaiming note;—The defender, though a purchaser, was not in the same position in which the parties in some of the **[1208]** previous cases were, for he had warning at

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at the next calling of the cause; and the Lord Ordinary, having 'then heard the procurator for the defender, in respect the pursuers had failed to give in a condescendence, appointed by last interlocutor, assoilzied the defender from the whole remaining conclusions of the libel.' Three short representations on the part of the pursuers are stated to have been afterwards lodged, which were successively refused by the Lord Ordinary. Some years afterwards the pursuer raised two fresh actions against her brother—one, an ordinary action for payment of L.15,000, as her share of her father's moveables; the other, a reduction of the settlement of 1791, and of the two decrees of absolvitor which had been pronounced in the former action. In opposition to these claims the plea of *res judicata* was advanced by the defender. As regards the point with which the Lord Ordinary is now dealing, it may be of some importance to observe that the argument for the parties respectively seems to have been mainly directed to this question,—whether or not the decrees challenged constituted decrees *in foro*, or not; and, for the defender, it was maintained that, if a proper act of litiscontestation, or an act before answer, were necessary to constitute a decree *in foro*, the greatest number of the decrees of Court must be considered as decrees in absence. It was answered, for the pursuer, that the decree of absolvitor, so far as related to the claim of legitim, passed *sine causa cognita*, and that the utmost effect to be given to it was to subject the pursuer in the expense already incurred. She also pleaded that she was not debarred from bringing her claim anew, 'for decrees are not to be considered *in foro* without litiscontestation, and there can be no litiscontestation without extracting an act or warrant, by which a proof of special facts is granted to the parties.' The Lord Ordinary 'found that the pursuers are not barred from insisting in the present action of reduction and renewed claim of legitim,' and repelled the defence of *res judicata;* and the Court, 'upon advising a petition against this interlocutor, with answers, by a considerable majority adhered to the judgment of the Lord Ordinary. Observed from the bench: There is no doubt great difficulty in opening up a decree of Court, but there is a supereminent power of equity vested in the Court, which cannot more properly be applied than in a case like this, where the process had been given up through the poverty of the defender. In all such cases, it is the duty of the agent to take measures for having the party put upon the poors' roll, to enable them to have the merits of their cause fairly discussed.' It appears obvious, from the line of argument adopted by the parties, that it was conceded that a decree *in foro* could not be opened up even in a reduction. It does not clearly appear, from the brief report of the opinion of the Court, whether the decree was considered to be one *in foro* or otherwise. In any view, it seems obvious that the Court had difficulty in taking that step, which their opinion, that the equity was with the pursuer, led them to adopt. The present case differs materially from that of Millie, in so far as, in the present instance, the decree obtained against the pursuer, Mackenzie, has been admittedly followed by possession, on the part of those in right of the pursuer, of the subjects to which the action related.

"The case of Millie is that upon which the pursuer here appeared most strongly to rely. It forms, however, the subject of remark by Lord Brougham in the case of Brown *v.* Sinclair and others, 2 Shaw & Maclean, p. 143, which may be thought in some degree to shake its authority. His Lordship states,—Millie *v.* Millie appears to be a strong decision; and after stating the circumstances as appearing from the report, his Lordship proceeds:—'Upon this I must take leave to observe, that unless decrees like this are totally unlike all others, no such power can exist in any court which intends to make its proceedings serious and regular, for it enables any man who has a negligent attorney, or a light purse, to harass his adversary with a suit, to withdraw and suffer judgment to go against him, and then to escape from the force and effect of that judgment; nor could a like privilege be refused to a defendant whose case is much stronger for such relief.'

"It was truly remarked, at the discussion before the Lord Ordinary, that the decision in the case of Millie was affirmed in the House of Lords, as appears from the abstract of judgments of that House appended to the volume of the Faculty Reports

the sale that the right to sell the property would be disputed, and the decree by default, now under [1209] reduction, formed a step in his title. Besides, if the pursuer was

ending 10th July 1810. The parties had not then observed that the case is reported in Mr. Paton's House of Lords' Reports, vol. v. p. 160. It is there stated, in reporting the pleading for the appellant, that it was stated for that party that 'the plea of *res judicata* is a bar to the present action, but on this plea the appellant does not rest his case.' It further appears from this report that the respondents in the original appeal had brought a second or cross appeal against those interlocutors in the original actions, which terminated in absolvitor in favour of the appellant, David Millie; and the report bears that it was pleaded for the appellant, 'that the second appeal brought by the respondents, in reference to the decrees of absolvitor in the former action, was quite unnecessary, as the interlocutor of the Court below has reduced these decrees.' Such a mode of meeting the second or cross appeal could only be consistently adopted by a party who could say that he was not maintaining the decrees against the respondents; and there seems, therefore, to be much reason to suppose that the House of Lords was never called upon to consider at all the merits of the judgments in the Court below, whereby the original decrees had been opened up.

"The pursuer also referred, at the debate, to the case of Malcolm *v.* Henderson and Brown, 17th November 1807, reported in the App. to M.D., *voce* Tailzie, and where the point was argued, whether the acquiescence of the pursuer in a decree of absolvitor, obtained in consequence of the pursuer having failed to lodge a condescendence, amounted to *res judicata*, and where the Court repelled this plea. It is stated by the reporter, that 'on this point the same argument was maintained with that in the case of Millie *v.* Millie.'

"In the case of Leith *v.* Leith, 7th June 1822, 1 Shaw, No. 518, the Court appear to have suspended a decree, in respect that the cause of the party against whom it had been taken abandoning her defence arose from the indigent circumstances to which she was reduced, and her other inability to prosecute her claim in a court of justice, and that the said decree passed in absence, and *sine causa cognita*.

"The case of Clark *v.* Newmarch, 17th November 1825, 4 S. 182, is, like the above, favourable to the argument of the pursuer, so far as founded on his poverty and alleged inability to proceed with his defence.

"In Steel *v.* Black, 23d May 1859, 7 S., 648, a bill of suspension was passed by the Court of a decree pronounced after appearance, a reduction of the decree having been brought subsequent (as the Lord Ordinary would understand from the report) to an interlocutor of the Lord Ordinary refusing the bill.

"The cases to which the Lord Ordinary has now referred appear to him to go far to show that the Court has admitted the relevancy of the allegation of poverty, and consequent inability to proceed, as a ground for challenging a decree which has passed by default; and did the case now before him present features not differing materially from those which existed in these instances, he at least must have given effect to these precedents, so far as to have proceeded with farther inquiry as to the facts of the case. But unless the Lord Ordinary has drawn an impression from the perusal of these cases which is altogether erroneous, none of them present features such as exist in the case with which he has here to deal, where the decree *in foro* has been followed by possession attained under it, and by a sale to a third party on the faith of it.

"On the question thus raised, it humbly appears to the Lord Ordinary that the case of Sinclair *v.* Brown and others, when traced through its various stages, throws much light. It is first reported of date March 3, 1835, 13 S., p. 594, where, after ordering cases, the Court altered the judgment of the Lord Ordinary (Moncreiff), and the rubric, the quotation of which may suffice for the present purpose, bears—'Title to pursue—Minor—Prescription—Decree *in foro*—Process.—(1.) A decree of reduction of heritable right being taken in 1786, and followed by a decree of reduction-improbation in 1788, and both being led in absence against an undefended pupil—held that it was competent to open them up within the long prescription, and that minority was to be deducted in computing the prescription; (2.) Although heritable titles were made up in 1788 in reliance on the decree, and possession followed ever since, and repeated sales of the lands were effected, and the pupil's representatives were for twenty years of full age before bringing their challenge—held that they were not barred,

successful in regaining his property, the defender would be refunded the price he paid [1210] for it. The decree under reduction was only a decree by default pronounced

as they had taken no share in the transactions affecting the lands; (3.) Held that a decree of reduction-improbation was in absence, although the production had been satisfied, in respect that no defences were lodged, no discussion took place, and no farther compearance was made; (4.) Question, whether a decree of reduction-improbation, regularly obtained in absence against a person of full age, is liable to be opened up.'

"An appeal was taken against the judgment, and the case is fully reported, as already stated, in the 2d vol. of Shaw and Maclean's Appeal Cases, p. 103.

"The Lord Ordinary is unwilling to add, by quotation, to the length of this note; but it will be seen from the report, that the case was held to present features of a character which led to a remit to this Court, with an instruction 'to order the matters of law in question in this cause to be heard before the whole Judges. It appears, from the opinion of Lord Brougham, who moved the remit, that the leading matters as to which his Lordship considered the remit necessary were (p. 147)—1st, As to the general effects of a decree in absence—whether the right to reduce it arises merely from its being in absence, or depends upon the circumstances of the case—that is, the *laches* of the party, the intermediate dealing with the property, and the time suffered to elapse without challenging the decree;' and, 2dly, 'Supposing the decree to have no other privileges than belongs to any decree in absence, and that the forty years can alone cover the defect of litiscontestation,' whether certain periods of minority, pleaded by the parties against whom the decrees operated, were to be deducted? The latter question has of course no direct bearing here, and needs not to be further adverted to.

"The case was accordingly remitted to this Court, and the report of the proceedings which first followed is to be found under date March 9, 1837, 15 S., p. 770. A hearing in presence took place, and the opinion of the Court as embodied in the rubric, was—(1.) 'That as the decrees affected the titles of an heritable estate, minorities were to be deducted in computing the years of prescription against the pursuers; and, (2.) That if, after deducting minorities, the long prescription had not run upon the decrees in absence, these decrees did not technically form a title to exclude; and observed, that, nevertheless, this did not necessarily imply the instant recal of the decrees, or place the defenders in exactly the same situation as if they had never been pronounced, but that the lapse of time, combined with other circumstances, might form a plea of personal exception against the pursuers, or might have a most important effect in determining that general question of which the pursuers necessarily undertook to make out the affirmative—viz., "Whether, in the whole circumstances, the decree ought, or ought not, to be reduced," and that the lapse of time might affect the question of *onus probandi*, in regard to the facts on the ascertainment of which the ultimate reduction of the decrees might depend.'

"It may be right to observe, that Lord Moncreiff (who acquiesced with apparently some expression of doubt in the opinion expressed by his brethren) had originally, as Lord Ordinary, held, and seems still to have been inclined to hold, that the decrees, taken together with the lapse of time, acquiescence of the parties, and other circumstances, did form a title to 'exclude the pursuer of this reduction from calling for productions of the other writs enumerated in the summons to be reduced.'

"When the case was resumed in the Second Division of the Court, their Lordships expressing a concurrence in the opinion of their brethren, pronounced an interlocutor whereby their Lordships 'recal the interlocutor of 3d March 1835, and find, that if the minorities shall be competently established, the pursuers cannot be held as barred from challenging the decrees of 1786 and 1788, as decrees in absence, and remit to the Lord Ordinary to have the cause prepared, and to proceed farther as shall be just, reserving the effect of all the pleas of parties.'

"The case next appears in the reports, under date March 10, 1841, 3 D., 871. Certain intermediate proceedings had, however, taken place, which are not separately reported, but which are to be found in detail in the session papers in the Faculty Collection, which the Lord Ordinary has examined. The interlocutor of the Lord Ordinary (Cuninghame), who had succeeded to Lord Moncreiff as Ordinary in the cause which is mentioned in the report as having been recalled, will be found partly quoted in the opinion of Lord Fullerton, and bears date 10th July 1838. By that

before the record was closed. Till the record was closed, there was no completed contract of litiscontestation; and the principle of all the decisions was, that where a decree

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interlocutor his Lordship found the pursuer entitled to be 'reponed against the said decree pronounced against the said Henry Sinclair in his infancy, and that the defenders are bound to establish the grounds of the same as they would have been had the pupil been defended; but reserving always to the defenders to found on the lapse of time.' His Lordship also remitted the case to the jury roll. On 6th December 1838, the Lords recalled 'the interlocutor reclaimed against, so far as it finds that the pursuers are entitled, *hoc statu*, to be reponed against the decree pronounced against Henry Sinclair the second, in his infancy,' &c.

"The parties were thereafter allowed by the Lord Ordinary a proof of their averments, the result of which is embodied in the interlocutor of the Lord Ordinary, quoted in the report, pp. 871, 872, and under which the reasons of reduction were repelled, and the defenders assoilzied, with expenses. This interlocutor was adhered to by the Court.

"It appears from the proceedings that the pursuer there led no proof, and the terms of the judgment imply, what the session papers fully disclose, that a strong case had been made on proof for the defenders—stronger, doubtless, in respect of the lapse of time, and the number of transfers of the property subsequent to the decree, than anything which can be said to exist in the present case.

"But what appears to the Lord Ordinary still to remain as applicable to the present case, is the principle upon which the Court there proceeded. If that principle was that a decree in absence, even against an unprotected pupil, was not *ipso facto* reducible, but might or might not be so, according to the circumstances existing when the challenge was brought, it seems obvious that the same principle must, in an infinitely stronger degree, lead to support a decree *in foro*, and that such a decree ought not to be set aside, if at all otherwise than on most cogent reasons.

"How, then, does the case for the pursuer stand here, looking to the whole facts as set forth by him? These have been already partly detailed in the preceding portion of this note; and on a consideration of them, the Lord Ordinary has come to the conclusion that they suffice to show that the original decree ought not to be disturbed. It must, of course, be taken for granted that the pursuer's poverty prevented him from proceeding in 1845 with his defence; but where sequestration ensued, and by force of the then existing Bankrupt Act, as well as by that which at present regulates the matter, the whole heritable estates of the pursuer was transferred to, and vested in, the trustees for the pursuer's creditors, absolutely and irredeemably for the purposes there provided, it does not appear to the Lord Ordinary that the continuing poverty of the pursuer, which is only to be inferred from the fact of his sequestration, is of material importance, or is relevant here. It is not said that the trustee and creditors could not, if they had seen fit, have asserted the right which the pursuer had permitted to drop. It is not said that the pursuer ever called on his trustee to assert that right; and, even now, how does that matter stand? The right, such as it is, still stands vested, under the Bankrupt Act, in the trustee for the pursuer's creditors; and the present action, as the pursuer has been discharged without composition, and has not been reinvested, must be held to be truly insisted in, in the first instance at least, for behoof of the pursuer's creditors. If there be a reversion, the pursuer will have a personal benefit. But supposing the trustee and creditors to have been claiming here directly, could it possibly have been held that they would have a right so to do, after allowing the decree of 1845 to stand unchallenged until 1859, possession to have followed upon it, and a public sale to have taken place to a third party, and a price paid on the faith of it? The Lord Ordinary thinks not; and as regards the question as with the pursuer himself, it does not well appear how, with justice to the defender, he can succeed in this action. It may be that the case is a hard one as against the pursuer—it must be a hard one if decided against the defender, who has purchased on the faith of a decree, from which all that could be gathered was, that the pursuer having once defended the action, had ceased to oppose it. The defender saw, and was entitled to trust to the fact, that the subjects affected by the decree were in possession of those in the right of the party who obtained it, and that the subjects were exposed to public sale by them as their own. No doubt it must be taken as true that the pursuer

was taken without either a closed record or a proof, it is liable to be opened up.[1] This could not be held to be a decree *in foro*. If [1211] a decree in absence might be opened up, a decree for default to lodge a revised defence was surely less entitled to favour, especially when it was explained that the pursuer could not lodge his revised paper owing to his state of poverty. Moreover, the whole proceedings in Roderick Mackenzie's sequestration under which the property was sold were such as required inquiry, it being stated that he was not bankrupt. In various respects, the circumstances in favour of the decree being sustained were not stronger than those in many cases where decrees had been opened up. The case of Millie *v.* Millie, referred to by the Lord Ordinary, was a clear authority in favour of the pursuer. The only attempt to impugn it was founded on a dictum of Lord Brougham; but in the case his Lordship was dealing with, the party seeking to get the better of the decree had been pursuer; and, as his Lordship remarked, a defender who has been decerned against in absence, or by default, has a much stronger case.[2] The delay in raising this action was also accounted for by the pursuer's poverty; but the length of silence was not to be a bar to a party enforcing his rights. It was difficult to fix a time within which a decree might be opened up; in one case it had been allowed after a lapse of twelve years.[3] Whether there was undue *mora* or not depended much upon the peculiar circumstances of each particular case; here there was a sufficient statement to account for the delay.

Lord Justice-Clerk.—The decree which is sought to be opened up by this action of reduction was a decree by default, pronounced on 5th December 1845. The effect of that decree was to reduce and set aside a conveyance in favour of the pursuer, on the ground that it was obtained by fraud. It appears that Mackenzie (the pursuer) became bankrupt in the same month, and that from that time no steps have been taken to open up the decree till the institution of the present action, the summons in which was signeted on 10th January 1859. It is important to notice what took place before the Lord Ordinary in the earlier stages of this case. The record was closed on 19th December 1859; and the Lord Ordinary having heard counsel on the pursuer's title to sue, found that, in respect of the sequestration of the pursuer's estates, and that the discharge he had obtained did not reinvest him in the estate, he had not established any title to sue. Thereafter Macrae sisted himself in the action as trustee on the sequestrated estates of Mackenzie. The consequence was, that, on payment to

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appeared at the sale, and intimated that he meant to challenge the decree pronounced against him, and claim restitution. But his intimation, as stated by himself, was of the most vague description. It is not even expressly stated whether it was made before or after the bid by the defender, or whether the latter was present at the time of the intimation. But supposing it to have been made in such a form as to convey to a purchaser's mind a possibility of challenge, what occurred? The sale took place on the 27th December 1854; the pursuer says the disposition has since been granted to, and the price paid by, the defender; and at the distance of not less than four years from the date of the sale, the present summons (signed 10th January 1859) has been brought.

"The Lord Ordinary thinks that the defender ought to be protected in the right which he has acquired on the faith of the decree of this Court. He confesses to a feeling which has caused him to hesitate as to his judgment, arising from the obvious consequence that the pursuer thereby loses a right to which it must be here presumed he had originally a just title; but, as the Lord Ordinary has already stated, there is an equity not less obvious on the side of the defender Smith, who is alone defending this action; and the Lord Ordinary has endeavoured to dispose of the case according to what appears to him to be the law applicable to the facts as set forth by the pursuer."

[1] A *v.* B, 19th May 1815, Fac. Col.; Leith *v.* Leith, 7th June 1822, 1 Sh. & D. p. 435 (N.E.); Clark *v.* Newmarsh, 17th Nov. 1825, 4 Sh. & D. p. 184; Steele *v.* Black, 23d May 1829, 7 Sh. & D. p. 648; Girdwood *v.* Wilson, 13th May 1834, 12 Sh. & D. p. 576; Barclay *v.* Barclay, 24th Dec. 1842, *ante*, vol. v. p. 394; Boak *v.* Watson, 14th July 1860, *ante*, vol. xxii. p. 1468; Ivory's Ersk. Note iv. t. 1, sect. 69.

[2] Brown *v.* Sinclair, H.L., 2 Sh. & M'L. p. 143.

[3] Girdwood *v.* Wilson, *ut supra*.

the defenders of the expenses incurred by them in discussing the preliminary plea, the action was allowed to proceed. That conclusion his Lordship came to with some difficulty, and I am not astonished at it, as Mackenzie was not vested in the estate when he raised the action, and without the trustee the pursuer had no title to sue. The addition of a pursuer to a record is always a very delicate matter. In this case the whole title and interest to pursue was in Macrae, and not in the pursuer; for the creditors, whom Macrae represented, so far as we can see, have not yet received one penny from the other portions of the sequestrated estate.

Now the question comes to be, whether the pursuer has assigned any sufficient reason for the delay of fourteen or fifteen years in raising this action? I am of opinion that no sufficient reason is given, and I deal with this entirely as a question of relevancy. The whole statements are contained in the 20th, 21st, and 25th articles of the pursuer's condescendence. It is said in the 20th article that "the pursuer, the said John Mackenzie, appeared in said action, and satisfied the production therein, so far as in his power, by lodging the disposition by the said Roderick Mackenzie in his favour above mentioned, and the instrument of sasine which had followed thereon in his favour. Thereafter he lodged defences, and an order for condescendence and answers was taken by the pursuers of that action, on or about 18th November 1845, in obedience to which a condescendence was lodged; but the present pursuer having meanwhile become embarrassed in his **[1212]** circumstances, and his agents having refused to continue their services, decree in absence, and by default to lodge answers to the condescendence, was taken by the pursuers on the 5th day of December 1845, one day only after the answers were due, and before the defender (pursuer in this action) could obtain the services of another agent, and extract thereof was obtained, as aftermentioned. On or about the 18th day of December thereafter (1845), the estates of the pursuer were sequestrated under the Bankrupt Statutes." It is said, in article 21st, that this decree was extracted; and it is said, in the 25th article, that in the month of December 1854 the estate "was exposed to sale by public roup, and bought by Smith; that the pursuer appeared at the sale, and intimated that he meant to challenge the decree pronounced against him, and claim restitution of his property." Now I think these are the whole averments of the pursuer which are made with a view to support his present claim to have this decree opened up. It is stated that the pursuer was unable to maintain his defence through poverty. However that may have been,—and it may be very true that Mackenzie was in poverty when the decree was pronounced,—was his estate unrepresented, or was not the title and interest in his estate immediately transferred to the trustee for his creditors, and must not your Lordships look to him for a reason for this delay? Why did the trustee, who is now appearing to concur as a pursuer in this action, never propose to have the decree opened up after the date of his confirmation, at any time during the lapse of these fourteen years? There is not a syllable to account for that delay, but only the statement that the pursuer (the bankrupt) has been all this time in a state of poverty. Upon that statement I have to make two observations. In the first place, I do not look upon him as the true pursuer. His interests were infinitesimally small; the primary interest was in the trustee for the creditors, and I look to him as the primary pursuer. And, secondly, I put this question to the counsel at the bar, has the pursuer acquired means to raise and insist in this action, and, if he has not got means, is the action now raised because he has only for the first time procured the concurrence of the trustee for his creditors? If so, are we not entitled to an explanation how the trustee, who has been trustee for fourteen years, only now for the first time seeks to open up the decree? We have not heard a word about all that, which we were entitled to have had a complete explanation of. Again, it is said that at the sale the pursuer appeared and stated that he meant to challenge the decree pronounced against him, and to claim restitution of his property; but that statement raises this very important question, whether any effect is to be given to what is contained in the 25th article of the pursuer's condescendence, which is just this: That at a public roup of a bankrupt estate, the bankrupt, who is undischarged, appears and states that he has some ground for setting aside the sale. Is such a statement to be listened to as a ground for refusing to give effect to a sale? If it is, it appears to me that if any bankrupt chooses to do so, he may put a portion of his property *extra commercium* altogether; but such a statement is entitled to no respect—1st, Because such intimation was not properly made at all; and, 2d, Because, if made, it should

have been made by the trustee in the sequestration, and nothing of that kind took place. Therefore, I am not inclined to attach any weight to that averment.

LORD WOOD.—I am of the same opinion, and upon the grounds stated by your Lordship. It is not necessary to go over the cases that have been cited to us. I shall only say that I gather from them—and that most clearly—that where there is delay, apparently unnecessary, in attempting to open up a decree, even if pronounced in absence, the party making the attempt must establish strong reasons accounting for that delay; and that still more is that incumbent upon him where, as in the present instance, the decree sought to be set aside is a decree by default, which I hold to be undoubtedly a decree *in foro*. It is a very delicate matter to interfere even with decrees in absence, and greatly more so with decrees by default. Were interference with the latter to be permitted at all, to allow it without the statement of strong reasons might evidently lead to the most serious consequences. Now, for the delay of fourteen years that took place here, from the date of the decree in 1845 to the date of the sale in January 1859, I find no satisfactory reason stated, or, I should rather say, no reason whatever, considering, as explained by your Lordship, the situation in which the pursuer's affairs came to be placed, and the **[1213]** party who, as trustee for the pursuer's creditors, had the interest to move in the matter, and who is to be held as truly the pursuer of the action. And I may observe that, while in the cases cited it has been regarded as a grave matter to interfere with a decree by default pronounced against a pursuer, it is a much graver one, and would require still stronger reasons for interference, where the decree is a decree by default against a defender, to whom the possession of the subject in question was immediately thereafter transferred, and a possession hostile or adverse to the pursuer commenced, and continued for so long a period; and not only so, but when during that time the subject was publicly sold to a third party, the present defender, by whom the possession was maintained. With respect to the statements regarding the position of the pursuer, as arising from his appearance at the sale, and what then took place, I entirely concur in all that your Lordship has said.

LORD COWAN.—I concur in the opinion which your Lordship has delivered. I hold this to be a decree *in foro*. No doubt it is a decree by default, but still it is a decree *in foro*. There is no doubt also that it is competent to allow a proof of averments of such weight and relevancy as, if proved, would be legally sufficient to get the better of such a decree. Before we can permit inquiry, however, into the merits of the cause in which the decree sought to be set aside was pronounced, we must have averments to justify such inquiry. Even in the case of a decree in absence that is clear; but in the case where a decree by default is sought to be set aside, it is all the more necessary. And, in the present case, it is the more imperative to observe that rule, seeing that we have to deal with the interests of a third party, who in *bona fide* purchased the property and paid a price for it. It was argued that he could not but be aware that the decree formed a step in his title. No doubt there was an extract decree in the progress of titles exhibited to the purchaser; but when he saw that extract decree he would also see that it was an extract of a decree *in foro* which had stood unchallenged for a series of years, and under which there had been undisturbed possession. I forbear entering into the grounds of judgment farther, as I concur generally in the views so fully and elaborately stated by the Lord Ordinary in the note to his interlocutor, and in the opinion which your Lordship has now delivered.

LORD BENHOLME concurred.

The Court adhered to the judgment of the Lord Ordinary, and found the defender entitled to additional expenses.

[Cf. *Kirkland* v. *Kirkland's Tr.*, 13 R. 803.]

No. 169. **XXIII. Dunlop 1213.** 28 June 1861. 1st Div.—Lord Jerviswoode.

The ROYAL INFIRMARY of EDINBURGH and its MANAGERS, Pursuers.—*Moir—Hope.*

The LORD-ADVOCATE, Defender.—*Sol.-Gen. Maitland—A. B. Shand.*

Trust—Nomination of Trustees—Revocation—Codicil—Mortis Causa Deed.—A person who had executed before witnesses a formal trust-disposition and settlement, embracing both his heritable and moveable estate, afterwards cancelled portions of the trust-deed, and (*inter alia*) the names of the trust-disponees, and wrote on the margin, opposite the deletion, and with a mark shewing where it was to be introduced, the words, "managers of the Royal Infirmary for the time being," which words and the cancellation were authenticated by his signature, and were referred to in a codicil, which was so expressed that there was no doubt as to there being an effectual trust as regarded the moveable estate;—*Held* (*alt.* judgment of Lord Jerviswoode), on a construction of the codicil, that the truster had effectually substituted the managers of the Infirmary for the parties originally named as his trustees.

The managers of the Royal Infirmary of Edinburgh brought this action of constitution, adjudication in implement, and declarator against the Lord-Advocate, on behalf of her Majesty as *ultima hæres* of the deceased James Hewat Ferrier, concluding that the whole of his heritable estate should be **[1214]** adjudged and declared to belong to the pursuers as his general trust-disponees. The circumstances were as follows:—

James Hewat Ferrier, who was an illegitimate child, died suddenly on 25th June 1859, without leaving lawful heirs. In his repositories were found a trust-disposition and settlement, with a codicil annexed. The trust-disposition and settlement bore date 6th May 1851, and was in all respects formal and duly tested. By it he disponed to and in favour of the "following trustees, viz., Walter Grieve, agent for Sunbury Distillery, Edinburgh, Thomas Henry Ferrier, writer to the signet, Edinburgh, and Walter Hamilton Ferrier, sometime of the same place, presently in America, civil engineer, and to the survivors and survivor of such of them as shall accept, and to the heir-male of the last survivor being major, the greater number, when there are more than two trustees, acting and resident within Great Britain at the time being a quorum," his whole heritable and moveable estate, in trust for the purposes therein specified. He also appointed his trustees to be his sole executors. The purposes of the trust were—First, Payment of debts, &c. Second, Payment of an annuity to his wife, who, however, predeceased him. "Thirdly, That my said trustees shall pay all such legacies or annuities as I shall bequeath by any writing or writings under my hand. Lastly, That they shall implement and fulfil any directions which I may leave by any writing or writings under my hand as to the disposal of the residue of my said estates, clearly expressive of my intention, though not formally executed, and failing such writing or writings, they shall pay over the said residue to the trustees of the Royal Infirmaries of Edinburgh and Glasgow, equally between them, for the benefit of these institutions." Then followed powers to the accepting trustees to assume new ones, in room of trustees who died or declined to accept. The deed further gave to his trustees named and to be assumed powers of sale, &c., and contained a clause of registration for preservation, and testing clause, but no procuratory of resignation or precept of sasine. The deed was altered by James Hewat Ferrier, in the following particulars, viz.:—1st, The names of the trustees originally written in the deed, and the passage following therein, quoted above, were deleted; the word "cancelled" was written at three different places, and the signature "James H. Ferrier," adhibited across the lines so deleted; and instead of the words so deleted there were written by the truster on the margin of the first page of the deed, and subscribed by him, the words "Managers of the Edinburgh Royal Infirmary for the time being." In the directions as to the disposal of the residue of the truster's estate above referred to, the letter "s" of the word Infirmaries, and the words "and Glasgow, equally between them, for the benefit of these institutions," were deleted by the truster, and also the declaration and

directions immediately following these words, as to the assumption of new trustees, and across the lines so deleted, there was written five times by the truster the word "cancelled," under which and across the deleted lines the truster signed his full name "James Hewat Ferrier." The cancellations above specified, the words inserted on the margin and across the deleted lines, and the signatures appended thereto, were all made or written by the said James Hewat Ferrier with his own hand.

There was annexed to the said trust-disposition and settlement, a codicil, dated 7th December 1857, and holograph of the truster, and subscribed by him, in the following terms, viz. :—"Edinburgh, 7th December 1857.—Codicil.—It is my sincere desire and will that the foregoing document, described as my 'will,' dated the 6th day of May 1851, should be cancelled, in so far as it was dictated to me, rather than it was my own spontaneous wish. With this object, and to carry out my own views, I have drawn my pen threw and written the word 'cancelled' where I thought they were required, but nevertheless, I do declare that it is my will that none of the above docu-
[1215] -ment must be allowed to interfere with the purposes or intentions of this codicil, even although they should not be so erassed. In furtherance of the above, I, James Hewat Ferrier, do declare that it is my sincere wish that the whole of my property, heritable and moveable, money, silver-plate, cloths or goods of whatever description that may be in my possession at my death, or that I may have a right to claim as mine, shall go to, and I hereby bequeath to the funds of the Edinburgh Royal Infirmary, and I hereby appoint the managers of the said Edinburgh Royal Infirmary for the time being my sole executors or trustees to the intents as follows:—First, That tenement of houses belonging to me, situated in Fountain Bridge Street, Edinburgh, together with the fore and back areas, shall form a 'fund for ever,' by the rents, after adding any monies that may be raised by the disposal of any of my goods that my trustees may see necessary to dispose of, together with lying money, &c.; Second, That the above fund should be applied to the admission or relief of any human being, of whatever country or nation, who may not have a legal claim, or who may not have a friend, and is in sickness and distress. I am not aware if such cases exist; if there are such cases, and if it will consist with the regulations of the institution, I hope my executors will carry this through as far as is consistent with the rules and regulations, but never to the prejudice of the Edinburgh Royal Infirmary, and which I will leave, trusting to the discretion and decision of said trustees, hoping they will carry through my intentions as honestly and fairly as possible. JAMES H. FERRIER."

The pursuers pleaded;—1. The trust-settlement and codicil, or one or other of them, form a valid general conveyance in favour of the pursuers of the whole estate, heritable and moveable, which belonged to the deceased James Hewat Ferrier. 2. The words substituting the pursuers in room of the trustees originally named in the said general trust-disposition and settlement, being holograph of the truster, the substitution is valid and effectual, though not authenticated in the testing-clause. 3. In the circumstances above stated, the pursuers are entitled to decree as concluded for, to the effect of enabling them to complete a proper title to the said estate.[1]

It was pleaded for the Crown;—1. The defender is entitled to be assoilzied from the conclusions of the action, in respect the deeds founded on by the pursuers are ineffectual to convey to them any right to the subjects in question. 2. The alleged trust-disposition and settlement having been cancelled by the deceased, and, *separatim*, having been vitiated *in essentialibus*, and not been duly tested, but being wanting in the solemnities required by law, cannot receive any effect. 3. The alleged codicil is ineffectual and inoperative to confer any right upon the pursuers, in respect it contains no effectual conveyance of the subjects in question.[2]

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[1] *Authorities for Pursuers.*—Stair, 4, 42, 19; Erskine, 3, 2, 20; Menzies' Lectures, p. 128; Grant *v.* Shepherd, July 24, 1844, *ante*, vol. vi. p. 464, and 21st July 1847, Bell's App., vol. vi. p. 153; White, 1778, Brown's Chancery Cases, vol. i. p. 12; Moggridge *v.* Thackwell, 1792, Brown's Chancery Cases, vol. iii. p. 517; Mackilligin, 23d November 1855, *ante*, vol. xviii. p. 83.

[2] *Authorities for Defender.*—Ferguson *v.* Kemp, 2d March 1802, M. 16,949; Robertson *v.* Ogilvie's Trustees, 20th December 1844, *ante*, vol. vii. p. 236; Grant and

The defender alleged that the trust-settlement was cancelled, or at least was vitiated to such an extent as to deprive it of all effect, and that the codicil contained no effectual conveyance of the heritable property to the pursuers.

On 16th February 1861 the Lord Ordinary pronounced the following [1216] interlocutor:—"Assoilzies the defender from the conclusions of the action, and decerns; and finds no expenses due to either party."[1]

The pursuers reclaimed.

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others (Bell's Executors) *v.* Stoddart, 27th February 1849, *ante*, vol. xi. p. 860; Kedder *v.* Reid, 30th July 1840, 1 Rob. 183.

[1] "NOTE.—The question which here arises, as to the validity of the deed of the late James Hewat Ferrier, and which forms No. 3 of process, was very fully and satisfactorily argued before the Lord Ordinary, and views of much ingenuity and force were submitted on the part of the pursuers, as affording grounds on which to support the deed.

"With much of what was thus maintained the Lord Ordinary was able to concur; but after considering the whole matter, he has come to the conclusion that there exists at least one objection fatal to the deed as a conveyance of heritage, as to which alone its validity is here in question. He refers to the deletion of the names of the original disponees, and to the failure, as he conceives to be the case, to substitute, in any competent form, a new disponee or disponees for the parties whose names have been thus removed.

"The Lord Ordinary has examined the various cases relied on by both parties, and it appears to him there is authority sufficient to support the argument for the pursuers so far, that the codicil, which is admitted to be the holograph writ of the deceased, would warrant a court of law to hold that the deletions in the body of the original deed were the acts of the granter himself (a fact which is not disputed), and would thus so far authenticate the deed thus altered by deletion, as to warrant its being read with a view to ascertain whether or not those portions which remain are sufficient to constitute, in themselves, an operative and effectual writ.

"But supposing this to be so, the difficulty which still meets the Lord Ordinary is, that disponees are entirely removed from the deed. To meet the essential element in a deed of disposition, that there should be a disponee named, or otherwise effectually described in the deed, the pursuers relied mainly upon the words, holograph of the granter, 'Managers of the Edinburgh Royal Infirmary for the time being,'—(Signed) —'JAMES H. FERRIER,'—which are found on the margin of the first page of the deed. And if this matter could be determined on mere moral presumptions, it would probably be easy to conclude that the parties there named were intended by the granter to be substituted as disponees for those originally named in the deed itself. But looking at the question as respects the requisites of law, the Lord Ordinary thinks this marginal writing does not supply what is otherwise clearly awanting. There is no evidence within the body of the deed to shew the time when these words were written, that is, whether before or after the deletion of the original trustees, or that they were so written for the purpose of substituting the Managers of the Royal Infirmary as disponees in lieu of those whose names stand deleted. The marginal addition is neither mentioned in the testing clause of the original deed, nor in the holograph codicil. Had it been so, the case would have stood in a favourable position for the pursuers. As it is, the Lord Ordinary cannot find warrant for holding that the granter has sufficiently pointed out, or competently made the pursuers his disponees under the deed.

"If so, the pursuers must fail. For although a suggestion was made that the codicil might assist, if not itself operate as a conveyance, the Lord Ordinary cannot, dealing as with heritable estate, hold that writing to be of avail here. If it had contained words of disposition, it might itself have operated as a conveyance. But it is defective in this respect, and therefore the whole case of the pursuers must come to rest on the marginal addition on the first page of the deed already referred to.

"The Lord Ordinary has thought himself warranted in finding no expenses due to either party here, because there can scarcely be a question that the pursuers have maintained a case which is consistent with the real intention of the granter of the deed."

Of this date the case was advised.

LORD PRESIDENT.—The subject-matter of this action is the right to certain heritable property which belonged to the late James Hewat Ferrier at the time of his death. Mr. Ferrier died on 5th June 1859. He had no lawful heirs, and consequently the right to his heritable estate belongs to her Majesty as *ultima* [1217] *hæres*, subject to certain obligations, unless Mr. Ferrier disposed of it otherwise by some valid and effectual writing. Mr. Ferrier did leave a writing or writings whereby he disposed, or professed to dispose of his property, heritable and moveable. No question is raised about his moveable property—no question is raised that it was effectually disposed of by the writings; but as to the heritable estate the question is raised whether it was effectually disposed of by Mr. Ferrier, so as to exclude the right of the Crown as *ultima hæres*. The Royal Infirmary of Edinburgh, and the managers of that institution, claim right to the heritable property, and they rest their claim on the writings left by Mr. Ferrier, which they say are sufficient to give them such right. And the present action is brought to establish that right.

The action is in the form of an adjudication in implement. It is at the instance of these parties against the Lord-Advocate, as representing the interests of the Crown, and it is resisted on behalf of the Crown on the ground that the writings founded on are ineffectual to convey any right to the subjects in question. These writings founded on by the pursuers of the action are peculiar, and they certainly are, to say the least, very imperfect. They do not constitute a regular and complete conveyance of the property with all the usual clauses; and accordingly the present action is brought, as I have said, in the form of an action of constitution, adjudication in implement, and declarator.

The writings consist of—1st, A writing which is or was a trust-disposition and settlement; and 2dly, A holograph addition or codicil. To the first of these it is objected that it was cancelled by the deceased, and separately, that it is vitiated *in substantialibus*, not being duly tested; and, in the second place, it is objected that it contains no effectual conveyance of heritage, which means no words of disposition. The Lord Ordinary has, with apparent hesitation, given effect to these objections, and we are now called upon to review his interlocutor, and to express our opinions on the matter.

Of the intentions of the testator I think there can be no reasonable doubt. But though that may be an element in fixing the meaning of ambiguous or doubtful expressions, it is not enough for the solution of this case, which is rested on the ground of technical defects in the structure of the writings, or of legal consequences from the manner in which they have been operated upon. I shall, therefore, address myself to a consideration of the defences rested upon these grounds. But, in the outset, I wish to observe, first, that there is here no question of death-bed. Mr. Ferrier is stated to have died suddenly, and there cannot be here, therefore, any question of death-bed. That is not contended, and the sudden death excludes it. Then, second, the deed of disposition with which we are dealing was originally a valid and effectual deed, disposing of heritable property, and in all respects regular. In the third place, it was a conveyance to certain persons, not for their own behoof, but in trust for behoof of certain beneficiaries for certain purposes, and for the behoof of certain beneficiaries, of whom the first (after payment of his debts) was his wife, who predeceased him; the next in order was the Royal Infirmary of Edinburgh,—the only other beneficiary being the Royal Infirmary of Glasgow. And in the fourth place, the deed was not a holograph deed. If the deed is to have effect given to it, with the alterations made on it by the testator, the result would be to exclude the Royal Infirmary of Glasgow from any benefit, but to make no other change in his original intentions as to the ultimate destination of the property. If the deed is to have no effect given to it, the result will be that the heritable property will go to the Crown. That, I think, is the position of the case, and of the deeds which we have to deal with.

Now, then, taking the trust-deed as an originally good deed, let us trace the operations upon it, and their legal effects. In the first place, I observe that by a deletion in the deed, the Glasgow Infirmary is struck out, and certain conditions about the resign-

ing of trustees, &c., excluded; and the truster has stated in his holograph codicil that he has made these deletions upon it, and he has stated his object to be to give the benefit to the Infirmary of Edinburgh. The deed itself contained a clause in reference to the execution of the purposes, whereby it provided that "the trustees shall pay all such legacies or annuities as I shall bequeath by any writing under my hand, and that they shall implement and fulfil any di- [1218] -rections which I may leave by any writing or writings under my hand, as to the disposal of the residue of my said estates, clearly expressive of my intention, though not formally executed." The residue there means the residue after satisfying the provision to his wife, and after satisfying any legacies which he bequeathed by any writing under his hand. He left no writing, I understand, except his codicil.

Now, looking to the deletion that I have referred to, whereby the Glasgow Infirmary is struck out of the interests or the purposes of his trust (and the testator has explained by the codicil under his hand the purpose for which he has done so), I am of opinion that that is no objection to the deed,—that it is such an alteration of the purposes, such an enlargement of the benefits to the Edinburgh Infirmary, and such an extinction of the purpose as regarded the interest of the Glasgow Infirmary, as he could validly make, and that in that respect there is no objection to this deed. And I gather from the note of the Lord Ordinary that that is the view which his Lordship takes in regard to that part of the deed. But then there is a further deletion here,—an operation upon the deed whereby the truster has struck out the names of the trustees who were to carry into effect his trust-purposes,—the parties in whom the property was to be vested in order to carry into effect these purposes. And that deletion also appears to have been made by the truster himself, for he has marked it cancelled with his own hand, and signed it with his name; and he has referred in his codicil to the cancellations which he has made in the deed, describing them as marked with his own hand. It is very clear that if that cancellation had extended only to the extinction of the names of some of these trustees, that would have been no destruction of the deed. I think that the opinions of the Court in the case of Ogilvie *v.* Robertson, and the opinion of the Court in the recent case of Mackilligin, are clearly to that effect, as well as the earlier opinions in the case of Anstruther's trustees. But farther, there is here the circumstance that the truster has deleted the names of all these trustees. I think it is perfectly competent for the truster to add trustees. That has been constantly done. It is competent for him, by a codicil, to declare that certain persons shall not be trustees, but that others, in place of such persons, shall be trustees. That is an alteration which it is competent to make. The peculiarity here is, that he has deleted the whole of those persons, and it is said he has not sufficiently explained the meaning and purpose of that deletion, or substituted anything which can be effectual for it. I think it was competent for the truster to delete the names of all the trustees, and to state, in a writing under his own hand, that in place of them he substitutes other persons as his trustees. I think that is necessarily to be inferred from the opinions in the cases to which I have already alluded.

Well, then, the question comes here to be, whether he has done that or has not done that, or has done what is equivalent to it. He has written on the margin of the deed, opposite to the deletion of the names of the trustees, and with a mark showing where it is to be introduced, the words "Managers of the Edinburgh Royal Infirmary for the time being." But then, although I think the managers of the Royal Infirmary for the time being might constitute a valid disponee or disponees, the question arises, or at least is raised, whether he has so made them, by introducing their names there? The Lord Ordinary says that it does not appear whether he had introduced their names before or after he had made the deletion, or for what purpose. I differ from the Lord Ordinary upon that. I think it does appear for what purpose he introduced the names there. If he had introduced their names there without making the deletion, or before making the deletion, and had not followed it up by the deletion, perhaps the effect might be that these persons were or were not to be trustees along with those that he has named. But he has deleted the others. And the question comes now, I think, to be, whether, by that marking on the margin of the deed, and by the tenor of this codicil, he has stated that he has substituted these managers of the Royal Infirmary as the parties who are to carry into execution this writing for the benefit of the beneficiaries,

or has not done so. Now, that comes to be a question not so much upon technicality as upon the construction of this codicil; and in the view I take of the case it resolves into this,—how we are to construe this [1219] codicil? I think it was competent for the party to do what it is contended that he has done,—competent for him to do it by a writing under his hand; and the question is, whether he has done it, and that is a question upon the construction of the codicil.

I do not think that in construing the codicil, the circumstance that he has written these names upon the margin at the place he has done, and with his name to it, is unimportant or is immaterial. I think you are to take both matters into consideration. I think the place in which they are put, his name being attached to it, indicates of itself a purpose in putting them there. But I think that that purpose may be more clearly indicated, or may be negatived by the construction put upon the codicil. Now, as I read this codicil, I think that it indicates no change of intention on the part of the testator, to destine his property for the use of the parties who were the original beneficiaries, with the exception of the beneficiary whom he has deleted from the deed. On the contrary, I think this codicil indicates a determination and persistence in the purpose, and a persistence in the purpose expressed favourably for the remaining beneficiary. It is a codicil wholly in favour of the Edinburgh Infirmary; and in it, after stating that he had made the deletion on the margin of the deed in his own hand, he says,—"I declare that it is my will that none of the above document must be allowed to interfere with the purposes or intentions of this codicil, even although they should not be so erased. In furtherance of the above, I, James Hewat Ferrier, do declare that it is my sincere wish that the whole of my property, heritable and moveable, money, silver plate, clothes, or goods of whatever description that may be in my possession at my death, or that I may have a right to claim as mine, shall go to, and I hereby bequeath to the funds of the Edinburgh Royal Infirmary,"—plainly following out the purpose and indicating the intention that they are still to be the beneficiaries under this trust-deed,—"And I hereby appoint the managers of the said Edinburgh Royal Infirmary for the time being my sole executors or trustees, to the intents as follows." There is a nomination of these persons,—a statement that he means these persons to be his trustees or executors, and for the purpose, as I read it, of this codicil, by which he says that the whole of his property is to go to the managers of the Royal Infirmary. Then he goes on to state his purposes,—"1st, That tenement of houses belonging to me situated in Fountainbridge Street, Edinburgh, &c., shall form a fund for ever;" and then the whole personal estate is to be applied, by whom?—By the trustees of the Royal Infirmary. To what purpose?—"To the admission or relief"—that is, an infirmary purpose—the admission into the infirmary, and the relief there—"of any human being, of whatever country or nation, who may not have a legal claim"—(a very large benevolence this gentleman had)—"or who may not have a friend, and who is in sickness and distress. I am not aware if such cases exist, if there are such cases, and if it will consist with the regulations of the institution," thereby again pointing out the regulations of the institution, and the institution generally for whose interests these persons were named trustees,—"I hope my executors will carry this through as far as is consistent with the rules and regulations,"—*i.e.*, the rules and regulations of the institution,—"but never to the prejudice of the Edinburgh Royal Infirmary, and which I will leave, trusting to the discretion and decision of said trustees."

Now, I have said it is a question of the construction of this codicil. There may be doubtful language in it, or language not perfectly clear in it, admitting of being turned one way or another way possibly; but when we come to the matter of construction, the intention of the party is a great key to the reading of the clause. Now, the intention is beyond all question; the language is sufficient to enable that intention to be carried into effect, and that being so, I read this codicil as saying that he has substituted this Royal Infirmary, and the managers of it, as his trustees, and that he has deleted the other trustees,—that the Royal Infirmary are to take this property and manage it for the benefit of that institution, pointing out a purpose which they are to keep specially in view certainly, so far as consistent with their rules and regulations, but not to interfere in any way with the general interests of the institution. I think that, looking to the character of the deed, and taking step by step the alterations which have been made upon it by the truster, and looking to the opinions of the Court as

expressed, especially in the cases to which I have [1220] referred, this is the true reading of this deed, and that it is not destroyed by the alterations that have been made upon it.

LORD IVORY.—I have arrived at the same conclusion, and I may say, after a study of the authorities, that taking them together, I have little or no hesitation as to the soundness of that conclusion. It is necessary in the first instance to see what that trust-deed was in its origin, and what it has become in consequence of the alterations and cancellations made on it by the testator. There is no dispute that all the cancellations and other acts that affect the deed are acts of the testator himself. Now, originally it was a trust-deed for the purposes therein declared, through the medium of certain machinery therein afforded, against which there could be no objection. It was a mixed trust as to an heritable and moveable estate. It was not a deed purely affecting heritage,—it was not a deed purely affecting moveables; it was a deed that, as regards both heritage and moveables, was to have a certain unity of operation in regard to the combined purposes to which both estates were to be applied. It is important not to lose sight of that circumstance, because from technicalities in the law of Scotland, and its conveyancing practice, there is a difficulty in regard to the disposal of the heritage which does not exist in regard to the disposal of the moveables. But the question, how far the deed is a subsisting deed, whether it be operative, and to what extent, is a different question. In regard to the subsistence of it as a deed executed by the granter, it cannot subsist in regard to the one estate, and not in regard to the other,—I mean it cannot be a null deed in regard to the one, and be in a different situation as regards the other. Now, as it stood originally there was no difficulty arising from the circumstance to which I allude, and it is in consequence of the cancellations that any difficulty which exists has arisen.

The formal disponees of the deed,—viz., the trustees who were named to carry into execution the trust-purposes, have been deleted. That part of the deed has been cancelled. The trustees, as disponees, no longer exist. The question is,—the purposes of the trust being left, the beneficiaries being untouched, all the interests in the disposing of the estate remaining the same,—whether the cancellation of the names of the trustees, so as to destroy the dispositive clause as a formal disposition to certain disponees named, affects the deed?

In the first place, does it make a nullity as to the moveable estate? Can the deed subsist, as regards the moveable estate, without a trust-donee to carry it into execution? It subsists, because taking it altogether, with its codicil, the intention which, in the case of the moveable estate, is enough, is made clear. All the substance of the deed remains. Well, that goes a great way to show,—indeed it goes the whole length to show,—that if there had been no heritage in this case at all, the deed would at this moment have been a good deed by the law of Scotland,—a probative deed,—a deed which the parties interested in its execution could have enforced, notwithstanding that the formal machinery by which the trust was rendered operative was removed and destroyed. In no respect, therefore, in that case would the deed have been affected, as regards its subsistence and its operative effect.

Is it different with regard to the heritable estate, and to what effect and extent? The formal disponees are away just as they were away had it been confined to moveables. But all the substance of the deed remains; and, so far as the intention and purpose of the testator go, the deed in the case of the heritable estate stands in precisely the same predicament as it would have done in regard to the moveable estate. Now, the formal disposition and the formal nomination of trustees do not affect the interests of the beneficiaries. They do not affect the extent of the estate, nor the purposes to which it is to be applied. The deed, in its whole substance, is what the testator meant it to be, and the only thing that is changed upon it is, that the machinery by means of which it was to be carried into execution, according to the original intent, has been taken away. But that is very far from destroying the deed in its substance. It may create difficulties in its operation. It may introduce technical defects in point of form, which may even be fatal to the intention, though expressly declared, and though meant to remain untouched. But that is not, with reference to the instrument, anything that touches its validity as a subsisting deed. It may be an inoperative deed—a powerless deed [1221] in certain respects, but the deed as the deed of the granter remains, such as it is, and you must then deal with

or has not done so. Now, that comes to be a question not so much upon technicality as upon the construction of this codicil; and in the view I take of the case it resolves into this,—how we are to construe this [1219] codicil? I think it was competent for the party to do what it is contended that he has done,—competent for him to do it by a writing under his hand; and the question is, whether he has done it, and that is a question upon the construction of the codicil.

I do not think that in construing the codicil, the circumstance that he has written these names upon the margin at the place he has done, and with his name to it, is unimportant or is immaterial. I think you are to take both matters into consideration. I think the place in which they are put, his name being attached to it, indicates of itself a purpose in putting them there. But I think that that purpose may be more clearly indicated, or may be negatived by the construction put upon the codicil. Now, as I read this codicil, I think that it indicates no change of intention on the part of the testator, to destine his property for the use of the parties who were the original beneficiaries, with the exception of the beneficiary whom he has deleted from the deed. On the contrary, I think this codicil indicates a determination and persistence in the purpose, and a persistence in the purpose expressed favourably for the remaining beneficiary. It is a codicil wholly in favour of the Edinburgh Infirmary; and in it, after stating that he had made the deletion on the margin of the deed in his own hand, he says,—"I declare that it is my will that none of the above document must be allowed to interfere with the purposes or intentions of this codicil, even although they should not be so erased. In furtherance of the above, I, James Hewat Ferrier, do declare that it is my sincere wish that the whole of my property, heritable and moveable, money, silver plate, clothes, or goods of whatever description that may be in my possession at my death, or that I may have a right to claim as mine, shall go to, and I hereby bequeath to the funds of the Edinburgh Royal Infirmary,"—plainly following out the purpose and indicating the intention that they are still to be the beneficiaries under this trust-deed,—"And I hereby appoint the managers of the said Edinburgh Royal Infirmary for the time being my sole executors or trustees, to the intents as follows." There is a nomination of these persons,—a statement that he means these persons to be his trustees or executors, and for the purpose, as I read it, of this codicil, by which he says that the whole of his property is to go to the managers of the Royal Infirmary. Then he goes on to state his purposes,—"1st, That tenement of houses belonging to me situated in Fountainbridge Street, Edinburgh, &c., shall form a fund for ever;" and then the whole personal estate is to be applied, by whom?—By the trustees of the Royal Infirmary. To what purpose?—"To the admission or relief"—that is, an infirmary purpose—the admission into the infirmary, and the relief there—"of any human being, of whatever country or nation, who may not have a legal claim"—(a very large benevolence this gentleman had)—"or who may not have a friend, and who is in sickness and distress. I am not aware if such cases exist, if there are such cases, and if it will consist with the regulations of the institution," thereby again pointing out the regulations of the institution, and the institution generally for whose interests these persons were named trustees,—"I hope my executors will carry this through as far as is consistent with the rules and regulations,"—*i.e.*, the rules and regulations of the institution,—"but never to the prejudice of the Edinburgh Royal Infirmary, and which I will leave, trusting to the discretion and decision of said trustees."

Now, I have said it is a question of the construction of this codicil. There may be doubtful language in it, or language not perfectly clear in it, admitting of being turned one way or another way possibly; but when we come to the matter of construction, the intention of the party is a great key to the reading of the clause. Now, the intention is beyond all question; the language is sufficient to enable that intention to be carried into effect, and that being so, I read this codicil as saying that he has substituted this Royal Infirmary, and the managers of it, as his trustees, and that he has deleted the other trustees,—that the Royal Infirmary are to take this property and manage it for the benefit of that institution, pointing out a purpose which they are to keep specially in view certainly, so far as consistent with their rules and regulations, but not to interfere in any way with the general interests of the institution. I think that, looking to the character of the deed, and taking step by step the alterations which have been made upon it by the truster, and looking to the opinions of the Court as

expressed, especially in the cases to which I have [1220] referred, this is the true reading of this deed, and that it is not destroyed by the alterations that have been made upon it.

LORD IVORY.—I have arrived at the same conclusion, and I may say, after a study of the authorities, that taking them together, I have little or no hesitation as to the soundness of that conclusion. It is necessary in the first instance to see what that trust-deed was in its origin, and what it has become in consequence of the alterations and cancellations made on it by the testator. There is no dispute that all the cancellations and other acts that affect the deed are acts of the testator himself. Now, originally it was a trust-deed for the purposes therein declared, through the medium of certain machinery therein afforded, against which there could be no objection. It was a mixed trust as to an heritable and moveable estate. It was not a deed purely affecting heritage,—it was not a deed purely affecting moveables; it was a deed that, as regards both heritage and moveables, was to have a certain unity of operation in regard to the combined purposes to which both estates were to be applied. It is important not to lose sight of that circumstance, because from technicalities in the law of Scotland, and its conveyancing practice, there is a difficulty in regard to the disposal of the heritage which does not exist in regard to the disposal of the moveables. But the question, how far the deed is a subsisting deed, whether it be operative, and to what extent, is a different question. In regard to the subsistence of it as a deed executed by the granter, it cannot subsist in regard to the one estate, and not in regard to the other,—I mean it cannot be a null deed in regard to the one, and be in a different situation as regards the other. Now, as it stood originally there was no difficulty arising from the circumstance to which I allude, and it is in consequence of the cancellations that any difficulty which exists has arisen.

The formal disponees of the deed,—viz., the trustees who were named to carry into execution the trust-purposes, have been deleted. That part of the deed has been cancelled. The trustees, as disponees, no longer exist. The question is,—the purposes of the trust being left, the beneficiaries being untouched, all the interests in the disposing of the estate remaining the same,—whether the cancellation of the names of the trustees, so as to destroy the dispositive clause as a formal disposition to certain disponees named, affects the deed?

In the first place, does it make a nullity as to the moveable estate? Can the deed subsist, as regards the moveable estate, without a trust-donee to carry it into execution? It subsists, because taking it altogether, with its codicil, the intention which, in the case of the moveable estate, is enough, is made clear. All the substance of the deed remains. Well, that goes a great way to show,—indeed it goes the whole length to show,—that if there had been no heritage in this case at all, the deed would at this moment have been a good deed by the law of Scotland,—a probative deed,—a deed which the parties interested in its execution could have enforced, notwithstanding that the formal machinery by which the trust was rendered operative was removed and destroyed. In no respect, therefore, in that case would the deed have been affected, as regards its subsistence and its operative effect.

Is it different with regard to the heritable estate, and to what effect and extent? The formal disponees are away just as they were away had it been confined to moveables. But all the substance of the deed remains; and, so far as the intention and purpose of the testator go, the deed in the case of the heritable estate stands in precisely the same predicament as it would have done in regard to the moveable estate. Now, the formal disposition and the formal nomination of trustees do not affect the interests of the beneficiaries. They do not affect the extent of the estate, nor the purposes to which it is to be applied. The deed, in its whole substance, is what the testator meant it to be, and the only thing that is changed upon it is, that the machinery by means of which it was to be carried into execution, according to the original intent, has been taken away. But that is very far from destroying the deed in its substance. It may create difficulties in its operation. It may introduce technical defects in point of form, which may even be fatal to the intention, though expressly declared, and though meant to remain untouched. But that is not, with reference to the instrument, anything that touches its validity as a subsisting deed. It may be an inoperative deed—a powerless deed [1221] in certain respects, but the deed as the deed of the granter remains, such as it is, and you must then deal with

it just as you would have dealt with it if these purposes had stood, without any effect arising from the cancellation.

Now, in such a deed the difficulty arises from that puzzle connected with our conveyancing practice, that the heir cannot be displaced or disinherited by anything that does not come up to the full measure of dispositive words. There must be a disposition *de præsenti*,—*fictione juris* it may be,—for this is all a matter of fiction; in regard to the substance of the thing, there is no disposal of property. The difficulty here is with reference to the technical sufficiency of the expressions in the deed to carry the purposes into effect. "There is no disponee." That is what is said. There is no dispositive clause, but the dispositive words are not delete. There may be a blank, in a certain view, created by the cancellation, but the dispositive words and the dispositive purpose are there; and that seems to me to be an element which it is impossible to leave out of sight in dealing with this deed. There are many other cases in which the disponees might have fallen to the ground. The trust-disponees named might have predeceased the testator, or they might, surviving the testator, have declined to take upon them the office. Would the deed have fallen because the disponees had fallen? Not at all. The object of the deed would have been fulfilled and enforced by aid from the Courts. What the party had meant to do may have been defeated by the accident of the predecease of the trustees, or by their refusing to take upon them the office. But the deed, as a dispositive deed,—a deed containing all the technicalities of the law, not only the purpose of disinheriting, but the *modus operandi* necessary for carrying that purpose through, rendered available, would have been there; and being there, the Courts would have held that there was enough to oust the interests of the heir, and to let in the operation of the law to aid in carrying into execution what had been the intent of the party.

Now, where is the difference between those cases, where the formal disponees fall, and the case which is here,—that they fall by the act of the granter? The question recurs, did the granter, when he erased the names of these disponees, mean to destroy his trust-disposition, or did he merely mean to withdraw his confidence from the formal disponees whose names he had originally inserted? And that is a most important question; and it seems to me that it creates a difficulty of no other kind, and not otherwise defeating the intent and action of the deed, than if by the accident that I have mentioned, of predecease or non-acceptance, the trustees themselves had made the change. In the case of the trustees being the parties through whom the change had been made, of course the law never could recognise that an instrument which had been made by its proper granter was to be changed at the caprice, and by the *arbitrium* of the parties whom he had called in to execute his purpose. That would have been to leave the trustees to make the will in place of the granter of the deed,—to have left the trustees to say, You have disinherited your heir; we will not go along with you in that; we will restore the estate which you have taken from your heir, and give it to the heir by our proceedings.

There are cases in the books which show that even where the trustees refuse to act, it may be necessary from the structure of the deed that they shall act, not to the effect of the acceptance of the trust, but to the effect of dealing with that interest which has been formally given to them, so as, without involving themselves in the office of trustee, to make it necessary for them to execute certain formal deeds in order to restore the title to the right shape. I think there was a case of the name of Ochterlony in which that was done, which shows in another way that it is the substance that is always looked to, and not the mere form of the words and expressions. And, accordingly, in those cases to which your Lordship has alluded of Mackilligin, and Robertson, and Ogilvie (and there are others of the like class), the considerations with which we are now dealing have been very deliberately discussed and dealt with by the Court; and the result at which the Court seemed to arrive, in getting at the conclusion, correspondent with the conclusion at which your Lordship proposes to arrive here, has been that these formal disponees,—the nominate trustees,—are not the substantial disponees of the deed at all. The substantial disponee is the disponee having the interest,—the beneficiary in the deed, the party who is to be favoured,—the party to whom the estate is to [1222] be given. The formal trustees, the parties named to operate that result, are the mere hands by which it is conveyed from the granter to the disponees. They are the medium through which it is to come; they are the machinery by which certain

things are to be done; but they are no more. And it by no means follows that though you strike down the machinery, you strike down the substance of that which the machinery is to make available. And so the Court held that, in truth, and in substance, it was the beneficiaries who were to be regarded as the disponees; and that the others were there as mere form; that the substance had been preserved, and that the name was not to be allowed to destroy that substance.

I think here that though there may be difficulties created by what has taken place, it has not destroyed the existence of the deed, that the trust-disposition is a good disposition, sufficient to carry the estate, although it may be necessary that the Court interfere to supply the lapse of the trustees who have been named. It appears to me that this would have been the case if the estate had been wholly moveable; and that it would have been the case if the estate had been exclusively heritable. But when you come to have the mixed estate, I think that the mixed character of the estate gives an additional argument in regard to the matter of the heritable estate, because you have all the mind of the party in regard to it proved by what he has done in regard to the moveables. You have the trust in subsistence, although the nominees have fallen; you have an estate given, both portions of which are to be dealt with in the like manner, and are to be conveyed through the same form of disponees to the parties ultimately and essentially meant to be interested. All that gives an additional support to the argument that you cannot allow this deed to be destroyed, even as regards the heritage, by that which has taken place.

Now, I thought it right to look into some of the authorities with reference to this, which is a matter of considerable moment. There is a strong analogy I think to be gathered from the civil law in regard to it with reference to the matter of the *institutio hæredis*. There are important passages to be found in regard to it in the Pandects, l. xxviii., t. 4, s. 3. These passages are well worthy of being considered. And the very case which here occurs, occurred there with reference to the erasing or cancelling of the *institutio hæredis;* for it says,—"The question regarded a testator who had cancelled the names of the *hæredes* whom he had instituted in his testament, and the fisk had claimed his goods as caduca." The doubt arose, whether, in consequence of the cancellation of the institute heirs, the legacies and other burdens which had been imposed upon that heir also fell to the ground. And the question was formally enounced in this shape, how was this to be decided? Ought one to say that he who had effaced the names of his heirs, had thus sufficiently manifested his intention of dying intestate, or was that not rather severe, and was not the more just course to hold that in matter of doubt a less rigorous interpretation was to be had, and that the cancellation was to be confined to the single matter which it affected. And so it was held there, that notwithstanding the cancellation of the *institutio hæredis*, that which was only meant to operate through what had been cancelled, remained good to the party. It is also laid down in a treatise by Maurice, who is commenting on Voet at this very passage, that the legacies were still to be payable by the heir-at-law notwithstanding the testator had expunged the *institutio hæredis*. The *institutio hæredis* there was just the institution of the trust-disponees here.

Now, that leads me to remark, that, in the former discussion of this question, it was gravely debated,—at least it was raised as a question gravely deserving consideration,—whether, even if the deed were an entire blank with regard to the trustees, there having been no trustees named, the deed having been completed upon that footing of a total blank in the names of the trustees, the deed might not still be supported at law so as to entitle the beneficiaries to enforce its execution. I do not enter into that. It is a grave question certainly, but it is a question that does not appear to be necessary to decide here, because here there were trustees nominated. There were duties imposed upon them, — there were interests raised to be carried through at their hands, — and it is not the case of a deed left blank from the beginning in the names of the trustees, and therefore no machinery given through which it could originally have **[1223]** been carried through. That leaves, certainly, an additional difficulty which does not occur here,—that it might be doubted, whilst the machinery for carrying the party's purposes into effect had never been named at all, whether he had completed his purpose out and out,—whether it was a completed deed in the sense to make it his deed to all intents and purposes contained in it. But here you have not that. You

have the deed made in the form of a deed *inter vivos*, as is necessary in the case of the disposal of heritage. You have all that here. You have the deed well made, and when made, a good deed to all intents and purposes as a dispositive deed conveying heritage, and you never have that disposition, so far as regards the substance of its operation in favour of the beneficiaries, destroyed or recalled. All that you have is, that the names of the parties to whom its execution was to have been intrusted are taken away; but they are taken away emphatically, leaving the interests with which they were intrusted to remain in favour of those parties whom the Court held to be substantially the disponees instead of the mere formal disponees.

But here we have more than this. I think that would be enough if we had had no more. But we have this institution of other trustees in the margin of the deed, holograph of the maker, in favour of the managers of the Edinburgh Royal Infirmary for the time being. If this be good, it is the substitution of one set of trustees for another. It is a reinsertion into the deed of the office of trustees in the persons of other and different individuals. But it is said that this is not a valid exercise,—at least, not a probative exercise of the appointment, because you do not know the time when it was made,—whether before the other was deleted, or before the filling up of the testing clause. It is a probative act; it is so made as to form a continuing expression of the party's will here. It is not affected by any question of death-bed. Why shall it not have effect even if it had stood on this marginal note alone? To be sure the difficulty would remain, as a difficulty was raised in the argument, that new trustees named in a well devised and probative codicil cannot thus be habilely interjected into the heart of the previous trust, because there is no disposition in their favour. I need not remark on that. It has been over and over again decided that trustees may be so adjected in a codicil; and why not in a holograph marginal addition to the deed. And if so, that again would rear up a sufficient machinery for the purposes that we have now in hand. But it does not stand upon this marginal addition.

The codicil is a most important element in this case, and the codicil gives meaning, and purpose, and effect to the previous parts of the deed. Nay, even if the marginal addition were away, I should not say that there is not enough in the codicil to supply those directions which the trust-deed speaks of being afterwards done by a writing, however informal, under his own hand,—that that would not have given the trustees power to fill up the blank made by the cancellation, which is the act of the party. For, on 7th December 1857, he declares it to be his will, alluding to the cancellation and its object,—that it was not a cancellation to recal the deed and make him die intestate, but it was a cancellation to operate certain limited purposes which have there expression. And then he says,—"I do declare that it is my will that none of the above document must be allowed to interfere" with his leading purpose—"and I hereby appoint the managers of the said Edinburgh Royal Infirmary for the time being my sole executors or trustees to the intents," &c. There is an appointment of trustees. It is an appointment of substituted trustees. It might be held to be a recal of these if they had not been cancelled, and a substitution of the others to take their place. No doubt, there would have been the puzzle that, under such a deed as that, there might not be the means of a direct infeftment of the trustees so as to invest them in the feudal title. But that is a puzzle which does not affect anything. It would have affected it in however regular a shape the new trustees might have been named. And then he goes on to declare these his sole executors or trustees. They are to deal with the disposal of all the goods, &c., as realised, "that my trustees may see necessary," and "carry through my intentions as honestly and fairly as possible." This is on the same paper with the trust-deed. It is part of the trust-deed. It is a clear and indubitable expression of his purpose that the trust which he had previously created, and created through the force of the dispositive clause in favour of certain indi- **[1224]** -viduals, was to be followed out in favour of the beneficiary—the Edinburgh Infirmary (the other having been deleted),—that that is to be done by the trustees named in the codicil.

It is always to be considered, in dealing with cases of this sort, that a very different interpretation may be necessary in the case where anything is done affecting the nomination or interests of a trust-disponee, and where it is only in the support of the interests of the true disponee, made or intended in regard to the names of the formal disponee. As to the feudal title, the very nature of this action shows that that is

nothing. And, on the whole, I am perfectly satisfied,—very clearly and decidedly satisfied,—that this deed has not been destroyed, and that there are elements still remaining within it, and the codicil, for supporting the conclusions of the present action, and creating, through the assistance of the Court, a sufficient and valid title in favour of the trustees, the managers of the Royal Infirmary.

LORD CURRIEHILL.—It is of importance to keep in view the circumstance last referred to by Lord Ivory,—that the question here is not whether this trust-disposition is sufficient in its present state to be a part of the feudal investiture. That is not the question. This is an action of constitution and adjudication at the instance of certain parties, describing themselves as having been appointed trustees under a settlement, concluding against the legal representative of the granter, who, in this case, happens to be the Crown, to grant such a conveyance, or alternatively if the conveyance be not granted, that the Court shall grant a judicial conveyance in the form of an adjudication in implement. The question therefore is, whether or not the deed is sufficient to create such an obligation upon the representative of the granter as entitles the trustees to one or other of these remedies.

Now, we begin with a deed, which, as it originally stood, was unquestionably valid and effectual. There is a good dispositive clause; and, although the subjects are described only generally, that is quite valid and effectual. So far the case is clear. But it is said that the deed subsequently to its having been so framed, has been rendered ineffectual, and that in two different ways: 1st, It is said to be vitiated *in substantialibus* by large portions of it having been cancelled; and 2dly, It is said to have been rendered ineffectual as a conveyance of heritage (and it is only as a conveyance of heritage that we are here dealing with it), because, although the rest of the dispositive clause remains untouched, the names of the disponees have been cancelled, and the place left vacant by that cancellation has not been validly supplied.

With reference to the first of these objections, the deed would, I think, have been vitiated *in substantialibus* if the cancellation had not been the act and deed of the granter himself, and if that had not been sufficiently established or admitted. But we have it established by writing under the granter's own hand, that the act was his. In the codicil of December 1857 he has expressly told us that it was he himself that made that cancellation, and he has identified the portions cancelled, by stating in the subsequent codicil that he had put in the word "cancelled" at the proper places; and, accordingly, you will find that word written in his own hand at these places. Now, cancellation has not the effect of nullifying a deed when it is the act of the party himself, and with the view of giving effect to his intentions. It is only when that is not the case, or when there is no evidence of that being the case, that cancellation has such effect.

But, then, it is said, although it be his own act, he has done too much, because he has destroyed the deed in what is essential to make it a valid conveyance *in mortis causa* of heritage. By our law, as it still stands, an owner of heritage cannot make a valid testamentary conveyance of it except by a *de præsenti* disposition. There cannot be a *de præsenti* disposition unless there be a disponee. A disposition means that something is transferred from one party to another, and unless there be a transferee there can be no transfer. That is sound enough in point of law. But the question is, has the truster failed to appoint a disponee in place of those whose names are cancelled? The answer to that objection is, that he has appointed a disponee in two different ways: in the first place, by a holograph marginal note naming the disponee, naming the managers of the Royal Infirmary of Edinburgh; and secondly, by a nomination of these parties in the codicil of December 1857, as his trustees and trust-disponees. It may not be necessary for **[1225]** us here to solve the question whether either of these two things by itself would have been sufficient to supply a disponee, because we have here the two. But at the same time, we may consider what would be the effect of each of them if it stood by itself.

I think that, but for the testing clause which exists in this deed, the mere insertion of a marginal note might have been sufficient. A marginal note is quite a competent mode of expressing part of a deed, provided the marginal note be authenticated as part of the deed. When the deed is written by another hand than that of the granter himself, this must be done by his stating in the dispositive clause that he has signed it in presence of witnesses, and mentioning the name of the person by whom it is

written. All these things are necessary to make it part of the text when it is written in a different hand. These statutory requisites are as applicable to a marginal note as to the body of the text; but when so authenticated, it is just as much a part of the deed as what is in the original text itself. And I think there would be very much to be said in favour of the view that when it is holograph of the party, that is sufficient authentication, the hand-writing being admitted or proved, because the statutory solemnities for the authenticating of deeds are not necessary in cases of holograph writings. And, therefore, I think there would have been very much to have been said in favour of that view but for the testing clause here. But the testing clause would falsify this, because it bears that the deed was written by another hand, and signed at a certain date before witnesses; and there was nothing to show on the face of the original deed itself that this may not have been there from the beginning. We do not know about that so far as the deed itself is concerned. I therefore think that the testing clause in this case, so far from authenticating this as part of the text, rather operates to the contrary; and for that reason I would have very great difficulty indeed in sustaining this marginal note as supplying the want of a disponee, if we had had nothing else.

But we have a codicil in 1857, and in that codicil he names the same party—the managers of the Edinburgh Infirmary—to be trustees. There is an express nomination of them. Now, let us see what would have been the effect of that, if it had stood by itself. I confess it appears to me that that would have been sufficient, even if the marginal note had not been there. In saying so, I hold that that codicil, according to its sound construction,—for its meaning is a matter of construction,—and without repeating what your Lordship has said upon that subject, I think, according to its true construction, it amounts to an effectual nomination of the managers of the Royal Infirmary as trustees. Still, it is said, a nomination of trustees does not make them trust-disponees, because there is still no disposition in their favour; and a mere nomination of a party will not do, unless there be a disposition in his favour. Now, I think it is clear law in principle, and established by authority, that in the case of *mortis causa* settlements,—I think the case might be different as to deeds *inter vivos*, but in the case of *mortis causa* settlements, the principal deed, and all the codicils that are executed by the granter during his lifetime, and before any of the deeds are delivered, are to be read as one deed. I think that in that case a nomination of trustees either in the deed itself,—in some other clause of the deed beyond the dispositive clause, or in a codicil,—has the effect of making the party so appointed a trust-disponee.

I think this was one of the points that occurred in the case of Roberton's Trustees *v.* Ogilvie, to which your Lordship alluded. In that case there were six disponees in the dispositive clause. It appeared that the names of three of them were written upon erasures, and a question arose about that, though it does not affect the point which I am dealing with here. There were six disponees, and only six mentioned in the dispositive clause itself. But in a subsequent part of the deed, in describing the purposes of the trust, the granter stated that his widow was to be a trustee. The result was that none of the six trustees accepted. There was no accepting trustee, unless the widow was one. But it was said, there is no disposition in her favour; she is not in the dispositive clause, and there are no dispositive words from beginning to end in her favour. The answer was, by his appointing her trustee, he virtually put her name into the dispositive clause; and so the Court held, and were quite clear upon that point.

Then there came the case of Mackilligin, to which your Lordship alluded. In that **[1226]** case there were eight trustees appointed in the dispositive clause. By a codicil the nomination of three of these trustees was revoked, and a new trustee, Sir J. Elphinstone Dalrymple, was nominated; but there was no disposition in his favour. Then, by a second codicil, the truster revoked all former nominations, but of new nominated the five of the original trustees, and Sir J. E. Dalrymple as trustees. Then the question arose after the granter's death, whether there were any disponees? It was said Sir J. Dalrymple had never been a disponee at all; and though the other five had been originally disponees, their nomination as such had been revoked; and although they were appointed again, there was no disposition in their favour. So that the very question was raised there as to whether they were disponees or not. That case

came before me in the Outer-House, and I was of opinion, and expressed that opinion, that there were disponees, on two different grounds. One was, that the clause of revocation in the second codicil, when properly construed, did not amount to a revocation of the original disposition. The second was, that assuming that it did amount to a revocation, the persons named of new, even if they had been different persons altogether, were, by their being merely nominated and appointed trustees, placed under the dispositive clause. In that case I stated a farther alternative view, viz., that even although the names of the trustees had been an entire blank, as Lord Ivory has stated, it would have been a perfectly good trust for behoof of the beneficiaries. I founded my opinion on this last point upon very radical principles in conveyancing, which had been very fully discussed in the case of Alcock, and on which very great difference of opinion existed; but I founded it still more on the opinion so recently before expressed by very eminent Judges in the case of Robertson *v.* Ogilvie. The case went to the Second Division, and the Second Division declined to meddle with that latter view of the matter. But on both the two other points that I have mentioned, viz., that the revocation in the second codicil truly did not import a revocation of the original nomination; and also, separately, upon the second point, that a mere nomination of trustees in a codicil, although different altogether from those in the original deed, was sufficient to place them in the dispositive clause as trust-disponees; on that latter point, as well as the former, all the Inner-House Judges were quite clear. I shall read a few sentences from the opinions as to that matter. The Lord Justice-Clerk says,—"The truster, by an after codicil, alters the trustees—(reads from Lord Justice-Clerk's, and from Lord Wood's opinions.)—Now, I think these opinions could not be more applicable to the case in which they were delivered, than they are to the case which is now before us, the codicil having the construction which your Lordship puts upon it. And upon that ground, I confess, I would have thought this sufficient, even without the marginal note, but, *a fortiore*, is it at least equivalent in its effect to a new testing clause holograph of the testator, stating that he had nominated the parties named in the marginal note, in his own handwriting, trustees under that deed.

Lord Deas.—This is an action brought by the managers of the Royal Infirmary of Edinburgh *nominatim*, against Her Majesty, as *ultima hæres* of the late James Hewat Ferrier, concluding for a conveyance to them of the heritable subjects described in the summons, which belonged to Mr. Hewat Ferrier, or otherwise for decree of adjudication in implement of Mr. Hewat Ferrier's general trust-disposition and settlement of 6th May 1851, and relative codicil of 7th December 1857.

Two pleas have been maintained to us in defence against the action—1st, That the deed is cancelled and vitiated *in essentialibus;* and 2d, That, as the deed now stands, it contains no disponee or disponees, and consequently, that it is ineffectual as a disposition of the deceased's heritage, to which alone the action relates.

The Lord Ordinary did not give effect to the first of these pleas, but he considered the second to be well founded, and, consequently, assoilzied from the action. I shall notice these two pleas in their order.

I. The alleged cancellation or vitiation consists in the pen having been drawn through the words of a good many continuous lines in two different parts of the deed; but the whole words so deleted remain legible, so that we can still see distinctly what they were. The first set of words deleted consist of those in the dispositive clause, by which certain persons, and the survivors, and survivor of them who should accept, and the heir-male of the last survivor, were appointed to be trustees, the majority, while there were more than two acting and residing in [1227] Great Britain, being a quorum. The second and only other set of words deleted are those by which the Royal Infirmary of Glasgow had been placed in the position of being entitled to one-half of the beneficial interest under the deed, and the words by which provision had been made for the assumption of new trustees in room of any dying, declining to accept, becoming incapable of acting, or retiring from the trust.

That the granter himself made these deletions is placed beyond doubt by his having written the word "cancelled" across the lines deleted, and subscribed his name to that word; and by his having stated, in his holograph codicil, that he had done so. The effect, upon the import of the deed, of the deletions thus made by the

granter, was twofold,—First, to give the whole beneficial interest to the Royal Infirmary of Edinburgh, in place of one-half going, as originally intended, to the Royal Infirmary of Glasgow;—Second, to cancel the names of the individual trustees, and the relative provisions for securing successors to them in the trust. The first of these effects resulted from allowing the words, "the Royal Infirmary of Edinburgh," to remain in the deed, while the words which followed, "and Glasgow equally between them," were struck out. That the granter intended this to be the effect of deleting these words is clear from the codicil, in which he declares his wish to be, that the Edinburgh Royal Infirmary should have the whole of his property, heritable and moveable. And that he intended the effect of the remaining deletions to be to cancel the appointment of the individual trustees, and the provisions for securing successors to them, is equally clear from the codicil by which he appoints the managers of the Edinburgh Royal Infirmary to be his trustees and executors—an appointment inconsistent with the supposition that he meant the original appointment to stand.

It being thus apparent what the words deleted were—what the effects of deleting them are, and that the granter made these deletions himself, intending these effects to follow—I think it impossible to say (apart from the separate objection of there being no disponees) that the deletions can be regarded as vitiations *in essentialibus*, which annul and destroy the deed. These deletions introduce no uncertainty or ambiguity into the deed; no inextricability or confusion; nor, indeed, any single element on which the fatal nature of vitiation *in substantialibus* rests.

II. But the more serious question is, whether there are now any disponees in the deed?

I think there are. I think "the managers of the Edinburgh Royal Infirmary for the time being" are the disponees; and, if so, it was not contested that these words are sufficiently definite and descriptive to entitle the individual pursuers, as the managers for the time being, to obtain either a conveyance or a decree of adjudication in implement.

In place of the names of the trustees deleted from the dispositive clause, the granter substituted on the margin the words just quoted, "the managers of the Edinburgh Royal Infirmary for the time being," and these words he authenticated by his signature. It is admitted that the words just quoted are the granter's holograph writing, and that the signature attached to them is his genuine signature. Now, even if the case stood there, I should be slow to affirm that a marginal note, holograph of the granter, could not receive effect unless mentioned in the testing clause in the manner which would be required if it had been written by a third party. There would be much to be considered before arriving at that conclusion. But the case by no means stands there; and it is, consequently, not necessary to deal with it on that footing. There is here written evidence under the granter's own hand that he had cancelled the original nomination of trustees, and substituted this in its place. He not only wrote and subscribed his name to the word "cancelled," across the deleted nomination, but he tells us in his holograph codicil that he had done so. The same codicil bears, "I hereby appoint the managers of the said Edinburgh Royal Infirmary for the time being my sole executors or trustees." It is impossible to read this repetition of the words which he had added on the margin of the original deed without being satisfied that the words on the margin are descriptive of the trustees he meant to substitute for those whose names he had deleted. He was not a professional man, nor even a scholar, as the defective orthography and grammar of the codicil sufficiently indicate. The critical remark, that he appoints trustees by the codicil, in place of saying he had already appointed [1228] them, has therefore no force. Neither has the almost equally critical remark, that the words, "to the intents as follows," which occur after the appointment in the codicil, limit that appointment, and prevent it from being applicable to the general purposes of the deed. I think it plain that the special intent introduced by these words, of obtaining admission into the infirmary, and relief in sickness and distress for those who were friendless, and had no legal claim to such relief, is introduced merely as a recommendation to his trustees, to be acted on only in so far as consistent with his leading purpose, of having his whole funds applied by them for the general purposes of the institution; and that, in other respects, the codicil is merely expressive and confirmatory of what he considered he had already

done by his trust-deed as altered by his own hand. I look upon the language of the codicil as equivalent to saying that he had altered the language of his trust-deed, so as to make it a conveyance of his whole heritable and moveable estate to the managers of the Edinburgh Royal Infirmary for the time being, as trustees for the purposes of that institution, with the special expression of a wish that the most friendless persons, of whatever nation, should participate in the benefit, so far as this might be consistent with the rules of the institution.

Viewing the matter in this light—looking upon the holograph marginal note in this deed as adopted and authenticated by the codicil—I think it unnecessary to consider the more difficult questions suggested in the argument, as to the effect of a nomination of trustees in a codicil, where the nomination in the deed, which alone contains dispositive words, has been deleted, and no other substituted; or the effect of a deed which points out the beneficiaries, but where, although a trust was plainly intended, no trustees have been actually appointed, either by the deed or by any relative codicil. It will be time enough to deal with such questions as these when they arise, as well as with any questions relative to holograph alterations upon *inter vivos* deeds, where other and different considerations may come into play. Here we have to deal with an undelivered *mortis causa* deed, which is not said to have been executed upon deathbed, or to raise any question which renders the date, either of the deed or of any alterations upon the deed, material. The granter was entitled to alter the deed at pleasure after he had signed it, as well as previously. The only incongruities resulting from what he did are, that the testing clause of the trust-deed bears, that the deed was written by David Kerr Smith, and signed by the granter on 6th May 1851, whereas the marginal note, which he made part of the deed, was written by himself, and signed of a subsequent date—incongruities which might have been avoided had he made his alterations before the testing-clause was filled up. But I do not regard these incongruities as material. The date of the deed is not a statutory solemnity. The names of the writer and witnesses are not required where the deed is holograph, and, by parity of reason, are not required for that part which is holograph. There is nothing to prevent a deed being partly tested and partly holograph; and it seems to follow that the authenticity of each part may be ascertained by the rules applicable to tested and holograph deeds respectively. It is not necessary, however, to affirm that proposition here, because the probative codicil, as I read it, adopts and authenticates the holograph words added to, and virtually introduced into the original deed. And, upon the whole, though the question here raised is important, my opinion, after very fully considering it, and going over the authorities, is clear and decided that the deed and codicil taken together import a valid trust-conveyance of the deceased's heritable estate.

The Court pronounced the following interlocutor:—"Recal the interlocutor of the Lord Ordinary reclaimed against: Find and declare in terms of the last conclusion of the summons as amended, that the lands and others therein described have been validly and effectually conveyed to, and now belong to the pursuers as trustees of the deceased James Hewat Ferrier, otherwise James Hewat, heritably and irredeemably, in trust, for the ends, uses, and purposes specified in the trust-disposition and settlement and codicil mentioned in the summons: Adjudge, decern, and declare the said lands and others, and all other lands and heritable estate and effects which pertained **[1229]** to the said James Hewat Ferrier, otherwise James Hewat, at the time of his death, together with the writs, titles, and securities thereof, to pertain and belong to the pursuers as trustees foresaid, heritably and irredeemably, in implement of the foresaid trust-disposition and settlement and codicil: Ordain that the pursuers, as trustees foresaid, be infeft and seised in the said lands, and other heritable estate and effects, to be held by them of the immediate lawful superiors of the same, in the same manner as the said James Hewat Ferrier, otherwise James Hewat, his predecessors or authors, held or might have held the same; and for that purpose grant warrant to any notary-public to give to the pursuers sasine in the foresaid subjects, in terms of the 19th section of the Act 10 and 11 Vict., cap. 48, and also grant warrant for letters of horning at the pursuers' instance against superiors, and decern: Find the defender liable to the pursuers in the expenses of process, both prior and subsequent to the interlocutor reclaimed against," &c.

No. 171. **XXIII. Dunlop 1236.** 28 June 1861. 2nd Div.—Lord Kinloch.

The DUKE OF ARGYLE (Tutor of Callander of Ardkinglass and Craigforth), Petitioner.—*Sol.-Gen. Maitland—Clark.*

JOHN M'ARTHUR and Others, Respondents.—*Young—Shand.*

Lease—Subject—Management—Interdict.—Tenants of a farm accommodated the horses of a stage-coach to the injury of a neighbouring inn belonging to the same landlord. The landlord applied for an interdict against subsetting the stables or office-houses on the farm for accommodating stage-coach horses, or using them for any purpose inconsistent with that for which they were built, and from converting the office-houses into stables for coach horses. The Sheriff granted interdict as craved. *Held*, 1st, that the respondents had no right to accommodate the stage-coach horses; 2d, that the tenants had committed a breach of interdict by allowing the horses to remain after the interdict was served.

The inn and posting-house at Cairndow, at the head of Lochfyne, and the adjacent farm of Achadunan, are both the property of George Frederick William Callander of Ardkinglass and Craigforth, to whom the Duke of Argyle is tutor-nominate. The respondents are tenants of the farm of Achadunan. On 29th July 1859 a petition was presented to the Sheriff of Argyleshire by the Duke of Argyle, setting forth,—that the farm possessed by the respondents was let as a sheep farm, and as an agricultural and pastoral subject; that they had converted part of the stabling or office-houses on their farm into stables for the horses of a stage-coach running between Tarbet, on Loch-lomond, and Oban; that they had no right to subset or convert the subjects from the use for which they were let into a rival posting establishment to the inn at Cairndow; and therefore praying for interdict against the premises being sublet, or the stables and offices being used for any purpose inconsistent with that for which they were let to the defenders, or the other offices being converted into stables for the accommodation of the stage-coach horses. The Sheriff-substitute (Maclaurin) ordered service and answers, but did not grant interim interdict. On appeal, interim interdict as craved was granted by the Sheriff.

The Duke of Argyle, with concurrence of the procurator-fiscal, afterwards presented this petition to the Sheriff, setting forth that the interlocutor by which interim interdict was granted was served upon the respondents on 8th August 1859. On that day, the whole horses were removed from their **[1237]** stable, but were brought back on the 10th or 11th of August, in breach of the interdict. The petitioner prayed for a warrant to apprehend the respondents and bring them before the Sheriff, and, on the charge of breach of interdict being either admitted by them or proved, to punish them by fine or imprisonment. The respondents were brought before the Sheriff, and examined. They declared that the horses occupied a stirk-house and other houses not used for the cattle in summer. The only alteration made to accommodate the horses was putting up two uprights. The accommodation was granted for the season; and the only remuneration received by the respondents was the manure made by the horses, which benefited the farm. After the interdict was served the horses were sent away, but were taken back on the respondents being advised by their law agent at Inverary that the interdict had been wrongously granted.

The Sheriff (Cleghorn), after hearing parties' procurators, pronounced this interlocutor on 6th October 1859:—"Finds that the interdict narrated in the petition was served upon the said defenders on the 8th day of August last; that it is admitted by them that at that date they were giving accommodation in a stirk-house and stable on the farm of Achadunan to eight or thereby horses, belonging to the proprietors of a coach then running between Tarbet and Oban, and used for horsing the said coach, and that although immediately on the interdict being served, the defender Duncan M'Arthur sent away the said horses, they were a day or two subsequently received back and accommodated as before, and continued to be so accommodated with the knowledge and consent of all the defenders down at least to the 7th September, when the defenders were examined: Finds that the defenders have each and all of them been found guilty of a breach of the said interdict, and contempt of the authority of this Court: Therefore ordains the defenders to appear in the Sheriff court-house at Inverary, on the 19th

day of October current, at ten o'clock forenoon, that they may hear sentence pronounced, under certification; and appoints a copy of this deliverance to be served upon the said defenders at least six days previous to said diet of compearance, and decerns." On the defenders appearing, in obedience to this interlocutor, each was fined L.5; and they were found liable in expenses.

The respondents advocated, and pleaded;—(1.) The interlocutor of 6th October 1859 ought to be recalled, and the petition dismissed, in respect the petitioner has made no relevant averment of breach of interdict against the respondents. (2.) The interdict, of which it is alleged the defenders committed a breach, having been illegal and incompetent, in respect it followed on an appeal to the Sheriff, which was incompetent, the defenders are entitled to be assoilzied from the conclusions of the petition. (3.) It was incompetent and irregular on the part of the Sheriff to compel the respondents to emit the declarations founded on, and at least it was incompetent and irregular to proceed on these declarations as on a concluded proof, and after the record was closed.

The Lord Ordinary, on 12th December 1860, pronounced this interlocutor:—"Finds that the interdict of 8th August 1859, referred to in the proceedings, was competently granted by the Sheriff: Finds that, by said interdict, the advocators were prohibited and discharged from using the office-houses on the farm of Achadunan, for the purpose of giving accommodation to the post-horses connected with a certain stage coach running between Tarbet and Oban: Finds it proved, in point of fact, that subsequently to the service of the said interdict, and notwithstanding the same, the advocators used the premises for the purpose of giving such accommodation, and were continuing to do so at the date of presenting the petition for breach of interdict: Finds it thus sufficiently established, that the advocators acted contrary to the terms of the said interdict, and were, all and each of them, guilty of breach of the same: Finds that the penalty imposed by the Sheriff **[1238]** is reasonable and moderate in the circumstances of the case: Therefore remits *simpliciter* to the Sheriff, and decerns: Finds the advocators liable to the respondent in the expenses incurred in this Court, as well as in the Sheriff-court: Allows an account," &c.[1]

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[1] "NOTE.—A process for breach of interdict is a process for contempt of Court. Its object is not the redress of individual wrong, but the vindication of judicial authority. For the attainment of this object the procedure ought to be as summary as is consistent with justice.

"It appears to the Lord Ordinary that there are no sufficient grounds for holding the proceedings in the present case invalid in respect of irregularity. The petition for breach of interdict was duly served, and the advocators cited to attend in Court on a specified day. They were then subjected to a judicial examination, of the competency of which proceeding the Lord Ordinary entertains no doubt. The Sheriff closed the record on a minute by the advocators, simply bearing 'that the defence was a denial that any breach of the interim interdict was committed by them.' On advising the case the Sheriff held (and the Lord Ordinary thinks rightly) that the judicial declaration sufficiently established a breach of the interdict. He therefore found to this effect, and ordained the defenders to appear in Court on an after day, in order to hear sentence pronounced. The defenders having appeared and having offered no excuse for their conduct, the Sheriff fined each of them in L.5, and found them liable in expenses, a not immoderate award, supposing the case made out against them.

"It is now contended by the advocators that the Sheriff should have allowed a proof before pronouncing judgment. It is not said that any proof was asked by them from the Sheriff. And if the judicial examination sufficiently established the breach of interdict, it is not very apparent how any further evidence should be requisite. Any proof that might be led would either contradict or confirm the statements of the advocators in the judicial examination. The advocators could scarcely ask proof to contradict their own declarations. If it only would confirm them, such confirmation was held by the Sheriff (and the Lord Ordinary concurs with him) to have been uncalled for. On the merits of the case it was maintained by the advocators.—1st, That the interdict had been incompetently granted, and, therefore that no breach of interdict could take place. 2d, That there was no sufficient evidence that the interdict was broken. In regard to the first point the Lord Ordinary would remark, that where an interdict is *de facto* granted by a court, it would require a strong case to be made

[1239] The respondents reclaimed, and argued;—The premises had not been subset; the reclaimers had not let the stables to the coach proprietor after the date of the

out to justify an individual in taking it upon him to pronounce the interdict incompetent, and on that account to refuse it obedience. The Lord Ordinary is of opinion that in the present case no incompetency attaches to the interdict.

"The objection stated by the advocators is founded on the 19th section of the Sheriff-court Act 16 and 17 Vict., cap. 80, which declares that, 'until an interlocutor shall have been pronounced disposing in whole of, or in part of, the merits of the case, it shall not be competent to appeal to the Sheriff against any interlocutor of the Sheriff-substitute, not being an interlocutor disposing of a dilatory defence, or an interlocutor sisting process, or an interlocutor allowing a proof.' In the present instance the Sheriff-substitute, when the petition for interdict was presented to him, declined to give an interim interdict, and merely ordered service. The petitioners appealed to the Sheriff, who granted the interdict. It is contended that he was precluded from doing so by the above quoted enactment, which rendered the appeal incompetent.

"The Lord Ordinary cannot concur in this view. The provision quoted appears to him to be applicable to the ordinary procedure on the merits of the case, and not to interim orders for the regulation of possession by way of interdict. If the Sheriff-substitute, at the first presentation of such a petition, grants an interdict, it would be very anomalous, and might lead to the most mischievous consequences, to hold that the Sheriff could not be appealed to in order to have the interdict recalled. And the same rule must hold in the converse case. It may be said that, in granting an interdict, the Sheriff is *pro tanto* pronouncing on the merits of the case. And the Lord Ordinary is not unwilling to adopt this view. But the Sheriff must be equally held to do so in refusing the interdict. To say, as the advocators said, that in granting the interdict the Sheriff acts in the cause, while in refusing interdict, he merely refrains from acting, is to use a verbal fallacy. In either case, equally he regulates possession one way or another.

"There has been perhaps an unnecessary difficulty created by the circumstance of the application to the Sheriff being formally by way of appeal. There was nothing to prevent the Sheriff, if applied to on due notice, exercising his authority in the first instance to impose an interdict for the regulation of possession. An interdict by the Sheriff, issued directly in the first instance, was quite competent. If the Sheriff-substitute, when applied to, decline to say anything on the subject, one way or other, it cannot surely be maintained that application to the Sheriff was wholly shut out. In these circumstances the application, by way of appeal, seems to have been the most correct course. But in whatever form applied to, the Sheriff, as the Lord Ordinary conceives, must have had authority to interfere. The Lord Ordinary, therefore, cannot hold the interdict to have been incompetently granted. Whether it was rightly granted, having regard to the particular circumstances, is a question which is beside the present case. The interdict, having been *de facto* granted, ought to have been obeyed.

"The judicial declarations appear to the Lord Ordinary, as they did to the Sheriff, clearly to make out that the interdict was not obeyed, but directly contravened and broken. The interdict was in substance against the advocators using their farm offices for the accommodation of the post-horses connected with a certain stage-coach running between Tarbet and Oban. There was a great deal of minute criticism presented to the Lord Ordinary on the terms of the interdict. It appears to the Lord Ordinary that the terms of an interdict are not to be construed like the terms of an entail. They are to be taken in their plain practical import, and to be obeyed agreeably to such. Though the prayer for the interdict had several alternatives, they involved in substance an interdict against the use of the farm offices, either by the advocators themselves or others deriving right from them, in the way complained of, and the interdict was of relative import. According to the statements in the judicial declarations, the post-horses were removed immediately on the interdict being granted, and this was right. But the advocators say that, on consulting with their law-agent, they were told by him that the interdict did not apply to the case, and advised to bring the horses back. This was accordingly done. And with the assent of all the advocators, the horses were occupying the premises at the time of the judicial examination. The

interdict; there had been no alteration of the premises, no conversion of the subjects into stables, and especially no such conversion after the date of the interdict. The reclaimers had been advised that the interdict could not apply to them. If the premises were subset at all, that had been done before the date of the interdict.

The Court did not call for an answer.

LORD JUSTICE-CLERK.—This is a clear case of a breach of interdict; and the interlocutors, both of the Sheriff and the Lord Ordinary, are well founded. These tenants, the defenders, were giving accommodation to the horses of a stage-coach, in return for the manure—a very excellent arrangement for both parties, supposing it to be legal, and not a violation of the rights of any one else. But the landlord of these tenants did consider it a violation of the conditions of the lease; and he sought and obtained an interdict against them, to which he seems well entitled; because this plan of accommodating the horses of a stage-coach for the whole season was clearly a conversion or perversion of the farm buildings to a purpose that was never contemplated by the lease.

Now, what does he pray for in his petition for interdict? First, that the de- **[1240]** -fenders should be prohibited from subsetting their premises. But his interdict is not confined to this: he goes on, secondly, to pray that they should be prohibited from using the stables or other office-houses for any purpose inconsistent with that for which they were built by the proprietor, and for which they were let to the defenders; and it appears to me that a party in the position of the defenders, who takes in horses working regularly in a coach, and accommodates them in this way, is using the stables for an unauthorised purpose, and it would, in my opinion, be a breach of an interdict granted in terms of this part of the prayer to continue to use them in that way. Then, thirdly, the landlord prays for interdict against their converting the office-houses on the lands into stables for the accommodation of the said stage-coach horses; and that part of the interdict was also broken, if the horses continued to be still accommodated in the farm buildings. The term "converting" means inverting or perverting the premises from their proper and legitimate use. In the case of Baillie *v.* M'Kie (16th July 1842, 4 D. 1520), the Lord Ordinary (Lord Ivory) uses the term "convert" to express the using the subjects in a totally different line of business. In Leishman *v.* Sievwright (6th June 1826, 4 S.D. 683), Lord Justice-Clerk Boyle says—"I am very clear that an urban tenement cannot be perverted to a totally different purpose." When the term "converting" is here used, it means, not the actual derangement of the physical corpus of the building, but that the use for which the building was let is altered; that it is not used for the purpose for which it was let to the tenants.

It is said that the defenders did not mean to commit a breach of interdict; that they took advice on the subject, and acted as they were advised to act. Now, this will not do. In the case of Hamilton *v.* Caledonian Railway Company, after the railway company had been interdicted from entering on lands to which they had not a statutory title, they got a statutory title, and then, under legal advice, commenced to execute works on the lands without a recal of the interdict; but, although everything else was regular, they were held to have violated the interdict, because their proceedings were in form done in the face of it; so that it will not do to say in defence that a breach of interdict was not intended.

The only other question here is, whether the Sheriff has imposed a proper amount of penalty. I think he has acted in the matter with great leniency. And, as I quite agree in the findings of fact contained in his interlocutor, I am also disposed to agree as to the penalty or fine imposed.

The other Judges concurred.

The Court adhered, and found the petitioner entitled to additional expenses.

Lord Ordinary concurs with the Sheriff in regretting that this advice was given. He agrees in thinking that the proceeding was neither more nor less than a direct breach of interdict. And the Sheriff, as it appears to him, has done nothing more than was right and fitting for the vindication of his authority and that of the law."

No. 172. **XXIII. Dunlop 1240.** 3 July 1861. 2nd Div.—Lord Mackenzie.

WILLIAM INGLIS, Pursuer.—*Sol.-Gen. Maitland—Scott.*

ROBERT M'INTYRE, Defender.—*Gifford.*

HUGH MAIR, Defender.—*Young—John Morison.*

JOSEPH TAYLOR, Defender.—*Patton—A. Mure.*

Process—Relevancy—Reparation—Agent and Client—Issues.—In an action of damages for wrongous use of diligence, directed against the principal parties for whom the diligence was alleged to have been executed, and also against the law-agent,—*Held* that, in the circumstances of the case, as alleged on record, a separate issue ought to be taken by the pursuer against each of the defenders.
Terms of issues adjusted.

This was an action of damages at the instance of Inglis against M'Intyre and Mair, and also against Taylor, a law-agent, alleged to have acted for them. The action was founded on an alleged wrongful poinding of the pursuer's goods upon an extract decree against him in favour of M'Intyre and Mair for L.2, 2s. of expenses, and 10s. 6d. of dues of extract. The material allegations of the pursuer were as follows:—(Cond. 7.) "The pursuer, who had been perfectly willing to pay at any time, made the defenders and those acting for them repeated offers of payment of the sums contained **[1241]** in the decree, including dues of extract. In particular, on or about 2d June 1859, the pursuer's brother, Robert Inglis, acting for the pursuer, called at the shop or warehouse of the defender, Robert M'Intyre, in Argyle Street, Glasgow, and tendered payment of L.2, 12s. 6d., being the contents of said decree, including dues of extract, to M'Intyre's wife, who was there acting for him, but she refused to accept payment, although she informed her husband of the pursuer's offer. The defenders, however, paid no attention to this offer. The pursuer's brother thereafter called on the said defender personally and tendered payment, which was not accepted. Accordingly, on or about the 7th of said month of June, the pursuer called personally at the premises of the defender, Robert M'Intyre, whom he then found, and to whom he tendered payment of the contents of said decree and dues of extract, but he also refused to accept payment, at least he refused to accept payment except on condition of the defenders being permitted to retain the extract decree." (Cond. 8.) "Again, on or about 15th June 1859, a clerk of the defender, Joseph Taylor, who was acting as the agent for the other defenders, having called at the pursuer's counting-house in Glasgow, the pursuer, by his clerk, tendered to Taylor's clerk, as acting for Taylor and the other defenders, payment of the contents of the decree, including dues of extract, but he also declined to accept of the money except upon payment of certain expenses, no account of which was ever rendered to or left with the pursuer. The defenders were aware of these several tenders of payment, or of some of them, and agreed in rejecting them." (Cond. 9.) "Notwithstanding of the said repeated offers of payment of the contents of the decree, including dues of extract, the defenders, Robert M'Intyre and Hugh Mair, and their agent, the said Joseph Taylor, proceeded to do diligence against the pursuer for recovery thereof, and they instructed Mr. Thomas Barclay, messenger-at-arms in Glasgow, to execute a poinding of his effects for the same. Accordingly, Mr. Barclay called at the pursuer's counting-house, on or about the 18th of said month of June 1859, for the purpose, when the pursuer personally tendered to Mr. Barclay a five pound note of the City of Glasgow Bank, in payment of the contents of the said decree, including dues of extract, and of such other charges as might be claimed, although he was not bound to tender more than the contents of the decree, for the purpose of stopping the diligence. Mr. Barclay refused to accept of the money, and, notwithstanding the pursuer's remonstrances, executed a poinding of his effects for payment of the contents of said decree. The schedule and execution of poinding falsely bore that payment had been demanded of said debt, but that no payment had been made or

offered. Mr. Barclay refused to accept the money, and proceeded with the poinding in consequence of the express directions and instructions of the defender Joseph Taylor, who was acting for and with the other defenders, and encouraging and instigating them in their said illegal proceedings, Taylor's instructions to Barclay being that he was to carry through the poinding at all hazards, unless the whole expenses of charging and poinding were paid over and above the principal sum in the decree." (Cond. 13.) "The said proceedings were taken, and diligence carried through, to gratify the malicious feelings of the defenders, to expose the pursuer to the public, and in particular to the remarks" of the supporters of Mr. M'Leod (a party in regard to whose treatment, while under sequestration, the pursuer and the defenders had been violently opposed to each other), and to injure the pursuer's feelings, character, and credit. (Cond. 14.) "In particular, the defender Taylor has for a long time past cherished the most malicious feelings against the pursuer, which he has lost no opportunity of expressing and gratifying. *Inter alia*, three years ago, or thereby, he said to William Henderson, merchant, Glasgow, that he would like to get a hold of the pursuer in an action or actions, &c. . . . . The said defender also **[1242]** exhibited his said malicious feelings on many other occasions; and, in order to gratify them, he altogether went out of his duty as an agent, in reference to the foresaid diligence of poinding and sale, and proceedings connected therewith, and not only maliciously encouraged the other defenders in their illegal proceedings, but also instructed the diligence to be carried out."

Each of the defenders pleaded that the allegations of the pursuer were irrelevant as against him; but the plea was seriously urged only on behalf of Taylor, the law-agent, who pleaded also, "the defender having acted merely as agent for the other defenders in the procedure adopted to obtain the sum in the extract in question, is not liable to the pursuer in any damage."

The pursuer proposed the following issue against all the defenders conjointly:—"Whether, in or about the month of June 1859, the defenders Robert M'Intyre, Hugh Mair, and Joseph Taylor, or one or more of them, and which of them, wrongfully caused a poinding to be executed of a wardrobe, or other effects belonging to the pursuer; and wrongfully procured, or wrongfully caused to be procured, a warrant of sale thereof, to the loss, injury, and damage of the pursuer? Damages laid at L.300."

The Lord Ordinary, on 15th June, reported the cause, in respect parties differed as to the form of issue proposed by the pursuer, adding to his interlocutor the subjoined note.[1]

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[1] "NOTE.—This is an action of damages for wrongful use of diligence under a Bill Chamber decree for the sum of two guineas of expenses, with 10s. 6d. as the dues of extract, after repeated offers of payment in full are said to have been made by the pursuer. The action is directed against Robert M'Intyre and Hugh Mair, who obtained the decree, and Joseph Taylor, writer in Glasgow, who is said to have acted as their agent in the business.

"For the defender Taylor it was pleaded, that as he had acted merely as agent for the creditors in the decree, no relevant case was stated against him. But it is thought the pursuer is entitled to an issue against Taylor, more especially as it is alleged that, after the pursuer had tendered full payment of the sum in the decree, including dues of extract, Taylor had given positive instructions to the messenger to proceed with the poinding, 'unless the whole expenses of charging and poinding were paid over and above the principal sum in the decree;' and that, in consequence of these instructions, the messenger refused to accept payment of the contents of the decree when this was offered to him, and executed a poinding of certain effects belonging to the pursuer. Assuming these statements to be true, the Lord Ordinary sees no reason to doubt that the agent is responsible for any loss sustained by the pursuer from the wrongful use of diligence by the messenger. See Stewart, 6th July 1784 (M. 13,989); Pearson, 18th July 1833 (11 Sh. 1008); Carne, 28th June 1851 (13 D. 1253), and other cases.

"As to the other defenders, Robert M'Intyre and Hugh Mair, they did not go the length of maintaining the irrelevancy of the action, so far as it was directed against

Young, for the pursuer, contended that there was no interest to split this into two issues. There might have been a reiteration of the promise, but it was all one case.

LORD PRESIDENT.—There is a clear distinction between the proof necessary to establish a promise of marriage which is to be made the foundation of a declarator of marriage, and a promise which is to be made the foundation of a claim of damages. The former must be direct and specific. The latter may quite competently be inferred from a course of conduct and correspondence; and it is not inconsistent with this that in this case the correspondence should of itself establish the promise. I do not see any good objection to the issue.

Issue approved of.

No. 175. **XXIII. Dunlop 1251.** 6 July 1861. 1st Div.

GEORGE RIGGS and Others, Pursuers.—*Young*—*J. C. Smith.*

Dame MARGARET F. W. DRUMMOND and Others (DRUMMOND'S Trustees), Defenders.—*Sol.-Gen. Maitland*—*A. R. Clark.*

Process—Proof—Diligence—Servitude—Right of Way.—In a declarator of right of way or footpath, the Court allowed the pursuers access to the defenders' titles, to the effect of getting extracts, at the sight of a commissioner, of such portions as related to the footpath, although there was no averment in record that they contained any reference to it; and also to correspondence and specifications relative to the erection of a march wall between two estates across the footpath,—but refused access to the titles of an estate adjoining that through which the footpath was alleged to run, from which it was separated only by a stream.

This was an action of declarator of right of way through the estate of Mountmarle, belonging to the defenders. The pathway was alleged to have existed from time immemorial prior to 1824. Issues were adjusted, and the pursuers now moved for a diligence to recover, not only all the plans and titles of Mountmarle, but of the adjoining estate of Hawthornden, also belonging to the defenders. There was no averment in record that these plans and titles made any mention of the footpath, nor that the footpath had gone through any portion of the estate of Hawthornden.

The defenders now objected;—That this was a fishing diligence, to discover whether the defenders' titles might not help the pursuers' case. Moreover, their case depended not on plans and titles, but on possession. With Hawthornden the action had nothing whatever to do.

Replied.—The reason why no averment was made in the record was, that the pursuers had no knowledge of the actual fact whether or not these titles and plans made mention of the footpath, but it was extremely likely that they did. Hawthornden was only separated by a stream from Mountmarle, and hence the importance of the titles and plans of that estate also.

The Court refused to grant diligence to recover the titles and plans of Hawthornden, but in regard to Mountmarle they granted a diligence as follows:—"1. All charters, dispositions, assignations, conveyances, procuratories and instruments of resignation, precepts and instruments of sasine, decrees of special and general service, and all other writs, evidents, rights and titles of and concerning the lands of Mountmarle, Hewen, and others, or any of them, for forty years prior to the year 1824, and failing principals, drafts or copies thereof, making mention of the footpath in question, that excerpts may be made at the sight of the commissioner of the portions relating to said footpath.

"2. All plans prior to 1824 of the said lands of Mountmarle, Hewen, and others.

"3. All plans, specifications, estimates, offers and acceptances, or contracts for, and all letters and correspondence relating to the construction of any wall or dyke on or near the march fence between the lands of Mount-[1252]-marle or Hewen and the Earl of Rosslyn's lands, said wall or dyke running down to the north or left bank of the north Esk; as also of the door or gate in said wall or dyke; and all accounts, vouchers, and receipts for work done in connection with the erection of said wall or dyke and door or gate, or either of them, and failing principals, drafts or copies of any of these."

No. 176. **XXIII. Dunlop 1252.** 6 July 1861. 1st Div.—Lord Ardmillan.

Sir PATRICK MURRAY THREIPLAND, of Fingask, Bart., Pursuer.—*Millar.*

JOHN MUNRO and WILLIAM STEWART JAMES MUNRO, Defenders.—*Young*—*A. R. Clark.*

Landlord and Tenant—Lease—Penal Rent.—In an action by a landlord for additional penal rent under an agricultural lease, in respect of miscropping, circumstances in which *held* (*alt.* judgment of Lord Ardmillan), that the farm consisted of two portions—one being arable land permanently under rotation, the other pasture, the fields of which were only occasionally broken up, and that clauses prescribing the mode of cropping the "land under cultivation," and fixing a penal rent for miscropping, did not apply to the pasture land—and that the landlord had no claim for damage in respect of the cropping of the pasture land except at common law.

Sir Patrick Murray Threipland, proprietor of the farm of Spittal, brought this action against John Munro and the representatives of the deceased Donald Munro, joint tenants of the farm under a lease which expired in 1858, claiming payment of L.100, "being additional rent due by the defenders in respect of their having miscropped the lands of Spittal." The subjects had been let for nineteen years from Whitsunday 1839, as to the houses, meadows, and pasturage, and such parts of the fallow-break as William Gunn and John Sinclair Gunn, the outgoing tenants, should be bound, under the lease, to leave, with the exception of such parts of the sown grass as Sinclair and Gunn were entitled to pasture till the term of Martinmas 1839,—and at the term of Martinmas 1839 as to the arable land.

By the lease the tenants bound themselves "to cultivate and manage the same according to the rotation and principles of modern good husbandry. And it is specially stipulated and agreed upon, that during the last six years, or in the option of the said tenants, during the last five years of this lease, the following division and rotation of cropping shall be followed over the whole lands under cultivation on the said farm of Spittal, and in regular breaks or fields, as far as possible, consistent with the nature of the ground and size of the field, viz., if the said six-crop shift shall be adopted," (which it was), "then one-sixth part of the said lands shall be in green crop or fallow, properly worked and cleaned; one-sixth part in white crop," &c. "And in respect that the said outgoing tenants have right till Martinmas next to the pasturage of the break of second crop grass to be left by them at their removal, it is hereby stipulated and agreed upon, that at the expiry of this lease the proprietor or incoming tenant shall be bound to pay to the said Donald and John Munro, or their foresaids, the value of the pasturage of the said second crop break of grass from the Whitsunday of their removal, being Whitsunday 1858, to the term of Martinmas following;"—then, after a variety of stipulations as to payment for the fallow-break, and dung, and young grass at the termination of the lease;—"and it is hereby declared and agreed to, that if the tenants shall adopt a different mode of management and cropping than that before prescribed for said last six years or five years as aforesaid, they shall be bound, and they hereby oblige themselves and their foresaids, to make payment to the proprietor and his foresaids of L.5 stg. of additional rent for each Scotch acre, and so on for any **[1253]** greater or less quantity than one acre that shall be differently managed, and not in the order above prescribed, and that at the first term of payment of rent after the deviation happens, and so forth, yearly and termly, so long as the deviation shall continue," &c.

Donald Munro died upon the 24th April 1847. The pursuer in his condescendence stated—(Cond. 10.) "Ever since his entry into possession of the said farm of Spittal, and more especially since and including 1857 and 1858, the said defenders, or at least the said John Munro, have miscropped the said farm of Spittal, and greatly deteriorated the same, by neglecting the principles of modern good husbandry, and deviating from the prescribed rotation." (Cond. 11.) "On 1st May 1857, the factor intimated in writing to John Munro that he was not attending to the prescribed rotation of cropping, and that the conditions of the lease would be strictly enforced." (Cond. 12.) "The farm was advertised to be let, and the conditions of the then current lease, on the faith

that its conditions would be attended to, were made the particulars of the new terms of set. Munro, finding that there was no prospect of being continued as tenant, ploughed up for first corn crop the extent of 9 acres odds in a hill pasture field of 49 acres odds, and this for the first time during the lease; the land so ploughed and cropped was unfenced, thus rendering the pasture in the rest of the field useless till the separation of the crop. He also ploughed up to the extent of 29 acres odds in a hill pasture field extending to 110 acres odds for second corn crop, land not formerly cropped during his lease, and these 29 acres odds so ploughed consist of nine separate patches or lots scattered over the field, thus also rendering the pasture of the remainder of the field useless to the incoming tenant till the separation of the crop. He also ploughed up for first corn a field consisting of 20 acres, 3 roods, 19 poles, which had not formerly been ploughed during his lease, the soil being light and difficult to lay down to pasture. The incoming tenant was thus deprived of a great extent of natural pasture, which in terms of the lease he should have entered to at the term of Whitsunday 1858." (Cond. 13.) "In consequence of the said John Munro having adopted a mode of management and cropping different from that prescribed and arranged on in the lease, the said farm has been greatly injured and deteriorated, to the loss and damage of the proprietor and incoming tenant, whose claims for damages are specially reserved in the present action." (Cond. 18.) "The quantity of ground so laboured and cropped, contrary to the terms of said lease, extends to 25 acres imperial, or 20 Scots acres at least." The farm consisted of about 216 acres, of which about 156 acres were divided into twelve fields of unequal size, which had been under rotation at and before the date of the defenders' entry to the farm, and continued under regular rotation during his possession. The rest consisted of certain fields of out-pasture. The present claim had reference to three fields marked No. 13, and hill pasture No. 1, and hill pasture No. 2. With regard to these—proof having been allowed to both parties of their averments—it appeared that the previous tenants had occasionally broken them up at intervals of years, and laid them down afresh in grass after taking two white crops; that the Munros had followed the same system, and that they left them precisely in the same condition as they received them at their entry.

The defenders pleaded;—1. That the stipulation for additional rent is illegal, and being expressed with reference to Scots acres cannot be enforced in respect of the provisions of the statutes 5 Geo. IV. c. 74, and 5 & 6 Will. IV. cap. 63. 2. The rotation prescribed by the lease having been followed, the pursuer has no claim under the clause on which he founds.

On 5th March 1861 the Lord Ordinary pronounced the following interlocutor:—"Finds that the first plea in law for the defenders is not applicable to the circumstances of this case, and repels the same: Finds that the pur- **[1254]** -suer has instructed that the defender John Munro miscropped certain parts of the farm of Spittal, as alleged on record, to the extent of 20 Scots acres: Finds that, in terms of the lease of the said farm, the defenders are liable to the pursuer in L.5 per acre of additional rent for the portion of the farm miscropped as aforesaid: Therefore repels the defences, and decerns against the defenders for payment to the pursuer of the sum of L.100 of additional rent, conform to the conclusions of the libel as restricted, with interest from the date of the action till paid: Finds the defenders liable in expenses; allows an account thereof to be given in," &c.[1]

The defenders reclaimed. At advising the opinion of the Court was delivered by the

Lord President.—This is a question of very considerable nicety and difficulty. It is an action at the instance of a landlord against a tenant, and the claim is for additional rent alleged to be due for miscropping, amounting to the sum of L.100, being at the rate of L.5 per acre of the lands said to have been miscropped. It is for additional rent.

The lease was for nineteen years from Whitsunday and Martinmas 1839, and it

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[1] "Note.—The Lord Ordinary does not think that the fact of miscropping can be disputed. The extent of ground actually under cultivation has been instructed, and the defenders' claim for ground left in fallow corresponds to that extent, taking (as is admitted) the six-shift rotation as the rule."

consequently expired at Whitsunday and Martinmas 1858. The rent was L.300. It appears from the statement of parties that there was a considerable amount of arable land on the farm. That is according to the views of both parties, although they do not quite agree as to the precise figures. It appears also that the entry to the houses and pasturage, and fallow ground, was at Whitsunday 1839, and the entry to the arable land at Martinmas 1839. But there was a condition with regard to sown grass, which the outgoing tenant was entitled to pasture. That was second year's grass, and he was entitled to pasture it till Martinmas 1839. There is a corresponding provision, that during the last year of Monro's possession he was not to be allowed to pasture the corresponding portion of the grass to Martinmas, but was to be paid for it from Whitsunday, which is six months before the expiry of his nineteen years' possession. There was no stipulation as to his being paid for anything else, which he was not to possess for nineteen years. But the lease seems to contemplate that he was to possess for nineteen years everything except that which he was to be paid for giving up, viz. that portion of the grass which was in second clover in the year of his ish.

Then the stipulation as to mismanagement or miscropping is a general one. The cultivation and management is to be according to a certain rotation, which is not limited to any particular years of the lease, but is applicable to the whole period of the lease. And then there is a special stipulation applicable to the last six years, prescribing a particular course of cropping; and, in regard to it, there are two things to be noticed. In the first place, that the rotation of cropping of each portion of the farm shall be such as is here set forth; and, in the next place, that the proportions to be under each kind of crop are all specified. But this last condition is to be obeyed with a certain latitude, which is necessary in the circumstances—"so far as possible, consistent with the nature of the ground and the size of the fields." The first of these conditions—the rotation of crops—was intended to prevent the exhaustion of the lands by bad rotation of cropping. The second was intended to preserve that order and uniformity of rotation of different kinds of crops which is important for good management, leaving, of course, a latitude to be exercised, if the fields were not of equal size, or the quality of the ground was not favourable for the rotation.

Now, the facts of the case have to be attended to. It appears that during the last six years, and, indeed, during the whole lease, or nearly so, according to the evidence, this tenant had gone on the six-shift rotation; and that in regard to certain of the fields, twelve in number, and comprehending about 156 acres, he adopted the particular course and rotation of crops which are specified in the lease. He did so during the last six years. There is no question raised about **[1255]** that, and the evidence goes to instruct it. It appears that he had followed the six-shift during the whole of the last years—for a longer period he says. The fields do not appear to have been of equal size; and it would not do, if the question related to that portion of the lands alone, to divide 156 acres by 6, and to say that these proportions were not observed, because the lease gave a latitude as to that. And, accordingly, it appears that one portion of these lands, somewhat larger than one-sixth, was in fallow—in fallow-break, as it is called—in the year of the ish; although, according to the evidence, that land had been going on under regular rotation during the last six years, and even a longer period, and serving its purpose on the rotation in respect, I suppose, that the fences did not admit of it being otherwise, or that the quality of the land was best so arranged. At any rate, there is no allegation that, in regard to that matter, there was any deviation from the course of cropping, or that there was any deviation from the balance or proportions of crops of these 156 acres.

There were other portions of land, three in number, which were differently managed. Now, the facts in regard to these fields, I think, may be stated thus. They are not, or some of them at least, fields that had been entirely under cultivation. But portions of them had been at times under cultivation. They were under corn crop at the time of the last tenant before Munro going out. Part was under first corn crop, and part under second corn crop, and with that last part, amounting to about 29 acres, Munro sowed grass when he came in. That part which was under first corn crop he sowed with a second grain crop, and then sowed it down with grass. I think Munro allowed these fields to lie untouched for seven or eight years, and then he broke them up again, all except one, and took two crops, and laid the land down again. Then he did not touch them any more till the last two years of his lease, when he again broke

up two fields, took a corn crop, and in the last year took another crop, with which the incoming tenant sowed grass seeds, thereby leaving these fields in the same position in which he had found them. Two fields, No. 13 and hill pasture No. 1, were also broken up in the last year, and a corn crop taken.

Now, in regard to these fields, the objection taken is not that the tenant applied to them a different order of cropping from what was prescribed. It is not alleged that he took three white crops in succession, or that he sowed rye-grass, and cut it without an intervening white crop. But the allegation is, that having broken up these fields, he has disturbed the proportion of crops on the farm. That is the allegation, which is pretty clearly brought out in article 12 of the condescendence; and, truly, the question comes to be, whether, by the reading of the clause as to additional rent in this lease, the breaking up of these fields and cropping them at all, the tenant has so disturbed the proportion of the fields under crops as to render him liable. That is the whole question. There is no question of miscropping, except in so far as the proportion of crops in the last years of the lease is alleged to have been disturbed. Now it is a question in which there may be room for difference of opinion, whether the clause in this lease as to additional rent for miscropping, as it is called, applies to these fields? No doubt when a condition is introduced into a lease of this kind as to cropping, and an additional rent fixed for it, the tenant is bound to obey that course of cropping prescribed in the lease. It will not be an answer to the demand of the landlord to say that the course he, the tenant, has adopted, is one which is now more approved of than that which was prescribed in the lease, or to say that it has done no harm to the lands, or that it has made the lands better than they would have been by following the prescribed course, or to say, "I did not intend to do any harm." The landlord is entitled to reply, "No matter, it is the bargain of parties." That, I apprehend, is fixed law. But in reading a clause of this kind, we must see that it is perfectly clear that the construction under which the landlord claims additional rent is made plain, and one which the tenant is bound to understand. In this case the reading of the landlord is, that this clause applied to the whole land that could be under crop during any part of these last six years. The reading of the tenant is, that penal rent applies only to that which was to be held to be, during the last six years, part of the rotation. Now, observe what are the effects or consequences of one or other of these readings. If the landlord's reading be right, then either these additional fields should have been under rotation of crop during the whole of the last six years, or **[1256]** they should never have been broken up at all. If they should have been under rotation of crop during the last six years, they should have been so placed under rotation as during all these six years to have preserved the balance of the fields in the different crops. That could not have been done by any operations within the six years. It must have been begun six years at least before the last six years, in order to bring it within the balance. That is obvious, for if the tenant broke up the land in the year before the last six years, and if he had then any quantity of crop of one kind more than one-sixth part of the whole land, he was violating the lease. Now, then, these 60 acres must, in order to preserve the balance, have been either distributed into six portions of 10 acres each, and if so, must have been gradually brought into the condition of being ready to receive this rotation in the last six years, or he must have broken them up, not into 10 acres, but recast the whole farm, so as to bring them into nearly equal portions, including these. That might have raised another question as against him, whether, while he was doing that, he was obeying the first part of this condition, which says that he shall manage according to the rules of good husbandry. Therefore that could not have been the intention of the parties.

But then he might have left these fields unbroken up altogether, and then there would have been no question that the whole of the land under cultivation was in the order and in the proportion prescribed. These fields would then have remained pasture, and what would have been the consequence of that? The tenant would not have had nineteen years possession. He did not get possession of them till Martinmas, and there is no provision that he shall continue in possession of them till Martinmas, or that he shall get compensation.

In that state of matters we come to read this clause, and I think the fact is, that this piece of land is an exceptional piece of land, not within the meaning of this provision as to continuous cultivation and rotation of the farm. It may be contended

that when it says that the whole shall be left in a certain condition at the termination of the lease, that that means all that is in any way under cultivation. But here it was left in the order prescribed, and the order is not the thing objected to here, but the proportion only.

A question may arise as to whether, by breaking up these fields in the last year of the lease, this party did right in putting in two white crops successively into them —whether he did anything contrary to the rules of good husbandry, or did any damage to the land. That is a different question altogether, and separate from the question of penal rent. I do not think that the case presented to us is laid on that ground; but, while I think that the sounder and safer reading which the tenant might naturally and reasonably put upon it is not the penal reading, and that the stipulated rent of L.5 per acre is not due for what is here alleged. I think that the claim of the landlord remains as to any injury done to the farm or incoming tenant by which the estate is damaged. It is necessary, in such a case as this, for the landlord, who alleges miscropping, and seeks to enforce penal rent, to specify the precise field which has been miscropped. Now, I find in the record no specification of any particular land miscropped except these particular fields, and in regard to them the objection stated is not to miscropping, but to the disturbing of the balance of the others which were properly cropped. I have already said I think that is not a sound reading of the provisions that would make them apply to the facts here ascertained. Therefore we recal the interlocutor of the Lord Ordinary, and reserve to the landlord his claim for any damage that he has sustained, and to the tenant his defences as accords.

Lord Deas was absent.

The Court pronounced the following interlocutor:—"Recal the interlocutor of the Lord Ordinary reclaimed against: Find that the present action is brought for recovery of additional rent said to be due by the defenders in respect of miscropping the lands of Spittal: Find that it is not proved or averred that there was any deviation from the prescribed order or rotation of crops by adopting a different order or succession of crops, but that the miscropping founded upon is averred to have consisted in there having been in the last year of the lease an undue proportion of land under first and second corn [1257] crops after lea, by reason of the defenders having in that year, and the preceding year, broken up and sown with corn certain portions of the farm, described respectively in the proof as No. 13, hill pasture No. 1, and hill pasture No. 2, which portions of the farm had for several years before then been in pasture: Find that the said portions of the farm did not form part of the land under rotation of crops at any period during the occupancy of the defenders or of their predecessor, though they were occasionally at intervals of many years broken up, and after producing one or two crops of corn were again sown down with grass seeds and pastured, and in particular that they had been so broken up and cropped by the predecessor of the defenders in the last and penult years of his lease, and that two of them, being No. 13, and hill pasture No. 1, were again broken up, cropped with corn, and laid down with grass seeds by the defenders about the middle of their lease: Find that the arable land under rotation of cropping consisted of twelve fields, extending to 156 acres or thereby, and that the defenders having adopted a six-shift rotation appropriated two of said fields to each of the six breaks, and it is not proved or alleged that these breaks were not arranged and apportioned with due regard to the nature of the ground and size of the fields: Find that in each of these six breaks the prescribed course or rotation of cropping was adhered to without deviation: Find that, according to a fair and sound construction of the clause in the lease, as to additional rent of L.5 per acre, which is a penal clause, it applies, and was meant to apply, only to the six breaks comprehended in the rotation, and not to the other portions of the farm referred to, which never formed any part of the land under rotation: Therefore assoilzie the defenders from the conclusions of this action, and decern, but reserve to the pursuer to establish in another action any claim he may have against the defenders for damages on account of their having broken up the said three portions of the farm and sown them with corn during the last and penult years of their lease, and to the defenders their defences as accords: Find the defenders entitled to expenses of process; allow an account thereof to be given in, and remit to the Auditor to tax the same, and to report."

No. 179. **XXIII. Dunlop 1258.** 9 July 1861. 1st Div.—Lord Kinloch.

JOHN MAINS, Pursuer.—*Scott—J. C. Smith.*

DUNCAN MACLULLICH and JAMES FRASER, Defenders.—*Macfarlane—Gifford.*

Issues—Reparation—Public Officer—Privilege—Statute 9 *Geo. IV. c.* 69, *and* 7 *and* 8 *Vict. c.* 29 (*Night Poaching Acts*).—A conviction under the Night Poaching Act having been quashed on informality by the court of review, the party accused brought an action of damages for illegal imprisonment against the procurator-fiscal; —*Held* that in the circumstances the procurator-fiscal was privileged, and that the pursuer must take an issue of malice and want of probable cause.

John Mains sued MacLullich and Fraser, joint procurators-fiscal in Argyleshire, for damages on account of proceedings taken against him under the Night Poaching Acts. The pursuer alleged that he had been arrested and had been detained in Lochgilphead prison from 16th November 1859 till 19th November, when warrant was granted committing him to prison, to be detained until liberated in due course of law. While in prison on 18th or 19th November the defenders had presented a petition and complaint to the justices of peace, charging the pursuer and another with contravention of the statutes 9 Geo. IV. c. 69, and 7 and 8 Vict. c. 29, in so far as they "did unlawfully enter, with one or more nets," &c., "upon the public road immediately passing by a field called," &c., "and did there and then kill or destroy a hare; or otherwise did, time above libelled, unlawfully enter upon the said field, with one or more nets, &c., for the purpose of destroying game." The relevancy of the first charge was objected to, on the ground that it did not allege that the prisoner did unlawfully kill **[1259]** a hare. The justices found the libel relevant, and found the pursuer "guilty of both charges," and sentenced him to imprisonment for three months in Inverary jail. A note of suspension having been brought in the High Court of Justiciary, the conviction was set aside,[1] the Court holding that the first charge was irrelevant, as it was not alleged that the killing of the hare was unlawful, and that a person could not be said unlawfully to enter on a public road; and, farther, that the conviction was bad, in respect the charges were alternative, while the conviction was general.

The pursuer denied that he had been guilty of night poaching, and farther averred; —(Cond. 12.) "The whole of the said proceedings, taken and adopted by the defenders against the pursuer, as before mentioned, were, whether taken separately or together, malicious, without probable cause, oppressive, illegal, and to the great injury and damage of the pursuer, both in his reputation and feelings and patrimonial interest." (Cond. 13.) "In the above-mentioned suspension, the present defenders produced certain illegal and unwarrantable proceedings, which had been previously taken at their instance against the pursuer, connected with the illegal and oppressive apprehension and detention of the pursuer, as above set forth, of which proceedings the pursuer and his advisers were not aware until they were so produced. Under these last-mentioned proceedings, the said justices, upon an illegal, irrelevant, and informal petition and complaint, at the instance of the defenders, of this date (Nov. 19, 1859), granted warrant to commit the pursuer to the prison of Lochgilphead, till liberated in due course of law; and the pursuer was imprisoned and detained in jail accordingly. The word 'unlawfully' was written on the margin of said petition and complaint, after the date of the warrant of imprisonment proceeding thereon. In these circumstances, and the whole of the proceedings of the defenders last mentioned being also malicious, without probable cause, oppressive, and illegal, and to the great injury and damage of the pursuer, both in his reputation and feelings and patrimonial interest, he brought a suspension thereof before the High Court of Justiciary, under which the said last-mentioned proceedings were quashed."[2]

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[1] Mains and Bannatyne *v.* MacLullich and Fraser, 6th Feb. 1860, Irvine's Just. Rep., vol. iii., p. 533.

[2] Irvine's Just. Rep., vol. iii., p. 605.

In these circumstances he proposed to take issues, applicable to Lochgilphead and Inverary imprisonments respectively, whether the defenders, or one or other of them, "wrongfully apprehended and imprisoned the pursuer, or wrongfully caused him to be apprehended and imprisoned?"

Parties having failed to adjust the issues before the Lord Ordinary, his Lordship, on 12th June 1861, pronounced an interlocutor reporting the case in usual form to the Inner-House.[1]

[1260] The pursuer now pleaded;—That the defenders were not privileged. The Act 43 Geo. III. c. 141, which protects justices, does not require the insertion of malice and want of probable cause; and as the justices appoint their own fiscal, it would be a startling anomaly if greater protection should be extended to their officer than to the

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[1] "NOTE.—The present is an action of damages against joint procurators-fiscal, on account of proceedings taken by them against the pursuer under the Night Poaching Acts. These proceedings issued in a conviction by the justices of peace for Argyleshire, on which imprisonment followed. A note of suspension and liberation was presented to the High Court of Justiciary, and, on advising this note, the conviction was quashed. The pursuer now sues the procurators-fiscal for damages.

"The issues proposed by the pursuer are mainly objected to on the ground that they simply charge the defenders with having acted 'wrongfully,' and not with having acted 'maliciously, and without probable cause.' The defenders add, that the record does not contain statements to warrant an issue with even these words inserted.

"The Lord Ordinary has no doubt that a procurator-fiscal, discharging his duty as public prosecutor, stands in a privileged position. The principles so authoritatively laid down by the House of Lords, in the well known case of Arbuckle *v.* Taylor, 1st May 1815, 3 Dow, 160, and so frequently applied since that date, appear to place this beyond controversy. The privilege may be forfeited by formal irregularities in the proceedings. But, in the present case, the Lord Ordinary can find nothing in the record with reference to the leading ground of damage, except that the petition to the justices was not well or relevantly laid, and that the justices pronounced a wrong judgment, and by this wrong judgment sent the pursuer to jail. The Lord Ordinary cannot distinguish the case from that of an accusation unfounded on its merits, but not alleged to have been brought maliciously. A mistake in relevancy cannot, he thinks, be more unfavourably dealt with than a mistake in the substance of the charge. He is therefore of opinion that an issue which lays the act merely as wrongful is not an issue which meets the requirements of the case.

"As to whether the record contains materials for an issue charging 'malice and want of probable cause,' the Lord Ordinary participates in the difficulties stated by the defenders. The words, indeed, occur in the record; but no circumstance is stated which, directly or indirectly, infers malice, or even so much as rashness or precipitancy. The case of the pursuer seems to involve the inevitable conclusion, that, in every case whatever in which justices of peace pronounce a wrong judgment, and by that judgment incarcerate the accused, and the judgment is set aside by the court of review, the procurator-fiscal who prosecuted is liable in damages. The Lord Ordinary cannot assent to so sweeping and perilous a conclusion.

"The observations hitherto made relate to the main branch of the case, which is sought to be comprehended in the second issue. The first issue refers to certain proceedings preliminary to the trial before the justices, and which led to the pursuer being detained for trial in prison. These are set forth in the 13th article of the condescendence, which has a show of imputing formal irregularities. But the statement is not sufficiently specific to be even intelligible. It is impossible to say what is the precise irregularity charged. It is said, 'the word "unlawfully" was written on the margin of the said petition and complaint, after the date of the warrant of imprisonment proceeding thereon.' But what was in the petition before the word 'unlawfully' was added, or in what place the word was inserted, or how its insertion affected and altered the writ, is left unexplained. The article, as it stands, is meaningless.

"It may be added that this allegation of an *ex post facto* addition to the petition is not contained in the condescendence attached to the summons, and is, perhaps, therefore, to be disregarded as a substantive ground of action."

justices themselves.[1] The offence for which the pursuer was imprisoned was for "unlawfully entering upon the public road with intent to kill game." That was no offence either under statute or at common law, and therefore, in the circumstances, the word "wrongful" sufficiently covered any privilege which the procurator-fiscal might possess. Although the procurator-fiscal was privileged to indict for crimes, he was not privileged to indict for things that merely resembled crimes. Further, if it were necessary to aver malice and want of probable cause, it was not possible to aver malice except in general terms, and there could be no probable cause for accusing the pursuer of what only resembled an offence, more especially when, as set forth, he had not been guilty of any real offence.

Replied.—Parties were not agreed as to the ground on which the Court [1261] of Justiciary quashed the sentence. There had been two alternatives, and the Court had held that one of them—the charge of unlawfully taking game on the public road—had been improperly framed. That was not form but substance, and took this case out of that large class of cases in which actions of damages had been sustained. There was no case in which a procurator-fiscal, acting in the discharge of his duty, had been found entitled to no privilege, but had been subjected in damages without the pursuer being bound to prove malice and want of probable cause. There was no allegation here of departure from statutory form, and the error was not such as to deprive the defenders of protection, unless no protection was to be given in every case in which an indictment had been found irrelevant. The common informer who sets the machinery of the law in motion, has, by a series of cases, been found entitled to plead privilege; and why should not the same principle apply to a procurator-fiscal, who acts on that information.

At advising,—

Lord President.—The first question raised here is, whether the procurator-fiscal is entitled to insist that in an action of damages for such proceedings as are founded on here, the issue shall embrace the elements of malice and want of probable cause. Another question is, whether in this record malice and want of probable cause are sufficiently libelled. It was maintained to us that a procurator-fiscal had no such privilege; and the case of M'Crome *v.* Sawers, and other similar cases, were referred to in support of that view. It was farther, on special grounds, argued, that on the face of these proceedings the charge against the pursuer was of such an extraordinary character, viz., unlawfully entering upon a public highway—which was a thing in itself impossible—that, therefore, there could not be any necessity for taking an issue of malice and want of probable cause—that the case was out of the course altogether when there is gross irregularity on the face of the proceedings.

Mere failure of success on the part of the prosecution is not of itself a ground of action,—but there may be failure under circumstances which make it pretty obvious that there was malice and want of probable cause in raising the action,—in which case the party accused may have his action after acquittal, on the ground of malice and want of probable cause.

There is another class of cases where the libel may be held to have been irrelevant, or thought to have been ambiguous. I am not prepared to say that where a libel is found irrelevant, it follows that the party who was accused—who was apprehended on the charge, and then accused, and put to trial—is to have his action of damages merely because the libel was found irrelevant. I do not think there is any reason for that. There may, indeed, be such gross irrelevancy on the face of the libel as should have deterred any man from stating the accusation, and any judge from proceeding on it. Such as if there were no statement about killing a hare at all, but only that A B on such a day went along the high road. That might have spoken for itself; and in such a case it may not be necessary to libel malice and want of probable cause. But that is not the nature of this case. It was a question of relevancy which the court of review were called on to decide. They did not sustain it, although the inferior Court had

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[1] Sawers *v.* M'Crome, 10th Feb. 1835; Hill *v.* Dymock, 7th July 1857, *ante*, vol. xix. p. 955; Kelly *v.* Stuart, 16th May 1834, 7 W. & S. 343; Williamson or Graham *v.* Linton, 18th March 1858, *ante*, vol. xx. p. 808.

done so; and it may sometimes be a very difficult and nice question, whether an indictment is relevant or not. In this case the judgment of the court of review went on the grammatical construction of the sentence. The word "unlawful" was so placed, that it covered only the immediate sequence, and not the whole charge; and so things were averred which were held to be irrelevant; but in regard to part of the charge the complaint was held relevant. The conviction also was ambiguous, for it was a conviction on alternative charges. But that was the conviction of the justices who pronounced sentence upon it.

I think that a procurator-fiscal proceeding in regular course is entitled to have such protection as to have it put on the pursuer to prove malice and want of probable cause. The statute puts a duty upon the procurator-fiscal. In Scotland it is the procurator-fiscal of court who is required to institute a prosecution; and in this case this prosecution does proceed at his instance for the public interest. Therefore I think he is entitled to that protection of having malice and want of **[1262]** probable cause inserted in the issue. There is no palpable irregularity in the proceedings so far as he is concerned.

A different question arises, whether malice and want of probable cause is sufficiently set forth on this record. The record does state malice, and does state want of probable cause. I do not think that, in the case of malice, it is usual to criticise very minutely the circumstances out of which it is said to have arisen; and I see no ground for holding that there is not sufficient here averred to enable the party to have his record sustained. The want of probable cause may be somewhat different. It has been maintained to us that the libel itself suggested the want of probable cause, inasmuch as it charged the man with the absurdity of being on the high road. I do not think that will do. The want of probable cause for proceeding is want of probable cause for supposing that this party was doing what is a violation of the statutes. The pursuer avers that he was not guilty of the offence at all, and that the proceeding was "oppressive and illegal, irregular and informal." I think, therefore, the issue may be granted, with malice and want of probable cause inserted in it; and then it will come to be a question upon evidence probably, whether there was probable cause for proceeding against this party at all as guilty of a violation of the statute.

LORDS IVORY and CURRIEHILL concurred.

LORD DEAS absent.

The Court pronounced the following interlocutor:—"Find that the elements of malice and want of probable cause should be inserted in any issue to be granted; and remit to the Lord Ordinary to allow the pursuer to give in an amended issue, and to proceed with the cause as to his Lordship shall seem just: Find the pursuer liable to the defenders in expenses since the date of the Lord Ordinary's interlocutor; and remit," &c.

No. 180. **XXIII. Dunlop 1262.** 9 July 1861. 2nd Div.

MRS. JESSIE MACLEAN or MORISON and Others, Pursuers.—*Black.*

CHARLES MACLEAN and Others (MACLEAN'S Trustees), Defenders.—*Sol.-Gen. Maitland—Clark.*

Process—Production of Documents—Jury Trial—Act of Sederunt, 19th February 1841, *section* 19.—In this action of reduction of testamentary writings, executed by the late Colonel Maclean—in which issues were adjusted for trial by jury (see *ante*, p. 1099)—the pursuer moved for a warrant on the Lord Clerk Register and his deputes to transmit the deeds, which had been recorded, to the clerk to the process, in order that the rule established by the Act of Sederunt, 19th February 1841, section 19, might be complied with, which required that all documents to be used at the trial must be lodged with the clerk eight days before the trial, and in order that the pursuers' agent might have access to the deeds when preparing for the trial, as he required to show the signatures to the witnesses when precognosced. The Deputeclerk Register appeared by counsel and objected to give up the deeds, and maintained

that he was bound to do no more than attend and produce the deeds at the trial. The Court refused the motion, holding that the rule requiring production of documents previous to the trial would be satisfied by the production of extracts of the deeds, and that, if it was necessary to show the deeds to the witnesses in the course of the precognition, the witnesses might be taken to the Register House.

No. 183. **XXIII. Dunlop 1276.** 12 July 1861. 2nd Div.—Sheriff of Ayrshire.

GEORGE HILSON and Another (RUTHERFORD'S Executors), Pursuers and Respondents.—*Macfarlane—Lee.*

CHARLES MARSHALL, Defender and Advocator.—*Young—Millar.*

Loan—Proof—Parole Evidence.—In an action for payment of a sum of money alleged to have been lent—*held* (1.) that the debt could competently be proved only by writ or oath; (2.) that the debt was not proved *scripto* by two letters from the defender to the alleged lender, expressing regret for not having "cancelled the debt I owe you," and asking if the lender would take "a bill for the amount," but without mentioning the sum, or the nature of the debt referred to; and (3.) that a proof *prout de jure* as to the nature and amount of the debt was incompetent.

The executors of John Rutherford, a farmer, sued Marshall in the Sheriff-court at Kilmarnock for payment of "the sum of L.31, being a sum borrowed by the defender from the said deceased John Rutherford upon or about the 31st day of December 1842; *item*, the sum of L.2, also borrowed by the defender from the said deceased John Rutherford upon or about the 12th day of October 1843; but deducting the sum of L.2, repaid on or about the 9th day of February 1844."

The following letters from the defender to the deceased were produced:—"St. Martin's, 1st March 1847.—Dear Sir,—I beg to acknowledge receipt of your favour, and know not how to excuse myself for not having earlier, either wholly or in part, cancelled the debt I owe you. The only apology I can make is, that my father has been for a considerable time in a very poor state, and I have required to contribute materially to his support. The poor old man died just the other day, and I was in Aberdeen for a week to pay the last duties to him. Still had you not been too lenient, I might and would have done more or less. Whether you remain in this country, or go to America, it is quite time that the obligation were liquidated, and I am now willing to put it before every other consideration. As to sending you a bank order for the amount, I fear that is at present beyond my reach. Perhaps, however, you would be willing to accept, grant (which is the word?) a bill for the amount, so as to make the payments extend over the whole of the present year. I mean that whatever portion I could not overtake at the end of four months might be renewed for a similar period, of course at my expense. Should you eventually resolve on leaving the country, Mr. Haliburton, or any other confidential individual, might stand in your stead." "St. Martin's, 24th May.—(An envelope produced, with post-mark of 1850.)—Dear Sir,—I owe you many apologies for having allowed your last letter to remain unreplied to. I delayed doing so in hopes of being able to remit payment of at least part of what I owe you. Not being able to do so, I felt ashamed to answer at all. I have not forgot the obligation, and it must not be overlooked. During the last half-year, however, I have been sadly immersed in personal and domestic affliction, and am at the present moment poorer than ever I have been. In these circumstances, I think you ought to accept of a bill for the amount of my liability to you. It would not trouble me much to pay the interest of it, but I cannot see how I could, especially at present, raise the whole sum." . . .

The Sheriff-substitute pronounced an interlocutor finding that the only competent mode of proof was by writ or oath, and that the proof *scripto* had failed. The Sheriff, on appeal, recalled the interlocutor, and allowed the pursuers a proof *prout de jure* of the debt sued for, on the ground that the defender's denial of a debt on record was inconsistent with his letters, and was false and fraudulent.

Thereafter a proof was led, including excerpts from the deceased's books, and the evidence of the defender himself, who said he had destroyed the **[1277]** letters to which his letters were answers, and could not remember their contents, but swore that he had never borrowed any money from the deceased, and that his letters referred to some furniture received by him from the deceased.

The Sheriff-substitute, on considering the proof, assoilzied the defender, reserving to the pursuers to raise action, if so advised, for the value of the furniture supplied to the defender; but the Sheriff, on appeal, pronounced the following interlocutor:—"Recals the interlocutor appealed from, and finds that, by the defender's letters, No. 3 and No. 4 of process, it is clearly proved by his admitted writ that a debt of considerable amount for a person in his position was due to the late John Rutherford at the dates of these letters: Finds that the defender does not aver that he ever paid the debt thus acknowledged, but in the record denied that any debt whatever was due by him: Finds that, when examined as a witness, the defender, when asked what was the amount of the debt acknowledged in his letters, stated that he was unable to give the amount, as no account had been rendered to him, but that this statement is untrue and inconsistent with the terms of the defender's two letters, Nos. 3 and 4: Finds that, with regard to a fact within his own knowledge, and with which his letters show an intimate acquaintance, the defender was bound to answer the question put to him, and in consequence of his refusal must be held as confessed on the amount of the debt as libelled, or at least that, in the circumstances of this peculiar case, the entries in the late John Rutherford's books, with the evidence as to his declarations of the debt being due, are admissible as adminicles to establish the debt; and therefore finds the sum of L.31 sterling to be due by the defender to the pursuers as the executors of the late John Rutherford, with interest as libelled, and expenses of process."

The defender advocated, and maintained that the proof was incompetent. He would not object to a reference to oath, notwithstanding that it might be argued that under the fifth section of the Evidence Act (16 and 17 Vict. c. 20) a reference was now incompetent.

Argued for the respondents, who were called on to speak to the competency of the proof;—The letters of the defender proved a pecuniary debt, and although they did not show the origin or amount of it, yet, taken along with his denial on record of any debt whatever, they made way for a proof at large regarding the nature and amount of the debt. It would have been competent to the pursuers to demand a diligence for recovery of the letters of the deceased to which these letters were answers; and as the defender admitted he had destroyed these letters, extrinsic evidence was admissible to show what was referred to in the defender's letters.[1]

The Court pronounced the following interlocutor:—"Advocate the cause: Find that this being an action for repayment of a loan, the debt can competently be proved only by writ or oath of party: Therefore recal the interlocutors of the Sheriff complained of: Find that the pursuer has failed to prove the debt *scripto*: Allow him, if so advised, to lodge a minute of reference to oath: Find the pursuer liable in expenses."

[Cf. *Haldane* v. *Speirs*, 10 M. 542, 553.]

No. 184. **XXIII. Dunlop 1278.** 12 July 1861. 2nd Div.—Lord Mackenzie.

The NATIONAL EXCHANGE COMPANY of GLASGOW, Pursuers.—*Gordon—Young—A. Moncrieff.*

PETER DREW and MATTHEW DICK, Defenders.—*Macfarlane—Fraser.*

Process—Conjunction.—Two actions having been raised by a company against two joint shareholders for payment of separate calls upon the shares held by them, the

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[1] Smith *v.* Falconer, 9 S., 474; Stevenson *v.* Kyle, Feb. 5, 1850, *ante*, vol. xii., p. 673; Dowdy, Dec. 8, 1859, *ante*, vol. xxii., p. 181; Fiske *v.* Walpole, July 19, 1860, *ib.* p. 1488.

defenders in the second action stated several pleas not set forth on record in the first action, and made large additions to their allegations in point of fact. A motion by the defenders to have the actions conjoined *refused.*

Bank—Fraud—Mismanagement—Process—Relevancy—Issues.—Averments by a defender in actions for payment of a call which held insufficient to entitle him to counter-issues—(1.) Whether the pursuers had by false and fraudulent representations induced him to purchase the shares upon which the calls were made; (2.) whether the pursuers (the company) had acted as the brokers of the defenders in the purchase of the shares, and had in violation of their duty as such misrepresented the condition of the company's affairs, and thereby induced the purchase; and (3.) whether the directors of the company had grossly and culpably mismanaged its affairs, and whether the pursuers (the company) had, notwithstanding the defenders' protest, discharged the directors of all claims on account of their mismanagement, to the loss, injury, and damage of the defenders? but averments held sufficient, in regard to certain shares purchased directly from the company, to entitle the defenders to an issue of inducement by false and fraudulent representation. Terms of issue adjusted; and held that the defender must put in issue that the representation was false and fraudulent, not merely false or fraudulent.

Res Judicata.—The defender in an action for payment of calls craved counter-issues of inducement to purchase the shares in question by false and fraudulent representations on the part of the pursuers, and also that the pursuers had acted as brokers in the purchase, and had violated their duty as such, and thereby induced the purchase. He had previously, in another action against him at the instance of the same pursuers (the company) for payment of the price of the same shares advanced by the pursuers on his account, obtained counter-issues to the same effect, which had resulted in a verdict and decree against him;—*Held* that this amounted to *res judicata*, and proposed counter-issues disallowed.

Jury Trial—Absence of Material Witness—Postponement—Commission.—Circumstances in which a motion to discharge an order for trial, in respect of the absence of a material witness, or to grant commission to take the witness' evidence, *refused.*

See *supra*, pp. 1 and 27.

Besides the action raised on 14th August 1848 for repayment of sums advanced to pay the price of 240 shares, which went to trial in July 1860, the National Exchange Company of Glasgow, on 31st October 1848, raised an action against Peter Drew and Matthew Dick, as holders of 1370 shares (including the 240 shares forming the subject of the previous action), for payment of L.1370, being the amount due by them in respect of a call of L.1 per share, made upon 7th April 1848. The record in this action was not finally adjusted and closed till 13th July 1860.

On 6th June 1860 the pursuers raised another action against the defenders for a sum of L.1370, as the amount due by them in respect of another call of L.1 per share, made on 2d February 1849, for the purpose of meeting the debts and obligations of the company.

In both actions the pursuers set forth, in similar terms, the constitution of the company, and the making of the call sued on, which was stated to have been necessary in order to provide funds to meet the debts and obligations of the company. They also alleged:—(Cond. 8.) "The defenders are partners and registered shareholders in the company to the extent of 1370 shares, and the said call on their shares amounts to L.1370 sterling." **[1279]** (Cond. 9.) "The 1370 shares of the stock of the company held by the defenders were purchased from John Low, merchant in Glasgow, and others, and were transferred to them by six several deeds of transfer following, viz.—Of 470 shares, dated 11th and 15th March 1847; of 30 shares of same dates; of 400 shares, dated 18th, 19th, 23d, and 29th March 1847; of 120 shares, dated 23d and 29th March 1847; of 30 shares, dated 29th and 31st May 1847; of 190 shares, dated the 4th, 5th, 9th, and 10th days of November 1847; and of 50 shares, dated 9th and 10th November 1847."

In the first action the defenders' answer to the statement above quoted was as follows:—"Admitted, to this effect, that the defenders became proprietors of 1130 shares of the company, which were purchased at different times in March and May 1847. *Quoad ultra* denied, under a reference to the defenders' statement of facts."

And the defenders' statement, thus referred to, was to the following effect :—"(1.) The National Exchange Company was established in 1845 for making advances on railway stocks and other securities, and for discounting bills and carrying on every kind of banking business. The company afterwards added sharebroking to their own business, and acted in the double capacity of bankers and sharebrokers. Mr. John H. Barlow was appointed manager of the company in June 1845. (2.) Of the 50,000 shares into which the capital was originally divided, upwards of 8000 were reserved, to be afterwards disposed of by the company. The members of the interim committee of management, with the interim secretary, stock-brokers, and law-agents, were to be allowed the option of appropriating each 300 shares of the stock. (3.) The company proceeded to do business under the directions of the interim committee, and the interim secretary acted as manager until the appointment of Mr. Barlow. (4.) The defenders became joint proprietors of 1130 shares of the National Exchange Company, which were purchased on the faith of the conditions in the contract being duly observed by the directors and the other parties having the management of the affairs of the company. (5.) At the first annual meeting, held on the 17th September 1846, the shareholders were presented with a report, bearing that the company's affairs were in a prosperous state, and that the directors, availing themselves of the discretion allowed by the supplementary contract, had resolved to declare a dividend from the pretended profits of the concern of L.8, 6s. 8d. per cent, which was accordingly paid. (6.) The second annual meeting was held on the 16th September 1847, when a report was submitted, representing that there were funds sufficient to pay a dividend of eight per cent, leaving reserved profits to an amount exceeding L.5500. This report was entirely delusive. No sufficient allowance had been made for bad debts; and the company, so far from being in a situation to pay a dividend, was actually insolvent, having sustained losses which were more than sufficient to exhaust the whole paid up capital. (7.) Large losses arose from gross neglect and mismanagement on the part of the directors and Mr. Barlow, the manager of the company. It was the duty of the directors under the contract to have all the proposals for loans submitted to them for their approval before they were granted, but this regulation was not attended to. In a great majority of instances large loans were made by Mr. Barlow, the manager, on his own authority, without consulting the directors, upon securities that were wholly inadequate; and although they were aware of this system of doing business, they allowed it to go on unchecked, whereby very great loss was sustained by the company. The directors not only devolved the duties entrusted to them by the contract on Mr. Barlow, the manager, but put it in his power to misapply the funds of the company, by authorising him to draw money from the banks without requiring the order to be countersigned by two of the directors, according **[1280]** to the regulation contained in the deed of constitution. The shareholders were kept in entire ignorance of the true state of the company's affairs, which were represented to be in the most prosperous state, when they were actually insolvent. (8.) Shortly after the general meeting held on the 16th September 1847, the shareholders, by a deputation of their number, interfered, and demanded an investigation into the state of the company's affairs. It was then ascertained that the whole paid up capital, amounting to upwards of L.200,000, was exhausted, and that there would be a deficiency to be made up by a fresh call upon the shareholders. (9.) About the month of October 1847, before the shareholders were aware of the true situation of the company's affairs, the defenders were urgently solicited by Mr. Barlow, the manager, to purchase additional shares of the company's stock. At that period the shares began to fall in the market, and the directors of the company were most anxious to keep them up, and counteract certain rumours, unfavourable to the stability of the concern, which were beginning to get into circulation. The manager assured the defenders that this company would advance the necessary funds for purchasing the shares, and that the stock would be held until it could be sold at a profit without the defenders being called for any contribution in money, the company being secure by the large amount of stock held upon joint account. (10.) The defenders at this time were wholly ignorant of the true position of the company. They relied upon the representations given by the directors in their reports, and the assurance of Mr. Barlow, the manager, who prevailed upon them to accept 240 shares of the stock in addition to those formerly held by them, upon the footing of the company advancing the price. The Exchange Company, through their manager, Mr. Barlow, acted as the brokers in pur-

chasing these shares, and paid the price, and the transfers were taken in favour of the defenders jointly, and are still in the company's hands. (11.) The defenders were prevailed upon to enter into this transaction by gross fraud and misrepresentation. The reports of the directors, and the statements of their manager, were a tissue of falsehoods; and at the time when the company undertook to act as brokers for the defenders, and to advance the price of the stock, they concealed the fact that the affairs of the company were utterly desperate, and that the stock which they proposed to purchase was of no value, and might entail a serious loss on those who acquired it. (12.) The call sued for is not due, and was not regularly made in terms of the contract. It has not been paid by the general body of the shareholders, or by the directors themselves, several of whom have not paid up the previous calls, and the pursuers have not proceeded against all the parties who have refused to pay. Farther, the call has been made to meet losses occasioned by the culpable neglect and mismanagement of the former directors, who have rendered themselves personally responsible to indemnify the company."

The defenders pleaded, in the first action, that in the circumstances stated, involving culpable misconduct on the part of the directors, who were personally responsible, the pursuers were not entitled to make the call or to sue for it, and especially had no right to enforce payment of it, in respect of the 240 shares forming the subject of dispute in the action for advances above referred to.

The pursuers pleaded;—That the defenders, having taken no steps to set aside the transfers of the shares in respect of which the calls were made, and having made no averments relevant to invalidate the calls, they were bound to pay the same.

In the second action the defenders admitted the alleged purchases of shares, but alleged with much greater fulness and detail that the reports by the directors to the shareholders in 1846 and 1847 had been false and **[1281]** fraudulent, and that the affairs of the company had been grossly mismanaged by the directors. They also averred that the report of 1846 had been adopted by the company; and that seventy of the shares purchased by them had been acquired directly from the pursuers themselves. Their statements were to the following effect:—After setting forth the constitution and business of the company, and various acts of alleged mismanagement and neglect by the directors, in delegating their powers to Barlow, the manager, and otherwise, (Stat. 11.) "The directors prepared abstracts or statements of the affairs of the company preparatory to presenting their reports at the annual general meetings which took place in the years 1846 and 1847. The first annual general meeting of the company was held in Glasgow on 17th September 1846. To this meeting the directors presented a report, wherein they stated that 'after paying the whole expenses incidental to the formation of the united companies, and of conducting the business, they are enabled to avail themselves of the discretion allowed them by the deed of constitution, to declare a dividend out of the profits made by the company during the first year. The nett profits to the 31st July last amount to L.28,833, 4s. 11d., from which the directors propose to pay a dividend at the rate of L.8, 6s. 8d. per cent per annum, free of income-tax, viz., on the original stock 5s. per share, on the new stock 3s. 2d. per share. The directors, in making so large a dividend at the outset of the business, are encouraged to do so from seeing the amount of profit which has been realised from the brokerage department; and they wish particularly to direct the attention of the proprietors to this point, as each has within his power the means of aiding the efforts of the directors, by throwing into the hands of the company all business in the stock or share markets, here or elsewhere, over which he has any direct control or indirect influence.'" (12.) "This report was printed and circulated, and its import was made known to the defenders. It was published, or at least its import was published in the newspapers, and the defenders read it there. It was false and fraudulent, in so far as it represented that profits to the extent of L.28,833, 4s. 11d. had been made down to the 31st July 1846. No profits whatever had been made, but, on the contrary, great losses had been sustained. The accounts of parties who were then irretrievably insolvent, and known to the directors and shareholders to be so, were treated as good assets, and profits were calculated upon these accounts as if they were returning profits, which was not the case. The defenders refer to the schedule No. 1, hereto appended, for the names of parties who were then insolvent, or in doubtful credit, and whose accounts ought not to have been, as they were, taken as good assets, and who, if not then,

shortly afterwards became utterly bankrupt. Farther, the said report was made up by a false and fraudulent over-estimate of stocks and other properties held by the company, either absolutely or in security." (13.) "As the period for the second annual meeting in September approached, the directors professed to make up a statement of each account due by every debtor to the company, with the securities held by them, in order to enable them to frame the report to be presented to the general meeting. A balance-sheet was prepared as at 31st July 1847, from which it appeared that the capital then paid up amounted to L.201,790. Upon this balance-sheet a report was made by the directors to the company at the general meeting on 16th September 1847, in which it was said 'That the net profits made by the company (which have been much diminished in the brokerage department, in consequence of the depressed state of business generally, and particularly in the share markets), during the year ending 31st July last, amount to L.22,510, 16s. 5d., from which they propose to pay a dividend at the rate of 8 per cent, clear of income-tax, which will require the sum of L.16,983, 17s. 4d., and to carry the balance of L.5626, 19s. 1d. to the credit of the reserve account, which **[1282]** will then amount to L.21,126, 15s. 3d.,'" &c. (14.) "This report was false and fraudulent. The alleged profit was principally made up of two large items, one of interest, said to have been received on current accounts, amounting to L.11,044, 6s. 10d., and the other of commission, amounting to L.14,016, 13s. 4d. The commission consisted of sums charged against debtors in respect of advances at the rate of 3 per cent, in addition to 5 per cent which was charged against them, and which made up the interest account. The commission account also included sums said to have been received as commission on brokerage transactions. At the time when this report was presented, John Robertson, merchant in Glasgow, owed the company upon his own account L.56,454, 4s. 8d., and the same person, along with two others, called Cuthbertson and Tweedie, owed the company L.35,120, 7s. 5d. All these parties were sequestrated bankrupts at the time when this report was presented. Robertson's estates were sequestrated in March 1846, and Cuthbertson and Tweedie in April 1846, and yet the alleged profits were largely composed of interest and commission said to have been received or paid, or available from the sequestrated bankrupts. No commission or interest was obtained from these parties. The sum given up as profits from their accounts amounted to L.7104, 13s. 11d., which, being deducted from the alleged profit reported, left only of apparent profit L.15,416, 2s. 8d. The amount of bad debts which was then reported was only L.942, 7s. 6d., whereas the bad debts then known, or that by proper inquiry might have been known, amounted to upwards of L.100,000. The defenders refer to the schedule No. 2 hereunto annexed for a list of the said debtors. The gross sum at the credit of profit and loss, as at July 1847, was L.25,851, 17s. 4d., and of this sum no less than L.17,735, 8s. 7d. was falsely said to have been obtained from these insolvent or bankrupt parties." (15.) "The defenders, in reliance upon the truth of the said reports, and upon statements made by the said J. H. Barlow, manager for the said company, effected certain purchases of their stock. The said J. H. Barlow stated to the defenders, at the time when they made their purchases, that the company was in a prosperous and flourishing condition, that the reports represented correctly the amount of the actual profits earned, and recommended the defenders to make purchases. The defenders believed the statements in the said report, and of the said J. H. Barlow, and in reliance thereon their purchases were effected. They relied upon the report of 1846, and Barlow's statement for the first six purchases hereinafter mentioned, and upon both of said reports and Barlow's statement for the remaining purchases." (Stat. 16 sets forth the different purchases, the last being of 240 shares purchased in November 1847.) (17.) "In effecting the purchase of the 240 shares last mentioned, the pursuers acted as the defenders' brokers, and received payment as such of a brokerage commission. At the time when they undertook the duty of brokers for the defenders they were well aware that the stock of the company was utterly useless, while their manager and their reports represented it as valuable, and as earning profits. They farther concealed from the defenders information in regard to the enormous losses which the company had sustained. It was their duty, as brokers, to have disclosed to the pursuer the information which they possessed as to the real condition of the company. At least it was their duty not to misrepresent, as they did, the true state of the company's affairs to the defenders." (18.) "The defenders were prevailed upon to enter into these various transactions by gross

fraud and misrepresentation. Had it not been for the reports of the directors, approved of by the general meetings, the defenders would not have purchased the said stock. Farther, had it not been for the said reports, approved of by the company, the defenders would not have retained their stock, but would have sold the same in the market. They could have sold all the stock which they possessed in May 1847 at the sum of [1283] L.4463, 10s.; and after the general meeting in September 1847, to which the second report was presented, they could and would have sold the whole stock which they then held at L.3955; but they believed the reports of the directors to be true, and held their stock." (19.) "A special general meeting of the company was held on 8th March 1848. At this meeting a report was given in by the directors, which showed that the whole capital of the company was nearly exhausted; and the pursuer Mr. Gourlay at the said meeting presented a report, in which he stated the same fact as to the exhaustion of the capital; that the report of July 1846 was erroneous; that it proceeded upon the footing of holding the accounts of bankrupts to be good, and over-estimating certain securities which they held; that the report for the year ending July 1847 was also erroneous." (20.) "The directors in office at the time during the years 1846 and 1847, by whom the said reports were presented, were prosecuted at the instance of the pursuers or their predecessors to pay to the company the amount of the loss and damage which the company sustained by and through their neglect, malversation, or fraud. In said action the pursuers set forth the gross mismanagement and fraud of the defenders and of Barlow. Reference is made to the summons and record in that action, a copy of which is herewith produced, and also to a statement referred to in article 20 of the revised condescendence in said action, showing the losses arising to the National Exchange Company on the accounts of the parties therein mentioned, in consequence of advances made to these parties illegally, as at 21st March 1847, and a printed copy of which is herewith produced. After the said action had proceeded a certain stage, the pursuers, without consultation with the shareholders, compromised it upon payment, by the defenders therein, of L.11,000, and discharged the directors, conform to discharge, dated the 22d day of February 1854, and other dates, a copy of which is produced. At the annual meeting of the company, which was held upon 21st September 1854, a motion was made and carried to approve of the said compromise, and to discharge the defenders in the said action. The present defenders protested against a compromise, and that it should not be held in any way to affect their rights and interests. A copy of the said protest is herewith produced. The said compromise or discharge of the said action was unwarrantable and reckless. The defenders in said action had means sufficient to reimburse the company of all the losses which it had sustained. Their mismanagement was gross, and the false and fraudulent character of the statements and actings of the directors was apparent, and the settlement of the said claim for the small sum of L.11,000 was a reckless sacrifice of the interests of the shareholders. By so doing the pursuers have placed themselves, with regard to protesting shareholders with reference to calls upon them, in the same position as if such compromise had never been made. The company, by discharging defaulting directors, have placed themselves in their room and stead. They have thereby discharged or cut off the right of relief and claim of damages competent to shareholders who sustained loss and damage through fraud and malversation of the discharged directors."

The defenders pleaded;—Having been induced to purchase the said shares by false and fraudulent statements and representations made by the directors of the said company, and by the manager acting in behalf thereof, approved of and adopted by the shareholders and company, the pursuers were not entitled to insist against them for payment of said call, more especially in respect that the defenders were thereby induced to retain and hold the shares of the said bank when they could and would have sold the same. At all events, with reference to the shares purchased by the defenders directly from the pursuers, the pursuers are not entitled to insist. The fact that the Exchange Company acted as the brokers for the defenders in [1284] purchasing the stock, was an additional bar to the action. The company having, by granting them a discharge, freed and relieved the directors of all claims at the instance of the company against them, and thereby cut off the right of relief competent to the defenders as shareholders of the company, and their claims for indemnification against the said directors, the pursuers are now barred from insisting in this action. Lastly, the claims sued for are prescribed.

The plea of prescription, however, was repelled by the Lord Ordinary by an interlocutor, in which the defenders acquiesced.

The defenders having moved for conjunction of the two actions, the Lord Ordinary, on 2d March 1861, pronounced the following interlocutor in both cases:—"Refuses the said motion, and appoints the case to be put to the roll for the adjustment of an issue or issues for the trial of the cause; and, in the meantime, reserves all questions of expenses."[1]

The defenders reclaimed. The First Division having now refused a motion for a rule to show cause why there should not be a new trial in the [1285] action for repayment of advances, which had resulted in a verdict for the pursuers, the pursuers contended that the judgment in that case formed *res judicata* as regarded the main defence to the actions for calls.

On 16th March 1861 the Court pronounced the following interlocutor:—"Having heard counsel on the reclaiming note for the defenders, before answer, appoint the parties to lodge drafts of the issues which they propose respectively for the trial of the cause, and allow the pursuers to state in a minute what is now alleged for them at the bar, of the proceedings in another action between the parties."

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"On the assumption that the record in the second action contained the same statements in fact and pleas in law for the defenders as the record in the first action, there would be a manifest expediency in conjoining the processes, so as to save expense by one trial. But the defenders' motion for conjunction is strenuously opposed by the pursuers, on the ground that it is an undisguised attempt on the part of the defenders to cure an imperfect record made up by them in the first action by means of the record in the second, which is said to contain new averments in fact and new pleas in law, besides raising a separate question as to seventy shares of the stock said to have been purchased directly from the company, while nothing of this sort is hinted at in the first case. For these reasons the pursuers resist conjunction. But they have lodged a minute stating their willingness to allow the second action to stand over till after the trial of the first, provided both parties agree that it shall follow the same fate.

"To this proposal the defenders, as might be expected, declined to accede. But they contended that, although their allegations in the second action might be in some respects more specific, there was no substantial difference between the two cases, either as regards their averments or their pleas; and they made a counter proposal that the trial should proceed in the second action, leaving the first to stand over and follow the fate of the second. But this again was declined by the pursuers.

"The natural inference from this is, that both parties are satisfied that the defenders' pleas in the two cases are not identical; and this is confirmed by an examination of the records. Before disposing of the motion for conjunction, however, the Lord Ordinary deemed it advisable to appoint the parties to lodge the issues they respectively proposed for the trial of each case. A general issue of resting-owing was lodged by the pursuers in each action; but although the defenders were perfectly aware of the object of the order, they declined to comply with it by lodging any counter issues, stating, at the same time, very distinctly, that they reserved their right to do so, if necessary, after their motion for conjunction was disposed of.

"In this state of matters, it appears to the Lord Ordinary, from an examination of the records, and the explanations given by the parties, that there is such a difference between the two cases as to justify the pursuers in resisting the defenders' motion for conjunction, and he has accordingly refused that motion."

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"On the assumption that the record in the second action contained the same statements in fact and pleas in law for the defenders as the record in the first action, there would be a manifest expediency in conjoining the processes, so as to save expense by one trial. But the defenders' motion for conjunction is strenuously opposed by the pursuers, on the ground that it is an undisguised attempt on the part of the defenders to cure an imperfect record made up by them in the first action by means of the record in the second, which is said to contain new averments in fact and new pleas in law, besides raising a separate question as to seventy shares of the stock said to have been purchased directly from the company, while nothing of this sort is hinted at in the first case. For these reasons the pursuers resist conjunction. But they have lodged a minute stating their willingness to allow the second action to stand over till after the trial of the first, provided both parties agree that it shall follow the same fate.

"To this proposal the defenders, as might be expected, declined to accede. But they contended that, although their allegations in the second action might be in some respects more specific, there was no substantial difference between the two cases, either as regards their averments or their pleas; and they made a counter proposal that the trial should proceed in the second action, leaving the first to stand over and follow the fate of the second. But this again was declined by the pursuers.

"The natural inference from this is, that both parties are satisfied that the defenders' pleas in the two cases are not identical; and this is confirmed by an examination of the records. Before disposing of the motion for conjunction, however, the Lord Ordinary deemed it advisable to appoint the parties to lodge the issues they respectively proposed for the trial of each case. A general issue of resting-owing was lodged by the pursuers in each action; but although the defenders were perfectly aware of the object of the order, they declined to comply with it by lodging any counter issues, stating, at the same time, very distinctly, that they reserved their right to do so, if necessary, after their motion for conjunction was disposed of.

"In this state of matters, it appears to the Lord Ordinary, from an examination of the records, and the explanations given by the parties, that there is such a difference between the two cases as to justify the pursuers in resisting the defenders' motion for conjunction, and he has accordingly refused that motion."

referred to in the present action. In that action for repayment, the defence stated was, that the defenders had been induced to make the purchase by falsehood and fraud on the part of the pursuers and their manager, and that in the purchase of them the pursuers acted as the defenders' brokers. The same defence is pleaded in this action. And what is this action? It is an action to recover payment of calls due on the shares purchased by means of the money so advanced, and under the transaction founded on in that prior action.

The action for recovery of the money advanced, and the action for calls on the shares purchased with the money, are both to enforce the same contract, and they have been met by the same defence.

That defence has been tried in the prior action by the two counter issues set forth in the minutes; and a verdict was returned in favour of the pursuers on both these issues—that is, a verdict negativing the allegations put in issue; negativing inducement by fraud and false representation by the pursuers, whether in their capacity of brokers, or in regard to matters in which they did not act in that capacity. That verdict is in a position to be applied. And therefore the Court in that action is in a position to pronounce a judgment repelling these defences, and, if there are no other defences, giving decree in favour of the pursuers. Now that seems to me to fulfil the definition of *res judicata;* because in that action there was a trial of the same question as is raised here, and between the same parties. I can quite understand that, as Mr. Macfarlane says, there may be cases in which the same question of fact may be stated and tried twice in different actions. But this is not a case of that kind.

LORD WOOD concurred.

LORD COWAN.—I am of the same opinion. I could wish to have seen the decree in the previous action, in which the same defence was stated as has been stated here. But I assume that the verdict in that action will be necessarily followed by a judgment repelling that defence. And therefore we have *res judicata* with reference to the same matter, and between the same parties, as we have here. The recent case of the Marquis of Huntly (January 9, 1858) is a precedent very strongly supporting the conclusive character of this defence stated in similar circumstances. In that case the plea of *res judicata* was founded on a defence stated and sustained in a previous action between the parties relative to the same matter of right; and that judgment sustaining the defence was held conclusive in a subsequent declarator. I think all the elements requisite for the defence are to be found in the circumstances of this case.

LORD BENHOLME.—I am by no means clear on this point. The plea of *res* **[1288]** *judicata* is a very technical plea, and is circumscribed in its operation within narrow limits. On the one hand, I think it is clear that the determination of a mere plea can never become *res judicata*, because that plea may apply to many different circumstances. I doubt whether a judgment on a matter of fact will form *res judicata* in any circumstances unless the two cases refer to the same subject-matter.

The difficulty is to determine what difference in the subject-matter of the two cases will avoid this plea of *res judicata*. And I rather think that depends on whether the claims in the two actions are identical. If there be a difference in the claims in the two actions, I doubt much whether the plea will apply. If the subject-matters of the two actions be altogether different, it would be to no purpose to say in the latter action that the same fact which was raised in it had been decided in the former action.

The efficacy of the plea must therefore depend on the identity, or, at least, the close similarity of the claims in the two actions. There is not identity between the claim in this action and that in the prior action which has been founded on. The actions are different, and I think the question whether a decision on the one constitutes *res judicata* in regard to the other, is a very nice and difficult one. I think it is matter of doubt.

In consequence of the doubt expressed by Lord Benholme, judgment was postponed, in order that the proceedings in the other action might be brought before the Court. Thereafter the defenders were further heard as to the necessity of putting in the counter issue as to the seventy shares, that the representations were both false *and*

fraudulent. They contended that, as to these shares, mere falsehood was sufficient, because the purchase had been from the company itself, and not from a third party; and therefore the company was responsible for the representation, even if it was believed to be true.[1]

The Court, on 5th July, unanimously pronounced an interlocutor in the first action approving of the issue proposed by the pursuers, and disallowing the whole counter issues proposed by the defenders; and, in the second action, approving of the pursuers' issue, and of a counter issue for the defenders in the following terms:—Or, "Whether the pursuers did, by false and fraudulent representations as to the credit and solvency of the National Exchange Company, and the state of its affairs, induce the defenders, in or about the month of March 1847, to purchase from the said company seventy of the said 1370 shares, or any part thereof, and to accept transfers of the same?" *Quoad ultra*, the counter issues proposed by the defenders were disallowed.

Thereafter, the pursuers having given notice of trial, the defenders' agent lodged affidavits that he believed that Mr. Barlow, formerly manager of the company, was a material witness for the defenders in both actions; that he was believed to have left the country some years ago, and to be now resident in Sydney, New South Wales; and that the pursuers could not safely go to trial without his evidence.

The defenders moved that the order for trial should be discharged, or at least a commission granted to take Barlow's evidence.

Argued in support of the motion;—There could be no question as to the materiality of Barlow as a witness. He was manager during the period of the alleged mismanagement, and when the representations complained of were made. The defenders, no doubt, had been refused a counter issue in the first action. But still, according to the dictum of Lord Cranworth, they could prove their defence of fraud in the trial of the pursuers' issue.[2] The [1289] general issue of resting-owing raised everything, because it would be a good defence that the contract founded on was induced by the fraud of the persons with whom the defenders had contracted.

LORD JUSTICE-CLERK.—That is *obiter dictum*, on which, as it is entirely opposed to our practice in jury trials, we cannot act.

Fraser.—If his evidence were refused in the first trial, the defenders could have their remedy by appeal. In the second action there was a counter issue, and it could not be disputed either that Barlow was a material or a competent witness.

Answered for the pursuers;—In the action in the First Division as to the 240 shares, Barlow was examined when in Australia on interrogatories. These 240 shares were purchased after the seventy, and therefore all his statements previous to the purchase of the seventy shares were material in that former action, and must have then been made matter of inquiry. The pursuers had no objection that Barlow's evidence taken in that former action should be used in this. Barlow could not be used as a witness at the trial of the first action, in which it was not open to the defenders to prove fraud. The motion was a device for delay.

LORD JUSTICE-CLERK.—I am not surprised that the counsel of the pursuers should represent and believe that the motion now made is a device of the defenders to put off the trial; but I do not proceed on that. I deal with the motion on its own merits. It is an appeal to the discretion of the Court to grant it or not, as may appear to be consistent with the justice of the case. The averments which are intended to be proved by Barlow's evidence, are contained in the 15th article of the defenders' statement in the second action. They are averments as to representations made by Barlow as to the condition of the company, and it is said that the defenders relied on Barlow's statements in making all their purchases.

Now, what is the order in which the purchases were made? The first six purchases mentioned in the article are of 1130 shares, and the last purchases are of the 240 shares, the transaction for the purchase of which formed the subject of investigation in the action in the First Division. In that action the defenders had an issue under which

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[1] National Exchange Co. *v.* Drew, H.L. 1855, 2 M'Q. p. 124.

[2] National Exchange Co. *v.* Drew, H.L. April 20, 1860, Scot. Jur. vol. xxxii. p. 485.

it was open to them to prove that these shares were purchased in reliance on the misrepresentation of Barlow, as well as in reliance on the pursuers' reports—that is to say, the same allegations were made in that case with reference to the 240 shares as are made in this action with reference to the seventy shares. Now, the shares last purchased being the 240, the mind of the purchaser must have been operated upon by the whole of the preceding misrepresentations; and therefore it was material and relevant in that case to prove all Barlow's misstatements prior to the purchase of the 240 shares. But as the purchase of the 1130 shares was anterior to the purchase of the 240 shares, every statement as to the 1130 shares was available evidence in regard to the 240 shares also. Therefore it was impossible that the pursuers could fail to examine Barlow about the misrepresentations which induced the purchase of the 1130 shares, including the seventy shares.

Without having Barlow's deposition before me, I come to the conclusion that these parties had then an opportunity to examine Barlow on the very matter on which they propose to examine him now, and the pursuers have agreed that they may now use his former deposition.

That is my first reason for refusing this motion; but I have another. It is this: The first of these actions for payment of calls has been in Court for ten years. If the evidence of Barlow was thought by the defenders to be material with reference to the 1130 shares, is it possible for any reasonable being to say that these parties were justified in taking a commission to Australia to examine Barlow in that other action, without at the same time taking a commission to examine him as to the first of the two actions for calls. I think that the parties, by so misconducting their case, have forfeited their claim for a commission to Australia now.

The other Judges concurred.

The Court refused the motion.

No. 187. **XXIII. Dunlop 1290.** 13 July 1861. 2nd Div.—Lord Kinloch.

ARCHIBALD FERGUSON, Pursuer.

AGNES ANDERSON or FERGUSON and Others, Defenders.—*Mackenzie.*

Process—Jury Trial—Act of Sederunt 16th Feb. 1841, *sects.* 5, 7, 46—*Stat.* 13 & 14 *Vict. c.* 36, *sects.* 40, 41.—*Held*, that after issues have been adjusted in the Outer-House, a cause only depends before the Lord Ordinary for the purpose of trial, if the pursuer moves for trial during session; and a motion for absolvitor, in respect of the pursuer having failed to proceed to trial within year and day, should be made in the Inner-House.

In this case issues had been adjusted before the Lord Ordinary on 29th June 1860, and the pursuer not having proceeded to trial within year and day, the defenders moved his Lordship for absolvitor, under section 46 of the Act of Sederunt, 16th February 1841. The Lord Ordinary reported the case, in respect he had doubts whether the defenders' motion ought to be dealt with in the Outer-House.

It was argued for the defenders;—The 5th section of the Act of Sederunt provided that, after issues were approved of by the Lord Ordinary, the issues and process should be transmitted to the office for jury causes in the Register House; it was provided, section 7, after the issues were so engrossed and lodged, all motions in the cause should be made in the Division to which the cause belonged; and by section 39 of the Act 13 and 14 Vict., cap. 36, the engrossment of issues was abolished; and sections 40 and 41 provided for the trial of the cause before the Lord Ordinary. It was the practice, after issues were adjusted before a Lord Ordinary, that incidental motions—such as motions for diligence, motions under the 46th section of the Act,—should be dealt with in the Outer-House, and particularly, where notice of trial had been given.[1]

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[1] Bett *v.* Aberdein, 24th December 1853, *ante*, vol. xvi., p. 322; Kerr *v.* Boswell's Representatives, 25th May 1858, *ante*, vol. xx., p. 958.

LORD JUSTICE-CLERK.—My impression is, that it was intended by the Act of 1850 to send these jury causes to the Lord Ordinary for trial only; but that to all other effects the old regulations remained in force. If so, then, after issues are adjusted in a cause, it is an Inner-House case, except for the purpose of trial. Whether the trial shall take place before the Lord Ordinary, or at the sittings, depends on the parties themselves. I think this motion should be dealt with here.

LORD WOOD and LORD COWAN concurred.

LORD BENHOLME.—It is competent to deal with the motion here, and it seems the safe course to do so.

The Court pronounced an interlocutor by which, in respect the pursuer had failed to proceed to trial for more than year and day, the action was dismissed.

No. 188. **XXIII. Dunlop 1290.** 13 July 1861. 2nd Div.—Lord Kinloch.

ALEXANDER M'DOUGAL RALSTON and Others (FERGUSON'S Trustees), Pursuers.—*N. C. Campbell.*

JAMES HAMILTON and Others, Defenders.

Process—Appeal—Minor.—In an action of multiplepoinding, certain points were decided by a judgment of the Inner House, and the cause was remitted to the Lord Ordinary to be proceeded with. Pending an appeal to the House of Lords, a child was born, who had an interest in the questions decided by the judgment under appeal. A motion to receive a claim for the child, and appoint a tutor *ad litem* to protect his interests in the House of Lords, was refused as incompetent; but observed that it is competent for a party to make appearance in a suit for the first time in the House of Lords.

[1291] Lord Kinloch reported that the judgment of the Court in this case, pronounced on 13th July 1860 (see *ante*, vol. xxii., p. 1442), having been appealed against, a motion had been made before his Lordship that a claim should be received on behalf of a child born since that date, and for the appointment of a tutor *ad litem* to him, in order that the child's interests might be protected in the House of Lords; that the motion was not opposed, but as the process was not in dependence in the Outer-House, so far as concerned the points decided by the judgment appealed against, it was doubtful whether it was competent to grant it.

It was argued in support of the motion;—In this case there were still certain points undetermined, as to which the case still depended before the Lord Ordinary; and under section 13 of the Act 13 and 14 Vict. c. 36 it was provided that all processes should continue to proceed, notwithstanding reclaiming notes and appeals, to all effects not necessarily dependent on the interlocutor submitted to review.

LORD JUSTICE-CLERK.—In various cases parties have been allowed to appear for the first time in a cause in the House of Lords, and their previous absence from the cause explained in some satisfactory way. I am for refusing this motion, however, as incompetent, as there is no process, in which this infant is said to be interested, either before us or in the Outer-House. The 13th section of the Act does not affect the competency of the proceeding.

The Lord Ordinary was directed to refuse the motion.

No. 189. **XXIII. Dunlop 1291.** 16 July 1861. 1st Div.

Miss MARY MACLEOD HAY and Others, Petitioners.—*Ross.*

Curator Bonis.—Circumstances in which the Court appointed a *curator bonis* to a pupil who had been born in New Zealand, was residing in England, and had never been in Scotland, although she possessed heritable estate there.

Lord Jerviswoode reported this petition for the appointment of a *curator bonis* to Miss Mary Macleod Hay, who reached the age of twelve years on 19th June 1860. She was born at Auckland, in New Zealand, and was now residing near Liverpool. Her father died at Auckland without having named a tutor or guardian to his daughter, who was his only child. He was the son of the late Lieutenant-Colonel Hay of Westerton. Miss Hay's mother had married again, and was now residing near Liverpool. The petition was presented in name of the pupil, with consent of her mother and of her husband, for his interest, and their mandatory. The minor's estate consisted of—Sums lent on heritable security, in two securities for L.3000 each; balance of L.552, 8s. 9d. due by British Linen Company on deposit account current; silver-plate, &c., valued at L.40, 9s.; and balance due by factor *loco tutoris*, L.10, 6s. 4d.

Mr. Brodie, W.S., had been the factor *loco tutoris*, and this petition now prayed for his appointment as *curator bonis*.

The Court suggested whether the appointment was competent, the young lady having been born in New Zealand, being resident in England, and never having been in Scotland at all.

Ross, for the petitioners, referred to M'Lellan, Nov. 25, 1847, *ante*, vol. x., p. 148; Ross, 17th July 1846, *ante*, vol. viii., p. 1219; and Howden, 8th Dec. 1847, *ante*, vol. x., p. 225; and pleaded that the heritage being locally fixed in Scotland, the intervention of the Court was both competent and expedient. Suppose a guardian appointed by Chancery, he could not manage this property. The Court would be obliged to appoint [1292] some one to take charge of it, and they would not appoint a foreigner to do so.[1]

The Court, without delivering opinions, pronounced the following interlocutor:—"The Lords, on the report of Lord Jerviswoode, and having considered the cause, they, having reference to the peculiar circumstances of this case, remit to the Lord Ordinary to appoint a *curator bonis* to Mary Macleod Hay, mentioned in the petition."

No. 193. **XXIII. Dunlop 1293.** 17 July 1861. 2nd Div.—Lord Kinloch.

WILLIAM WEIR, Pursuer.—*Young—Fraser.*

COLIN DUNLOP and COMPANY, Defenders.—*Sol.-Gen. Maitland—Shand.*

Lease—Constitution—Property.—After missives of sale of lands, the purchaser entered into missives for a lease of the minerals. The purchaser failed to implement the conditions of sale, and afterwards both parties renounced the transaction. Thereafter the property was sold to a second purchaser, who got a disposition containing an assignation by the first purchaser of the missive of lease. *Held*, that there never had been a completed contract of lease, and that the personal obligation to grant the lease, and the real right to the lands, were not so combined in the person of the second purchaser as to entitle him to compel the [lessees] to enter into a lease in terms of the missives.

William Weir, the proprietor of the lands of Langlands, in the parish of Govan, near Glasgow, brought this action, concluding that Messrs. Colin Dunlop and Company, ironmasters in Glasgow, should be decerned to implement an agreement contained in missives of lease of the blackband ironstone in the lands of Langlands, entered into between them and Robert Livingston, coalmaster in Airdrie, to which lands and missives of lease the pursuer had acquired right.

The pursuer averred, that by missive of sale, dated 7th July 1858, John Bell, then proprietor of the lands of Langlands, sold the lands to Robert Livingston at the price of L.7200, Livingston becoming bound to grant a bill for L.500 of the price payable at Martinmas following. A bill for L.500, drawn by Bell as for part of the price of Langlands was accepted by Livingston; it was renewed, but the new bill not being

[1] See Carter, 21st Dec. 1857, *ante*, vol. xx., p. 286; Ross, 11th March 1857, *ante*, vol. xix., p. 699.

paid when due, it was protested, and diligence was raised upon it at the instance of Bell. Livingston entered to the possession of the mansion-house on the lands, and partly furnished it, with a view to his personal occupation; he also entered to the possession of the lands, and exercised acts of ownership by boring, or authorising others to bore for minerals therein. On 1st September 1858 Livingston addressed a letter to C. Dunlop and Company, offering to them on lease the blackband ironstone in the lands at a specified lordship and fixed rent, payable quarterly, for nineteen years from Whitsunday 1859. The offer was accepted by missive of the same date. In implement of the missives, the defenders took possession of the subject let, in November 1858, and employed men to bore in search of minerals. Bell thereafter entered into negotiations with Livingston for a renunciation of the purchase, and Livingston signed an improbative memorandum, bearing to be a renunciation of the sale to him, but which was never acted on. The pursuer was in course of bargaining for a lease of the mansion-house; but being anxious to acquire the lands on account of the minerals, and believing Bell to be the owner of them, entered into a negotiation with Bell for a purchase of the lands; and conditional minutes of sale passed between the parties. Before concluding **[1294]** the negotiation with Bell, the pursuer discovered the previous sale to Livingston, and the lease to the defenders. The pursuer then negotiated with Livingston for a purchase of the lands, including right to the lease of the minerals. The pursuer wrote to Livingston on 15th February 1859, asking what profit he would take on his purchase, including the lease. The day after Livingston replied that he would resell Langlands, including the lease to the defenders, for L.200. On 23d February a minute of agreement was entered into between the pursuer and Livingston, by which, on the narrative of the sale by Bell to Livingston, and the missives of lease between Livingston and the defenders, Livingston consented to a sale by Bell to the pursuer; and, on 1st March following, a minute of agreement was entered into between the pursuer and Bell, by which Bell sold the lands to the pursuer for L.6000. The pursuer on 18th May received a formal disposition to the lands from Bell and Livingston, containing a special assignation to the missives of lease, in the following terms:—"We also assign all leases, and missives of lease, entered into between us, or either of us, and third parties, and particularly a missive of lease entered into between me, the said Robert Livingston, and Colin Dunlop and Company, ironmasters, Glasgow, dated 1st September 1858, of the blackband ironstone in said lands." The disposition acknowledged L.6000 as paid to Bell, and L.200 as paid to Livingston. On 24th February 1859 the pursuer's agent wrote to the defenders, intimating the sale and assignation of the missives of lease to the pursuer, and stating that a formal lease between the pursuer and the defenders, in terms of the missives, would be prepared and sent for revisal. A draft lease was afterwards sent, but was returned unrevised, the defenders' agent stating that the defenders knew nothing of the pursuer in the matter. On 15th August 1859 the pursuer's agent presented to the defenders a receipt for the first quarter's payment of the fixed rent, which the defenders refused to pay.

The defenders averred that they had entered into the missives of lease only on the understanding that there was a seam of blackband on the property, and that Livingston had power to grant them a lease. In point of fact the lands contained no minerals worth the expense of working, and Livingston was never in a position to grant a lease of them. The arrangement proposed by the unstamped missive of sale between Bell and Livingston was never carried out. Livingston never paid any portion of the price, or obtained any title to the lands, or entered to the possession thereof, and the parties cancelled the proposed arrangement by a minute written on the back of the original missive, in the following terms:—

"We hereby renounce and discharge the within missive.

(Signed) "Robert Livingston.
"John Bell.

"Glasgow, 31st January 1859.
"Rob. Walker, witness.
"J. H. Cruickshank, witness."

Prior to the date of the renunciation, about 20th November 1858, the defenders put down a bore in search of minerals, but found no ironstone at the depth of twenty-eight fathoms. Within a few weeks from the time when the boring operations com-

menced, the workmen employed by the defenders were ordered by Bell to desist and leave the lands, under threat of interdict. The defenders then gave up their trial bores. By missives dated 5th February 1859, John Bell let the property to the pursuer at a rent of L.130 per annum, one of the conditions being that no ironstone should be calcined on the lands during the currency of the lease. After the pursuer's purchase of the lands the defenders were requested, but refused, to enter into an arrangement for a lease of the minerals, as they had ascertained that there were no minerals in the lands. Having failed to induce the defenders to enter into a lease, the pursuer adopted the design of procuring **[1295]** Livingston's consent to the disposition in the pursuer's favour, with the view of rearing up a claim against the defenders; and with that view the letters of 15th and 16th February 1859, between the pursuer and Livingston, were concocted; and, in furtherance of that design, the subsequent minute of agreement, founded on by the pursuer, and the disposition in his favour, were executed. To give colour to this claim a draft lease was sent to the defenders' agents containing clauses to which the defenders could not consent.

The defenders pleaded;—(1.) The alleged missives of lease sought to be enforced, being unstamped, cannot be competently founded on as a ground of action; (2.) Livingston never having had any right or title to the lands in question, the alleged missives for a lease of blackband ironstone were ineffectual, and could not be enforced or assigned. *Separatim*, Livingston having renounced and discharged the missive between him and the proprietor of the estate, could not thereafter effectually convey any right to enforce implement of the alleged missives of lease; and the pursuer, as in Livingston's right, had neither title nor interest to insist in this action; (3.) At all events, upon the grounds stated in the preceding plea, the pursuer cannot enforce his present claims, and the defenders are entitled to *absolvitor;* (4.) The arrangement between Livingston and the pursuer having been entered into fraudulently, and the consent by Livingston to the said disposition having been obtained, in execution of the design above mentioned, the pursuer cannot derive any benefit from the writings granted by Livingston, and founded on; (5.) The defenders were entitled to *absolvitor*, in respect that any obligation which might have been enforced against them was extinguished and brought to an end in consequence of Bell having compelled the defenders' workmen to desist from operations on the lands, in which the defenders acquiesced; and (6.), They were entitled to *absolvitor* in respect that there was no blackband ironstone in the lands, at least no such ironstone as could possibly be worked to profit.

The pursuer pleaded;—(1.) He was entitled, in virtue of the missives of lease and other writs condescended on, to the decree concluded for; (2.) The defenders did not set forth facts relevant to elide the conclusions of the libel, or to support their defences; and (3.) It was *jus tertii* to the defenders to found any plea on the alleged renunciation of the missives of sale between Bell and Livingston, the pursuer, as the assignee of both, being able and willing to implement the said missives to the defenders.

On 8th February 1861 the Lord Ordinary pronounced this interlocutor:—"Finds that the pursuer has not relevantly set forth a title to insist against the defenders for implement of the missives of lease, into which they are alleged to have entered with Robert Livingston: Therefore assoilzies the defenders from the action as laid, and decerns: Finds the pursuer liable to the defenders in the expense of process; allows an account," &c.[1]

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[1] "NOTE.—The state of facts averred by the pursuer is substantially the following," —(After a statement of the pursuer's averments, the note proceeded):—

"The question now arises, whether the pursuer Weir is entitled to enforce against the defenders, in his own favour, the contract of lease into which they entered with Livingston. The defenders maintain that this is a question of law, capable of being determined in their favour on the facts as stated by the pursuer himself. The Lord Ordinary, on full consideration, has come to agree with them in this view.

"The case is exclusively a case on contract. The action is for implement of a personal contract, and nothing else. But no contract was ever made between the pursuer Weir and the defenders, Colin Dunlop and Company. The Lord Ordinary will immediately consider the grounds on which the pursuer considers himself entitled to enforce the contract with Livingston. In the meanwhile, the case on its face wants

[1296] The pursuer reclaimed. The Court allowed "the parties respectively a proof of their averments, with the exception of the averments regarding [1297] the

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one of the ordinary requisites of a case on contract. The pursuer is no party to the contract on which he founds.

"Not only so, but the case is one in which, so far as the Lord Ordinary can perceive, the defenders, on their side, had they been as anxious to retain as they now are to reject the contract, could not have enforced implement against the pursuer. Suppose that the present action was at the instance of the defenders against the pursuer. The defence of the pursuer would at once be, that he never made any contract with the defenders, and therefore is not bound to fulfil any. How could the defenders answer such a plea? They could not bring themselves under the protection of the Act 1449, validating leases in a question with singular successors. To bring the statute into play, the lease must have been granted by a proprietor infeft. The lessee must further have been in possession under such a proprietor. There was no such relation sustained by Livingston and the defenders. Livingston was, at best, in the same position with an heir-apparent who never makes up a title. But suppose that such an heir-apparent grants a lease, and then dies, the Lord Ordinary conceives it not doubtful that the tenant would have no action on the personal contract against the succeeding feudal proprietor. As little, in his view, had the defenders against the present pursuer. But if the defenders could not have enforced the missives of lease against the pursuer, it seems necessarily to follow that the pursuer cannot enforce them against the defenders, for the contract is a mutual contract, in which both parties must be bound, or neither.

"The pursuer pleads that Livingston, the party to the contract, could at all events have enforced it; and that he, as Livingston's assignee, must be held to possess the same right. But, in so arguing, the pursuer appears to forget the nature of the right which he assumes to be so easily assignable. It was not, like a right under a money bond, capable of being transferred to any one whatever. The landlord's right under a lease is, in a strictly proper sense, not an assignable right—that is to say, though he may assign the rents during the period of his own title to draw them, he cannot, by an assignation of the lease, place the assignee in the position of a proper landlord. This can only be done by a conveyance of the lands, to which the lease becomes an incident right. Now, the only conveyance to the lands in the present case flowed to the pursuer from Bell, the proprietor previously infeft, who cannot be pretended to have had any right under the lease. The lease between Livingston and the defenders might be very effectual between the parties themselves; but as betwixt the pursuer and the defenders, neither the lease itself, nor any assignation of it by Livingston, could place them in the position towards each other of landlord and tenants in the subjects.

"It may perhaps be added that, even on the ordinary principles of the law of assignation, Livingston could not transmit to the pursuer a higher right than he himself possessed. But, at the date of the assignation, Livingston was not in possession of an enforceable right under the lease in question. He could only enforce against the defenders the obligations of tenants by clothing himself with the character of landlord—that is to say, with a proper title to the lands, by force of which he might give possession to the tenants, and security to their right. But at the date of the assignation he had neither a feudal title to the lands, nor even a personal right, in the sense of a disposition uncompleted by infeftment. His right lay on the naked missive of sale. Livingston was never in a position to enforce the lease against the defenders; and he could not communicate to the pursuer a right which he had not himself.

"It does not, as the Lord Ordinary thinks, suffice to solve the question that implement is now tendered by the pursuer, to the full effect to which it could have been given by Livingston, had he made up a complete title. This result arises simply of the pursuer's good pleasure, and because it is convenient for him to acknowledge the lease. The true case to test the argument is, to suppose that the pursuer had found the lease unbeneficial, and had refused to fulfil it. Could implement in such a case have been enforced against the pursuer? The Lord Ordinary can perceive no sufficient ground for holding the affirmative. The pursuer was no party to the contract. He was not made so by anything passing between him and Livingston. Even had Livingston taken him expressly bound to acknowledge the lease (which Livingston did not do, for he only assigned the right, and did not impose

existence of minerals in the lands, and regarding representations or understandings on the subject of the minerals embraced in the missives of lease."

The proof having been reported, the case was put to the roll.

It was argued for the pursuer;—Livingston was incarcerated on the bill he granted for part of the price of Langlands, and he signed the renunciation in order to procure his liberation; it was clear that Livingston did not consider he was divested by the renunciation so extorted from him, and equally so that neither Bell nor the pursuer considered him to be divested. The renunciation was improbative, and it was *jus tertii* to the defenders to plead that it was validated *rei interventu*. The sale to Livingston was indisputably an honest transaction; he took partial possession of the subjects, and paid part of the price by a bill. By the disposition to the pursuer, he put the pursuer in place of Livingston's right as well as Bell's; whoever took up Livingston's right was liable to have Livingston's contracts enforced against him; he was also entitled to enforce the contracts made by Livingston. Apart from the renunciation, the case was a simple one, but it was a contract to which neither the pursuer nor the defenders were parties, and out of which a *jus quesitum tertio* could not arise.

LORD JUSTICE-CLERK.—The sole object of this action is to enforce implement of a contract of lease. On the face of the writings, which are said to constitute the missives of lease, the lessor is Livingston, and Messrs. Colin Dunlop and Co. are the lessees. Unless the pursuer is in the right and place of Livingston as the lessor, he cannot enforce the contract against the defenders. Therefore the true inquiry is, whether the pursuer is in the position of Livingston? To solve that question, it is necessary to consider the position of parties at the time the lease was entered into. Livingston was not then in a position to grant a lease; he was not infeft; he had no title. The right he could grant was not a real right, and was not an effectual right of lease at all. But, though Livingston was not at that time in a position to grant a lease, he was in such a position that he could have made his own right good, and so made the lease effectual. But that would only be by giving effect to the doctrine of accretion, and till there was a *jus superveniens* in Livingston the lease which he had granted could not possibly receive effect. I do not mean to say, that this lease could become effectual only if Livingston himself became proprietor; for I can suppose a case in which the same individual became proprietor of the estate and the obligor in the contract Livingston had come under, so as to make it effectual; but what I mean to say is, that, till the personal obligation under the lease and the real right to the subject were combined in one person, the lease was ineffectual. If Livingston had died, and his representative had taken up his in- **[1298]** -complete title, he would have been such a party as I refer to. If, by a general service, he represented Livingston, he would have combined in his own person the real right to the lands and the personal obligation to grant the lease. I do not give any opinion on the question, what would have been the liabilities of an onerous assignee? Many difficult questions arise in such circumstances, which have not been dealt with in the argument submitted to us, and on which I reserve my opinion. The general proposition on which I rest my opinion is, that this lease can never become effectual until you have combined in one person the personal obligation and the title of property.

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the obligation), the pursuer could still have said, that, as regards the defenders, this was *res inter alios* on which the defenders could not found. But if the pursuer was not bound to the defenders, the defenders cannot be bound to the pursuer.

"The Lord Ordinary had presented to him some ingenious illustrations from the old case, under the civil law, of the sale *rei alienæ*. It was said that a contract to this effect was valid; and that, if the true proprietor was willing to give up the thing sold, the contract was enforceable on both sides. It appears to the Lord Ordinary that a good deal would depend on the circumstances; on the knowledge of the parties that the thing was in truth *res aliena*, and other particulars. But he thinks it more profitable to hold by the case in hand than to deviate into remote analogies. The case before him he thinks to be simply this: The pursuer was no party to the contract sought to be enforced. He has not competently come into the place of the original party, at all events to the effect of legally subjecting himself in the obligations undertaken by that party. He cannot therefore enforce at law the correlative rights."

After this lease was granted, which was on 1st September 1858, Livingston found he was unable to implement the contract of sale into which he had entered. So utterly unable was he to pay the price of L.7200 for the property, that he was unable to pay the bill he had granted for the first instalment of the price, and he was in consequence incarcerated by Bell. While he was in prison under the diligence on the bill, a proposal was made to him to cancel the transaction, which proposal was accepted and acted upon. I do not raise the question whether the renunciation is a probative document or not. I go on this—that it is proved by competent evidence that the right under the missive of sale has been renounced, for the cancelling of such a contract may be proved by parole. If it is proved by competent and satisfactory evidence that such a contract has been departed from, that is enough. I am quite satisfied on the evidence that both the parties and their agents arranged that Livingston should pay L.100 of forfeit to get out of the transaction, and that being done, that the whole matter was entirely at an end, the missive being delivered up to Bell, the seller. It seems to me that, after the 31st January 1859, Livingston's whole connection with the estate was at an end, and all prospect of his being able to complete his title, and so validate the lease, was also at an end. I do not mean that he might not have got a good title if he had afterwards paid the price; and if such a title had been set up, that might have validated the contract of sale. But no such thing took place.

While the sale to Livingston was put an end to in January 1859, the estate was sold to Weir under a contract of sale, to which Livingston was no party at all, by missives, dated 8th February 1859, under which the estate was sold for a smaller price than Livingston had agreed to pay. In that state of matters, what follows? Some of the parties lay their heads together to see if they cannot carry out the sale in such a way as to give Weir the benefit of the lease between Livingston and Dunlop and Company. I am not sure that this might not have been done by the help of Livingston, though perhaps it would not have been very fair or honest; but the way in which it is said to have been done is this:—A disposition is prepared in favour of Weir, in which Livingston is said to dispone along with Bell, and as concurring with him. Now, the conveyance by Livingston was futile, and was entirely without meaning. Livingston had been dissociated from the estate just as completely as if he had never heard of it. It is said that he conveyed the estate, and by the same deed assigned the lease to Weir, the purchaser. What Bell had to do with the lease is not explained to us, unless, indeed, it is said that the cancelling of the sale had transferred to Bell the right of lease; but this is, I confess, utterly unintelligible to me. If Bell had nothing to do with the lease, and Livingston nothing to do with the lands, how could they combine to make the lease effectual as between Weir and Dunlop? I should like to know what is the meaning of a lease granted by a party who has no connection with the subject, and is not in a position to make a lease effectual. It is an awkward and an unsuccessful attempt to transfer to Weir a right which Livingston himself never could enforce. I am therefore, after considering the proof that has been led, inclined to arrive at the same opinion as the Lord Ordinary has done. He dealt with the case on the relevancy; but now that the facts have come out on a proof, the result is the same, and I would propose to recal his Lordship's interlocutor, and substitute for it an interlocutor assoilzieing the defender.

LORD WOOD and LORD COWAN concurred.

LORD BENHOLME.—Having the proof before us, we can now arrive at a much more clear solution of the questions raised between the parties in this case than when it was argued on the mere relevancy. There is a great principle in our law that, in the case of a mutual contract, the one party must be prepared to fulfil his obligation under the contract before he can enforce it against the other party. **[1299]** And if, therefore, the one party has never been in a position to fulfil his obligation, he neither can himself enforce it against the other party nor transfer to any assignee the right to do so. I hold that principle to be applicable to the two contracts we have here to deal with. First, there was a contract of sale by Bell to Livingston, under which Livingston became bound to pay a sum of money amounting to L.7200, as the price of the subject sold. But he never could, and never did, pay that sum of money, for he was imprisoned on diligence used on his failure to pay the bill he had granted for the first instalment of it. In the second place, I apply the principle I have stated to the contract of lease between Livingston and Colin Dunlop and Co., said to

have been constituted by offer and acceptance. Livingston, it is true, offered to grant a lease, but he never had any real right in the property which he could transfer, or by virtue of which he could grant a lease. The proof that has been led has rendered the matter very clear. It is evident that Livingston never was in a position to fulfil his part of the contract of sale, and never was in a position to execute a valid lease. Messrs. Dunlop and Co., therefore, never having become bound to him as lessees (in respect that he never was in a situation to grant them a lease), I cannot understand how he could, to any effect whatever, assign an obligation incumbent on them to take a lease from him, which obligation he never held. Weir seems to have exerted his ingenuity to devise a scheme by which he might obtain the right to compel Dunlop and Co. to enter into a lease on the same terms as Livingston might have done had he ever been possessed of a real right to the estate. And, in pursuance of this scheme, he paid Livingston L.200 for the purchase of such a right. But that right Livingston never possessed, and therefore could not effectually assign. The fact that Weir bought and took a disposition of the property from Bell shows that Livingston never was proprietor, and, consequently, never was creditor, in the right which he affected to sell. If Livingston had not right to the estate, a purchaser from him could not get right to lease as lessor, which depended upon Livingston's right. It appears to me to be plain, that what Weir intended to buy from Livingston was the chance of being able to enforce the lease against Colin Dunlop and Co.

The whole facts of the case have been fully developed by the proof, and I have no difficulty in agreeing with your Lordships in the opinion that the defender is entitled to be assoilzied.

The Court pronounced this interlocutor:—"Recal the interlocutor reclaimed against: Find that the pursuer has no title to insist against the defenders for implement of the missives of lease between them and Robert Livingston libelled: Therefore assoilzie the defenders from the whole conclusions of the summons, and decern: Find the defenders entitled to expenses, and remit," &c.

[Cf. *Reid's Tr.* v. *Watson's Trs.*, 23 R. 640, 641, 642, 647, 650.]

No. 196. **XXIII. Dunlop 1301.** 18 July 1861. 2nd Div.—Lord Kinloch.

JOHN FITZSIMMONS, Complainer.—*Pattison.*—*Mair.*

THOMAS LINTON and ALEXANDER M'DOUGALL, Respondents.—*Young*—*Gifford.*

Process—Summary Complaint—Conviction—Penalty—Clause—Statute 16 & 17 *Vict. c.* 67.—A party was tried summarily before a police-court, along with two others, on a charge of contravening the Public Houses Act, in so far as, upon a day specified, "or about that time," the "accused did, all and each, or one or more of them," in a "shop occupied by them, or one or more of them, barter or sell spirits [1302] without having obtained a certificate." After evidence the complaint was passed from against two of the accused, but the third was convicted "of the offence charged against him," and fined in a sum equal to one-fourth of the statutory penalty, but not stated in the conviction to be a mitigated penalty, and imprisoned for non-payment. In a suspension and liberation, on the ground (1.) that the complaint was not in the terms required by the statutes and relative schedule, inasmuch as it did not sufficiently set forth the particular time and place of the offence; (2.) that the conviction was bad, both in respect that it was a general conviction upon an alternative complaint, and did not state of which of the offences the accused was convicted, and also in respect that it convicted the suspender alone of the offence charged, whereas the complaint charged the offence against three parties jointly; (3.) that the penalty imposed was not the penalty appointed by the statute, and was not stated in the conviction to be a mitigated penalty; and (4.) that after the complaint had been passed from against them, and before the case was concluded, the judge

had refused to receive the evidence of the other two accused persons, or to note that it had been tendered. *Held*, after a remit to the Sheriff, and report from him as to the facts connected with the point last mentioned (*aff.* judgment of Lord Kinloch), that the proceedings had been regular, and reasons of suspension *repelled*.

John Fitzsimmons was cited before the Police-court of Edinburgh, along with William M'Luskie and Mary Ann Stewart or M'Luskie, upon a complaint in the following terms:—"Unto the Honourable the judge of the Police-court of Edinburgh,—Humbly complains Thomas Linton, superintendent of police,—That John Fitzsimmons, residing in Broughton Street; William M'Luskie and Mary Ann Stewart or M'Luskie, both residing in Leith Street Terrace, have been guilty of a contravention of section 15 of the Act 16 and 17 Victoria, cap. 67, intituled, 'An Act for the Better Regulation of Public Houses in Scotland,' in so far as, upon the 11th day of December 1859 years, or about that time, the said accused did all and each, or one or more of them, in the shop or other premises in Union Place, occupied by them, or by one or more of them, barter or sell spirits without having obtained a certificate, and such offence is the third offence as regards the said accused John Fitzsimmons, and the first offence as regards each of the said accused William M'Luskie and Mary Ann Stewart or M'Luskie. May it therefore please your honour to impose the penalties, and award the expenses incurred by them, in terms of law, or otherwise to grant warrant for imprisoning them, in terms of law.—According to justice," &c.[1]

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[1] Sections 15 and 16 of the Act libelled are in the following terms:—(Sect. 15), "That every person bartering or selling spirits without having obtained a certificate, and every dealer in groceries, or other provisions to be consumed elsewhere than on the premises, supplying, whether gratuitously or otherwise, spirits to be consumed on the premises, shall be deemed guilty of an offence, and shall for such offence forfeit and pay the penalties provided in the 30th section of the said recited Act of the 9th year of King George the Fourth, and upon default of payment thereof, as therein mentioned, be imprisoned as therein provided: Provided always, that any person who shall have been three times convicted of any offence against this Act, shall be incapable of holding a license for the sale of exciseable liquors in all time coming; and provided also, that every person who shall be convicted of bartering or selling spirits without having obtained a certificate, shall, in default of immediate payment of the penalty imposed upon him for such offence, be liable, in the discretion of the sheriff, bailie, or justices, by whom he shall be so convicted, to be immediately imprisoned, as prescribed by the said 30th section of the said recited Act, in the case of default of payment, within four days after conviction."

(Sect. 16), "Every offence committed against this Act shall be tried and determined, and all penalties incurred under the authority of this Act shall be recovered and applied in the manner, and before the courts, and subject to the conditions provided in the said recited Act of the 9th year of King George the Fourth; but in the case of any person complained against for bartering or selling spirits without having obtained a certificate, it shall be lawful for the Sheriff, bailie, or justices, to or before whom such complaint shall have been made, instead of granting a warrant to the officers of court to summon the person complained against to appear to attend the hearing of such complaint, to grant warrant for the apprehension of such person, and after such apprehension, to inquire into the truth of the allegations in such complaint, and otherwise to proceed under such complaint as if such person had appeared under such a summons."

By the 23d section of the Act recited in the said statute, viz., 9 Geo. IV. c. 58, it is enacted, "That it shall be lawful for any person or persons to make complaint unto and before the Sheriff, or before any two or more justices of the peace for the county, or before the court of any royal burgh within whose jurisdiction the person complained against shall reside, stating in such complaint that the defender is a person keeping a common inn, ale-house, or victualling-house, under a certificate to him or her in that behalf granted, and selling ale, beer, spirits, wine, or other exciseable liquors by retail, under excise licenses, and setting forth the particular breach or breaches of the terms and conditions of the certificate complained of, and also, whether it is the first, second, or third offence, as the case may be; and thereupon the Sheriff, or bailie, or the justices

[1303] The procedure on the complaint as recorded was as follows:—(1.) On 19th December 1859, "the complaint being read over to them, they denied **[1304]** the same, when the following witnesses were examined on oath, videlicet:—John Blair, a shoemaker, residing in Alison's Square, and William M'Neil, a tailor, residing in Greenside Row, both in Edinburgh; William Angus and William Smith, both officers of the Edinburgh police establishment; James Watson, a commercial traveller, residing in Arthur Street, Edinburgh; and William Elder, an officer of the Edinburgh police establishment." (2.) Of same date the following interlocutor was pronounced:—"The judge continues the diet till the 21st day of December current, at ten o'clock forenoon." This adjournment was stated by the respondents to have taken place at the request of Fitzsimmons, and to enable him to lead evidence in exculpation. (3.) Of date 21st December there appeared the following minute:—"I pass from the complaint against William M'Luskie and Mary Ann Stewart or M'Luskie." (Signed) "THO. LINTON." (4.) A conviction took place of same date (21st December) in the following terms:—"At Edinburgh, the 21st day of December 1859 years, in presence of Frederick Hallard, Esquire, judge of the Police-court of Edinburgh, compeared John Fitzsimmons, and the complaint being read over to him, he denied the same; but it was proved against him by the oaths of John Blair," &c., as above, "credible witnesses; and therefore the Judge convicts the said John Fitzsimmons of the offence charged against him,

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to or before whom such complaint shall have been made, shall grant a warrant to the officers of court to summon the party complained against to appear at a time and place to be specified in such warrant and summons (such summons being served at least six free days before the diet of appearance), to attend the hearing of such complaint, at which time and place, if the said party appear and plead to such charge, or in case of his or her non-appearance, on proof by the oath of the constable, or other officer, of his having served such summons as hereinafter directed, at least six free days prior to the diet of appearance, it shall be lawful for such Sheriff, or bailie, or two or more justices of peace, to inquire into the truth of the allegations in such complaint, and on the same being proved, either by the confession of the party complained against, or by the testimony on oath (or affirmation, if a Quaker) of one or more credible witnesses, or upon other legal evidence, to pronounce judgment, and convict the party of the offence complained against, without any written pleadings or record of evidence—it being hereby provided that a record shall be preserved of the charge, and of the judgment pronounced: Provided always, that if such Sheriff, bailie, or justices shall see cause, it shall be lawful to adjourn the hearing of such complaint to a subsequent day, to be by them at that time appointed. And it shall be lawful for any Sheriff, bailie, or justices, before whom proceedings shall be had for the recovery of any of the penalties before mentioned, to summon before him, or them, any witness or witnesses, and require them to produce such writings or entries as may be required for the due decision of the case before them; and all such records to be so preserved as aforesaid shall be in the form contained in the schedule annexed to the body of this Act, therein designated by the letter D, or to such effect."

Schedule D of the said recited Act is as follows:—"(1.) Complaint. 'Unto the Honourable Her Majesty's Justices of the Peace for the county of
(or Sheriff or Magistrates of the burgh, as the case may be),—Humbly complains, A B, That C D, residing at ,
who keeps a common inn, ale-house, or victualling-house there, under a certificate in that behalf granted, and who sells ale, beer, spirits (or other exciseable liquors) therein, by retail, under excise licences, has been guilty of a breach of the regulations of the said certificate, in so far as (state the particulars, time, and place of the offence), and such offence is the first (second or third) offence.

"'May it therefore please your honours to impose the penalties, and award the expenses incurred by him, in terms of law, or otherwise to grant warrant for imprisoning him in terms of law, and also to declare his certificate to be forfeited. 'A. B.'

"The schedule then gives the forms of (2.) Warrant to cite; (3.) Citation; (4.) Conviction; (5.) Warrant of imprisonment for recovery of penalty and expenses,—At the end of which there is the following 'NOTE—The proceedings against persons selling exciseable liquors without having obtained a certificate may be similar, *mutatis mutandis*.'"

being a third offence, and finds him liable in the sum of L.7, 10s. sterling of penalty, and adjudges him to pay to the complainer the sum of L.3, 15s. sterling, being a first part of said penalty, and the remainder of said penalty to the Royal Infirmary of Edinburgh, payable to Alexander M'Dougall, treasurer superintendent of said institution, for behoof of the same, and that within four days after the date hereof, with certification of imprisonment. (Signed) FREDERICK HALLARD."

Upon this conviction, and in respect of non-payment of the sums therein mentioned, a warrant was subsequently granted, whereupon Fitzsimmons was incarcerated in the prison of Edinburgh.

Fitzsimmons presented a note of suspension and liberation, and in a record which was subsequently made up, after setting forth the complaint and other procedure, down to the minute passing from the complaint against the M'Luskies, he alleged—"Thereupon (viz., on the complaint being passed from against the M'Luskies), and before any farther procedure took place, the suspender tendered the said William M'Luskie and Mary Ann Stewart or M'Luskie as witnesses on his behalf. The complaint having been departed from against them, they were perfectly competent and admissible witnesses for the suspender. But the Judge of the Police-court would not allow them to be examined, and refused to take their evidence, or even make a note that they had been tendered, and that he had rejected them."

The suspender pleaded;—1. The complaint upon which the conviction and imprisonment proceeded was not authorised by nor in terms of the statutes, and were and are incompetent and illegal. 2. The conviction was informal, inept, and null, in respect that while the charge in the complaint was alternative, the sentence pronounced was general, and did not state of which of the offences charged the suspender was found guilty. 3. It was wrongful and illegal in the Judge sitting in the Police-court, to reject the witnesses tendered for the suspender. 4. There was no evidence sufficient to support the sentence.

The respondents alleged that the minute was written out, and the suspender's tender of the M'Luskies as witnesses was made, after the whole case had been closed and judgment pronounced; and they pleaded—1. The conviction complained of, and whole procedure connected therewith, were **[1305]** formal and regular. 2. By the statutes 9 Geo. IV., cap. 58, sect. 26, and 11 and 12 Vict., cap. 113 (Edinburgh Police Act, section 107), all review of the sentence was excluded, and the present suspension, and the whole of the suspender's objections were incompetent. 3. No objections having been taken to the form of complaint, and the case having proceeded to proof, and after the prosecutor's case was closed, an opportunity having been given to the accused to adduce evidence in exculpation, the suspender is debarred from stating any objection to the complaint.

On 13th March 1861 the Lord Ordinary pronounced the following interlocutor:—"Repels the reasons of suspension: Finds the judgment, conviction, sentence, and warrant of imprisonment, orderly proceeded, and decerns: Finds the suspender liable to the respondents in the expenses of process," &c.[1]

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[1] "NOTE.—1. The suspender maintained the following objections against the charge in this case—all of which appear to the Lord Ordinary to be unfounded:—

"1. That the general statement was applicable absolutely to all the three parties charged, or, in other words, charged a joint crime and nothing else, whereas the specific detail applied to 'all and each or one or other of them.' But this is just the ordinary alternative by which it is left open to the procurator to prove the case against one or more. The case is not one of formal indictment, but summary petition; and the terms are sufficiently accurate to express the substance of the case.

"2. That the time of committing the offence is stated with too much latitude as 'the 11th day of December 1859 years, or about that time.' But this is just the usual 'on or about the 11th December 1859.'

"3. That the charge is too vague in stating alternately that the parties 'did barter or sell spirits,' without saying whether they bartered or sold, and what was the description of spirits. But the charge adopts the very words of the statute, and states the essentials of the case. It is not an alternative offence which is thus charged. It is merely an alternative element in the commission of the same offence. The alterna-

[1306] The suspender reclaimed.

Argued for the suspender;—1. The complaint charged all the parties [1307]

tive is employed simply to prevent evasion of the statute, by the transaction, though truly the same, being put in a different form, and the statute equally applies to the disposal of any kind of spirits.

"4. That 'to barter or sell spirits without having obtained a certificate,' is not a well-laid offence; because the statute provides for no certificate to entitle to barter, but only for a certificate to entitle to sell. But the charge is quite consistent. The statutory certificate is undoubtedly a certificate for sale, and therefore it is such a certificate the want of which is charged. The crime is, that without this certificate the party either sold or bartered, which is another form of sale; and this crime is charged in the very words of the statute.

"II. The suspender further objected to the sentence pronounced against him on grounds which appear to the Lord Ordinary to be equally untenable.

"1. That the Judge awards against him the penalty of L.7, 10s. being the one-fourth of the proper penalty of L.30 (and failing payment, an imprisonment of seven weeks, being somewhat more than the one-fourth of the proper penalty of six months imprisonment), without stating expressly that this was a mitigated penalty in terms of the Act. But the penalty being rightly imposed under the power given by the Act, to mitigate the same to not less than one-fourth, the mere fact of its not being expressly set forth as a mitigated penalty is immaterial.

"2. That the statute declares that the judge shall award the penalty specified 'with the expenses of conviction,' and the expenses of conviction are not awarded in the present case. But the want of an award of expenses cannot vitiate the award of the penalty. The Lord Ordinary was indeed referred to certain English cases (Paley on Summary Convictions, p. 229), in which, under a statute enacting imprisonment and a whipping, a sentence is said to have been held bad which omitted the whipping; and under a statute imposing the punishment of death with the dissection of the body, the sentence is said to have been held bad because of the omission of dissection. But the Lord Ordinary can discover no case on this side of the Tweed in which this, as it appears, somewhat over-refined view was given effect to.

"3. That the warrant of incarceration proceeded on a narrative of non-payment of 'the sums of money before-mentioned,' whilst it provides imprisonment for a 'certain definite period, unless the said sum shall be sooner paid,' but the proceedings show that the penalty was a sum divisible into two sums, being a penalty of L.7, 10s., divisible equally between the prosecutor and the Royal Infirmary.

"III. The most important plea urged against the conviction was founded on the statement contained in the 14th and 15th articles of the reasons of suspension. It is there averred that, before the trial terminated, the prosecutor passed from the charge against the two persons accused with the suspender, M'Luskie and Stewart; and that thereupon—still before the trial had terminated—the suspender tendered these individuals as witnesses on his behalf, when the Sheriff not only refused to receive them, but even to make a note that they had been tendered.

"The respondent denies the statement, and explains that no tender of the kind was made till after the case had been closed, and the Sheriff had intimated that he found the suspender guilty.

"The record of the proceedings is wholly silent as to any such tender having been made; and hence there arose the important preliminary question—whether, in the face of the record, the suspender was entitled to prove his averment *prout de jure*. He insisted on such proof as his right, and did not disguise that, under an allowance of proof, he held himself at liberty to examine all or any of the persons present in the Police-court on the occasion, who ever they might be.

"The Lord Ordinary requested the suspender to show him authority for this course. He was referred to various cases, which seemed to have little bearing on the point, as, where the police had violently prevented witnesses and others from entering the court-room. The nearest case rested on was that of Mahon *v.* Morton, 6th February 1856, 2 Irvine, 383, where, on an allegation that an application for delay in order to examine witnesses in defence had been refused, and not even

conjunctly, and the prosecutor was bound to prove the case against the whole of them. The effect of the minute departing from the complaint against M'Luskie and his wife was, therefore, to destroy it altogether. This conviction was against the suspender alone, and he was thus convicted of an offence charged against three parties jointly. (2.) The complaint did not specify the particulars of the offence, whether a barter or sale. It was thus alternative; and the conviction finding the "offence charged" being general, was no answer to the charge. To barter spirits was no offence, as a certificate was not required for the purpose by the Public Houses Acts.[1] (3.) There was no authority in the statutes for the penalty imposed upon the suspender, the proper penalty for the offence being L.30; and the conviction not bearing that the penalty was mitigated, and a judgment for a smaller penalty than authorised by the statutes, was as bad as one for too much.[2] (4.) The evidence of M'Luskie and his wife ought to have been received, and the suspender was entitled to a proof at large of the allegations made by him in reference to the Sheriff's rejection of that evidence. At all events no consent could be given on behalf of the suspender to a remit to the Sheriff on the subject, and it was an error on the part of the Lord Ordinary to decide against him without some inquiry into the facts.

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noted by the magistrate, the Court 'remitted to the Sheriff-depute of the county of Ayr to inquire into and investigate such averment, taking such evidence as the parties may think necessary, and to report such investigation, either at length or the results thereof, as to him may appear necessary, for the satisfaction of the Court.

"The Lord Ordinary intimated that, if the parties both consented, he would follow the same course in the present case. The respondent at once gave his consent. The suspender refused to consent, objected to the course suggested, and insisted on a proof at large. It appeared to the Lord Ordinary that whatever might be done by a higher tribunal in the exercise of a supereminent jurisdiction, he could not, against the will of the party, make a remit of this description, when in the ordinary administration of justice in the Outer-House.

"The Lord Ordinary was therefore driven to the alternative of either allowing a proof at large, or holding by the record, as conclusive evidence of the *res gesta*. He had no hesitation in preferring the latter branch of the alternative. He could not reconcile it with his conception of a right administration of justice, that, in every case whatever, any litigant situated like the suspender should, by merely making the averment, be entitled to such a proof at large as the suspender contemplated as an ordinary step in the proceedings.

"It is true that any judge who should not only refuse to admit competent evidence, but refuse also to note that it was tendered, would be guilty of a breach of duty. But the remedy is to complain of him, as unfit for his office, to the proper authorities. It is a totally different thing to break in at pleasure on the ordinary course of judicial proceedings by a proof at large, to contradict or supplement the judicial record of the process.

"The general rule unquestionably is, that the *res gesta* must be all found in the record. The Lord Ordinary perceives an objection, similar to what is now stated, to have been found sufficient to quash a conviction in one case. But in that case the tender of the evidence was formally taken down on the record,—Bell *v.* Houston, 22d January 1842, 1 Brown, 49. On the other hand, he perceives the fact of the alleged application not being found in the record considered fatal to a cognate objection in another case; and he notices that an intimation was given by the Court in that case, that this was the rule to be held now established in practice,—M'Vee *v.* Dykes, 28th May 1855, 2 Irvine, 429.

"In these circumstances, it appears to the Lord Ordinary to be his only safe course to hold by the general rule, that the record, and that alone, is to be referred to for the *res gesta* before the Court. Nothing is more important to the sound administration of justice than to maintain a general principle—nothing more injurious than to relax a general principle to meet a particular case."

[1] King *v.* North, 1825, 6 Dow and Ryland, 142; King *v.* Pain, 1826, 7 Dow and Ryland, 678; Paley on Convictions, 140.

[2] Paley on Convictions, 226, 229.

The respondents were directed to confine their argument to the last point, as to which they opposed a proof at large, and contended that the usual and proper course was to remit to the Sheriff.

LORD JUSTICE-CLERK.—It might be doubtful whether the Lord Ordinary had power to remit to the Sheriff without consent; but we do not need any consent.

The Court, on 6th June, pronounced the following interlocutor:—"Before further answer remit to the Sheriff-depute of Mid-Lothian to inquire into the facts alleged by the parties respectively in the 14th and 15th articles of the suspender's statement, and the 9th and 10th articles of the respondent's statement, taking such evidence as the parties may suggest, and to report, either with or without his notes of the evidence, as he may think necessary, for the information of the Court."

The Sheriff's report, which states the effect of the evidence led, was as follows:— . . . "At the diet of 19th December 1859 the parole proof on both sides was concluded, the defender's solicitor having stated that he had no witnesses to adduce. He pleaded, however, that an existing written sublet of premises to the M'Luskies by Fitzsimmons released the latter from the application to him of the statute. This writing was handed to the police Judge, who thereupon, in order to consider what effect, if any, could or should be given to it, adjourned the case for two days. At the next diet (21st December 1859), accordingly, the police Judge, whenever the case was called, delivered his opinion that the writing aforesaid was not valid to the effect of exonerating Fitzsimmons from the operation of the law. He then proceeded to deal with the whole cause, and advised the public prosecutor, Mr. Linton, to withdraw the charge as against the M'Luskies. Mr. [1308] Linton intimated, either by word or gesture, his acquiescence in this advice. It was at this instant that Mr. Bell tendered the M'Luskies as witnesses. The Sheriff has been quite unable to discover any legal precedent or practice to entitle or enable a Judge to receive such evidence at such a stage. The M'Luskies were not dismissed from the bar until sentence was given against Fitzsimmons. All three were simultaneously judicially disposed of by one judgment. . . . Mr. Bell and Mr. Linton, speaking directly to the case in question, equally agree in testifying that the M'Luskies remained at the bar till the whole case was adjudicated, while Mr. Hallard, speaking more to general practice than to the individual case, corroborates thoroughly their testimony."

The Sheriff's notes of evidence, referred to in the above report, were printed and laid before the Court.

At advising,—

LORD WOOD.—The three parties, Fitzsimmons and the two M'Luskies, were brought to the bar charged with being guilty of a contravention of section 15th of the Act 16 & 17 Victoria, cap. 67, intituled "An Act for the better regulation of public houses in Scotland;" and the case proceeded against all of them as guilty of the offence charged. After evidence had been led the Sheriff-substitute made a proposal that the complaint should be withdrawn or passed from as against the M'Luskies, to which the prosecutor assented. Now, it appears to me that, in the circumstances, the inference from such a proposal being made by the Judge is, that he held the case established against all the parties, but at the same time wished to be enabled to pronounce sentence against one of them only. Had he not held that the case was proved against the M'Luskies, his course obviously would have been to dismiss them from the bar, without making any proposal to the prosecutor to pass from the complaint against them. But the Judge was in this position, that, holding the evidence sufficient against all the parties, he was, in terms of the provisions of the statute, called upon to impose a penalty on each, to the mitigated amount at least thereby prescribed; and, considering that this would be more severe than the case required, he submitted to the prosecutor the suggestion that the complaint as against the M'Luskies should be passed from—or rather not moved on for sentence—in order to relieve him from the necessity of imposing a penalty on any party but Fitzsimmons, the greatest delinquent, inasmuch as the offence was charged against him as being a third offence.

Accordingly, looking to the report of the Sheriff-depute, and relative notes of evidence upon the remit by the Court to him to inquire into certain of the state-

ments by the parties respectively in the revised reasons of suspension and answers, this appears to have been the view taken by the Sheriff-substitute of the evidence adduced, and upon which he proceeded in what he suggested to the prosecutor. And, whether regard is had to these notes or the record of the case, I can find no ground for arriving at the result contended for by the suspender, that in the circumstances and state of the procedure there was room for competently tendering the M'Luskies as witnesses for Fitzsimmons, and that their evidence was improperly rejected. On the contrary, I think that, by both, the suspender's pleas to that effect is negatived.

It is indisputable that before any suggestion came from the Judge to the prosecutor not to insist against the M'Luskies, the whole evidence which was intended to be adduced on either side, or which it could by the Judge be contemplated was to be led, was closed. The case so far was a concluded cause. It was in the hands of the Judge to pronounce sentence. It was only then, and when about to do so, that his wish in reference to the M'Luskies was signified, and nothing followed to the effect of acquitting the M'Luskies from the charge against them, either in form or substance. They were not removed from, but continued at the bar while sentence was pronounced upon Fitzsimmons, and no minute of abandonment of the charge was written out or subscribed by the prosecutor till afterwards. I have no idea that anything that was done, either by the Judge or prosecutor, was done upon the footing that the charge was not proved against the M'Luskies, and that they were to be taken as not guilty parties, and the case then to be dealt with as if they had been acquitted, so as to render further proof in reference to **[1309]** Fitzsimmons, by their being tendered as witnesses for him, competent. Quite the reverse. It seems to me to be impossible to suppose that the Sheriff could mean to put the case into the extraordinary predicament of dismissing the M'Luskies from the bar, so as to give them an opportunity of proving that they were the only guilty parties, and of retaining at the bar Fitzsimmons, who was to be by them proved not to be guilty. I look upon all that occurred as nothing more than a conversation passing between the Judge and a prosecutor in the cause concluded with respect to all the parties charged, at the moment when the Judge was about to pronounce sentence upon the closed evidence before him, and which arose solely from his desire not to be constrained, in the circumstances, to impose a penalty upon each of the parties, but to limit it to one, as appearing to him sufficient to meet the ends of justice. I can find nothing to induce me to come to a different conclusion. If the agent for the parties thought that there was no case against the M'Luskies, his course was plain, viz., to move that the complaint as to them should be disposed of in the first instance, before closing the procedure, or finally dealing with the charge as against Fitzsimmons,—then, if they were acquitted, to tender them as witnesses. But he made no motion of the kind. He allowed the case, as to all the parties, to be apparently concluded in the usual way —without even a hint that any separation of them before pronouncing sentence was desired. And in the circumstances, I am constrained to hold that the tender of the M'Luskies as witnesses for Fitzsimmons was nothing else than an attempt to take an advantage altogether unwarranted, in the position in which the case stood.

I am consequently of opinion that the reason of suspension, that the evidence of the M'Luskies was illegally rejected, is unfounded; and I am of the same opinion with regard to the other reasons, as to which I consider that all further remark is rendered unnecessary by the Lord Ordinary's note.

Lord Cowan.—I feel very little difficulty in this case. I arrive at the same result as Lord Wood. The ground of suspension is, that the inferior Judge unjustly refused to examine witnesses legally tendered. That is a good ground of suspension and liberation, if well founded. When stated, it will always receive, as it has in this case received, serious consideration from the Court. We remitted to the Sheriff to report to us as to the facts, and specially at what stage of the cause these witnesses were tendered, so as to enable us to judge whether their evidence was improperly refused. We have now a report by the Sheriff, and we have seen the notes of evidence taken by him. I think the facts reported are conclusive against the suspender's plea. I can well imagine that, in a prosecution like this, of three parties, when it is said that one of them is the tenant, and the others the actual possessors or subtenants of the premises, there may be ground for moving that the parties should be prosecuted separately. No

such motion, however, was made, and the case went to trial as a prosecution of the three parties jointly. The case was heard on the 19th December, and then the parole evidence was concluded, and a document was tendered to the Sheriff by the suspender's agent, with a view of instructing that the premises had been let to the M'Luskies; it had also to be inquired into, whether the M'Luskies were married. The case was, accordingly, continued till the 21st. At that sederunt the marriage lines were produced; and the case was to be decided by the Sheriff-substitute upon the proof which had been led at the previous diet. Even at that step of the procedure, before the Sheriff-substitute proceeded to pronounce judgment, it might have been competent for the agent of the defenders to have moved the Judge to consider and dispose of the case against the M'Luskies in the first place, in order that, if the case was not proved against them, they might be used as witnesses in favour of Fitzsimmons. But no such motion was made, and the Judge proceeded to state his opinion and to give judgment. On the report before us of the proceedings, I cannot come to any other conclusion than that the Sheriff-substitute was prepared to have pronounced judgment against all the three defenders. It would be absurd to suppose that he would have recommended the prosecutor to pass from the prosecution against the M'Luskies, unless he had been prepared to pronounce sentence against them. It is clear to me that he was ready to decide against them, but taking a lenient view of the case, and being unwilling to subject them, as well as the other accused party, in the statutory penalty, he recommended the abandonment of the prosecution. Having formed that opinion as to the position in which the case stood when the **[1310]** Sheriff-substitute made that recommendation, to which the prosecutor gave his ready acquiescence, and by which the M'Luskies got off, I cannot think that an offer to examine them as witnesses could then be competently made, or that the Judge's refusal, because of such offer, to delay pronouncing judgment against Fitzsimmons, can be founded on as unjust and oppressive. I think the case very similar to what sometimes occurs in the Justiciary Court, when, after a verdict of guilty has been returned against all the panels at the bar, the prosecutor, on the recommendation of the Court, abstains from moving for sentence against one or more of them. The proceedings had been concluded, and although no conviction had been recorded, the Sheriff-substitute was truly in a position to record a verdict of guilty against all the three, and to award penalties against them all; but as an act of leniency, he deemed it right to suggest to the prosecutor to pass from the case against the accused other than Fitzsimmons. I do not think there is any solid ground for objecting, in these circumstances, to this conviction.

LORD BENHOLME.—My opinion is very much the same as Lord Wood's. Had the minute passing from the complaint against two of the parties been fully written out and subscribed before any other procedure on the 21st December, the case would have presented a different aspect. But it is ascertained that the minute was not signed till after the sentence. The defence then rests entirely on the recommendation of the Sheriff-substitute, which was assented to by the prosecutor, but not yet acted on. But I have no idea that that provisional assent was given, except on the footing that the case was concluded, and that all that remained to be done was the final ascertainment of the position of the parties by the sentence of the Judge.

LORD JUSTICE-CLERK concurred.

The Court adhered, with additional expenses.

No. 197. **XXIII. Dunlop 1310.** 18 July 1861. 2nd Div.—Sheriff of Inverness-shire.

JAMES MACKENZIE, Suspender.—*Millar.*

ALEXANDER DOTT, Respondent.—*Sol.-Gen. Maitland—Rutherfurd.*

Bill—Negotiation—Indorsation—Notice—Statutes 12 *Geo. III. c.* 72, *sect.* 41; 19 *&* 20 *Vict. c.* 60, *sect.* 14.—An inland bill having been protested on a Saturday, *held* that, under the Act 19 & 20 Vict. c. 60, due notice of dishonour was given to the drawer by letter posted so as to reach him on the Monday following. *Held* that the fault of an inexperienced bank clerk, writing by mistake in a wrong place words of

special indorsation on a bill left with the bank blank indorsed, could not affect the rights or liabilities of any of the indorsers.

James Mackenzie, the suspender, was the drawer of the following bill:—"L.90 sterling.—Kingussie, 10th January 1857.—Five months after date pay to me or my order, within the British Linen Co.'s Bank here, the sum of Ninety pounds stg. for value received.

To Mr. John Dott, Jur., Merchant, Kingussie, } 12 June 1857. J. G. N. P.

"J. MACKENZIE.
"JOHN DOTT, Jr.

Indorsed thus—"*Pay the British Linen Company's Bank or order.*
"J. MACKENZIE.

[The words in italic deleted in the original.]

"ALEXR. DOTT."

Alexander Dott sued Mackenzie in the Sheriff-court of Inverness-shire for L.56, 5s., being the amount of the bill, under deduction of L.33, 15s. received from the bankrupt estate of the acceptor. Alexander Dott averred that he had indorsed the bill at the request of both drawer and acceptor, in order to enable them to get it discounted at the branch office of the British Linen Company at Kingussie; that it had been so discounted, and the proceeds paid to Mackenzie; that the bill had been dishonoured; that due intimation of the dishonour of the bill was made to Mackenzie both by the [1311] bank and by the pursuer; and that Mackenzie and John Dott having both failed to retire it, had been called upon to pay it, and had done so, with interest and charges, on 17th October 1857. That John Dott having become bankrupt, he (the pursuer) had been ranked on his estate, and drawn a composition of 7s. 6d. per pound. That when the bill was indorsed by Mackenzie and himself, the words, "Pay the British Linen Company's Bank or order," were not upon it, and that they had been written above instead of below Mackenzie's signature by an oversight of the accountant of the bank.

Mackenzie averred that the bill was drawn for the accommodation of the two Dotts, and that they had received the whole proceeds, and that it had been agreed between the parties that the Dotts should retire the bill; that he had not received notice of dishonour, and that the bill had not been otherwise duly negotiated.

The Sheriff-substitute (Thomson), on 4th July 1859, allowed the parties a proof of their averments, and his interlocutor was affirmed on appeal by the Sheriff (Young).

The defender led no evidence. On considering the proof led by the pursuer, the Sheriff-substitute, on 6th February 1860, decerned in favour of the pursuer, with expenses, and this interlocutor also was adhered to by the Sheriff.

Alexander Dott having caused a charge to be executed on this decree, Mackenzie presented the present note of suspension (which was reported to the Inner-House under the statute), pleading;—(1.) The rights and obligations of parties on the bill sued for depend on the document of debt, and the indorsation by the suspender to the British Linen Company, as shown on the back of the bill, being a special indorsation, the delivery of the bill to the respondent without an indorsement or assignation by them, did not vest the respondent with the title to the bill, or confer on him a right to sue the suspender for the contents. (2.) Even if the words, by which the indorsation to the British Linen Company was rendered special, might, without vitiating the document, have been deleted by the company, the respondent, who had obtained the bill subject to that indorsation, was not entitled, after it came into his hands, to make such a deletion, with the view of conferring upon himself a right of action which he did not acquire when he received the bill from the bank.

The import of the proof led in the Sheriff-court was, that the words "pay the British Linen Company's Bank or order" were not on the bill when it was discounted, but that they were written at the wrong place, by mistake, by the accountant of the bank when the bill arrived at maturity, and were deleted before the action was raised, and that notice of dishonour of the bill was sent by post to Alexander Dott and Mackenzie on the 15th June, the 14th being a Sunday. Alexander Dott deponed that he had not received one farthing of the proceeds of the bill.

It was argued for the suspender;—The bill had not been duly negotiated; the respondent had failed to prove that the dishonour of the bill had been duly intimated

to the suspender. It was proved that the acceptor had refused payment of the bill on Saturday 13th June, and it was not proved that the notice of the dishonour was posted so as to reach the defender on the next lawful day (Monday 15th June). If it was held to be proved that the intimation was posted on the Monday, that was not enough, unless it was posted so as to reach the suspender in ordinary course of post on that day. Though the suspender was post-master, he was in this question to be considered as one of the public. Unless the suspender received notice on the 15th June, he did not receive due notice, because the old rule that notice of dishonour of an inland bill might be given within fourteen days[1] had been **[1312]** abolished, and it was matter of special enactment that notice of dishonour of inland bills should be given the day after the dishonour was known,[2] as was the rule regarding foreign bills.[3]

LORD JUSTICE-CLERK.—I do not think that the suspender has raised any doubt upon either point in this case. In the first place, as regards the matter of indorsation, the difficulty is only apparent, and that appearance of difficulty has been removed by the proof; and it has not been maintained that the proof is either insufficient or incompetent. It appears to me that the result of the proof is that the defender Mackenzie, the drawer of the bill, indorsed it blank, and that Dott, the pursuer, thereafter indorsed it blank. Alexander Dott, the pursuer, was therefore, for the time, the *porteur* of the bill, which stood then blank indorsed by the defender, the drawer of it. And while the pursuer was in that relation to the bill, and to the parties, he himself blank indorsed it; and when he did so, he had all the rights of an onerous indorsee.

The bill was taken to the British Linen Company's Bank at Kingussie to be discounted, and while in the hands of the bank, a bank clerk, not being very well acquainted with business, wrote on the bill the words "Pay the British Linen Company's Bank or order," on such a place with reference to the indorsations of Mackenzie and Dott, as to make it appear as if Mackenzie's indorsation was a special, instead of a blank indorsation,—so that while the name of Dott appears on the bill as an indorser, there would be nothing to show that he was an indorsee. But it is proved, not only that this was done after the blank indorsations were written, but also that it was done by mistake. Is it to be said that that mistake can make any difference in the position of the first and second indorser? The Sheriff-substitute has found no difficulty on that point, and I have none. Dott, the pursuer, was the indorsee in the bill, and could not be ousted of his right by mistake of the clerk of the bank.

As to the next point, it is necessary to observe the state of the law as to notice of dishonour. By the 14th section of the Mercantile Amendment Act, the distinction between foreign bills and inland bills is abolished; and the statute of 12 Geo. III. on that point is in effect repealed, and the fourteen days allowed by that Act for giving notice of dishonour of inland bills is not now open to the parties.

The law as to the notice of dishonour of foreign bills is thus stated by Professor Bell:—"In England, so far as any rule of law appears to be fixed, it would seem that to such of the parties as reside in the same place, the notice must be given at farthest by the expiration of the day following, but not necessarily on the day on which the dishonour is known; and if that be Sunday, it is the same as if the arrival were on a Monday." "That if the proper day of notice be a day of public rest, or of similar sanctity, according to the religion of the person bound to give notice, it will be sufficient on the following day. Probably these rules would be followed in Scotland, as grounded in sound discretion and mercantile usage."—(Bell's Com. 5th ed. vol. i. p. 417.)

In the present case, the dishonour took place on Saturday the 13th June. The 14th was a Sunday, and therefore the notice of dishonour was well given, if it was given on the Monday following. Now it was proved that on Monday the 15th June, a letter was written in the ordinary course of business by the clerk of the bank, and entered in the letter-book of the bank, and was duly sent to the post-office; and one of the clerks depones that he delivered that letter himself—that is to say, he took

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[1] Stat. 12 Geo. III., c. 72, sect. 41.

[2] Stat. 19 and 20 Vict., c. 60, sect. 14.

[3] 1 Bell's Com. p. 417 (5th edit.); Byles on Bills, p. 244; Smith's Mercantile Law, p. 259 (6th edit.); Smith *v.* Murray, 8th July 1859, 2 Campbell's Reports, p. 208.

it to the post-office, and the defender being postmaster, he delivered it into his own premises, but whether he put it into the letter-box or not he does not remember. That is very conclusive and satisfactory evidence of notice of dishonour on the 15th. It might be rebutted by counter evidence, which would destroy its effect. If it could be shown that though the letter had been put into the letter-box, the defender had, for some reason not imputable to his fault, failed to receive it till the next day, the case would be different. But the burden of proving that falls on the defen- [1313] -der; and, on that point, the evidence of the defender is a blank. It is a point on which the defender was a competent witness, and the best witness. And what is the fair presumption from this want of evidence? It is not that he did not receive, but that he did receive it, as it might naturally be expected he would receive a letter delivered at his own premises.

The other Judges concurred.

The Court pronounced this interlocutor:—"Repel the reasons of suspension: Find the letters and charge orderly proceeded, and decern; and find the respondent entitled to expenses, and remit to the Auditor," &c.

No. 199. **XXIII. Dunlop 1314.** 19 July 1861. 1st Div.—Lord Jerviswoode.

JOHN M'MILLAN, Pursuer.—*Macfarlane—Fraser—Dundas Grant.*

The GENERAL ASSEMBLY of the [FREE] CHURCH of SCOTLAND, Defenders.—*Young—A. R. Clark.*

The Rev. Dr. ALEXANDER BEITH and Others, Defenders.—*Sol.-Gen. Maitland—N. C. Campbell.*

Church—Dissenting Establishment—Reduction—Jurisdiction.—Held (*aff.* judgment of Lord Jerviswoode) that sentences of suspension and deposition pronounced by a voluntary religious association against one of its ministers were not such spiritual acts as could not competently be taken cognisance of by the civil court; and that an action of reduction and damages against the General Assembly of the association, and certain individual members, on the allegation that such sentences had been irregularly pronounced, in excess of their powers, and in violation of the conditions which regulated the proceedings of the association amongst themselves, and which were alleged to form a contract amongst the members of the association, was competent;—and inquiry into the constitution and regulations of the body directed.

See *ante*, December 23, 1859, vol. xxii., p. 290.

In the conjoined actions of reduction and damages at the instance of John M'Millan against the Free Church, and the moderator and principal clerk as representing the Assembly, and against Dr. Beith, moderator, Dr. Candlish, and Professor Bannerman as members of the said Assembly, and as individuals, the Court, on 23d December 1859, repelled the defences against satisfying the production, reserving them *quoad ultra*, and remitted to the Lord Ordinary to proceed with the cause.

On 31st January 1860 the following minute was lodged:—

Clark, for the said defenders, stated:—"In obedience to the above interlocutor, and without prejudice to his pleas against the competency of the Court to review the judgments and sentences complained of, that he produced, as per inventory, volume v. of the Records of the General Assembly of the Free Church of Scotland, which contains the judgments and sentences called for. He farther stated that the said volume was the current volume in which the proceedings of the General Assembly of 1859 were in the course of being recorded, and he craved that the production should be held as satisfied, and that the said defenders should be allowed to borrow up and retain the said volume, they undertaking, as they hereby do, to make the same forthcoming whenever the Court should so order on cause shewn by the pursuer."

The production was then held as satisfied, and a record was made up and closed.

The pursuer narrated that he had been appointed parish minister of Ballachulish in

1828, but had seceded in 1843 with the body that called themselves the Free Church of Scotland, and became minister of the Free Church of Cardross. (Cond. 2.) That his emoluments amounted to L.214 a-year, viz., from the sustentation fund L.138; manse valued at L.25; clerkship of the Free Synod of Glasgow and Ayr L.40, besides L.11 derived from other sources. (Cond. 3.) "The ministers and members of the Free Church of Scotland adopted and became bound by certain articles and heads of agreement and association, which were embodied in several writings, viz., 1st, A writing called a 'Claim, Declaration, and Protest anent the encroachments of the Court of Session,' dated May 30, 1842; 2d, The writing called a 'Protest,' which is dated on the back thereof the 18th May 1843; and 3d, A writing called 'an Act of Separation and Deed of Demission,' dated the 23d May 1843, and recorded in the books of Council and Session 8th June 1843. According to these writings, the ministers and members of the Free Church recognised and adhered to the constitution and whole standards of the Church of Scotland, except in so far as they were thereby modified; and the constitution, acts, and standards of the Church of Scotland constitute accordingly the constitution, acts, and standards of the Free Church, **[1315]** and by which the affairs of the latter body are now regulated and managed. The aforesaid three writings, and the said constitution, acts, and standards, formed the contract or constitution under which the ministers, including the pursuer, and the members of the Free Church associated and bound themselves." To which it was answered:—"The writings here mentioned are referred to for their terms. *Quoad ultra* denied, under reference to the defenders' statement." He then narrated (Cond. 5.) what he maintained to be the correct procedure in case of libel, from the structure of the libel to the final deliverance by the General Assembly, concluding his averment thus:—"Such was and is the law and practice of the Established Church of Scotland, the constitution and standards of which have been made part of the contract or constitution of the Free Church as before mentioned, and such also has been the law and practice of the Free Church itself since the disruption." To which the defenders answered:—"This article does not correctly set forth the forms of process in the Free Church, and is denied. Explained that the forms of process do not form any part of the constitution of the church." He then narrated the proceedings in his own case, characterising those connected with his suspension as utterly incompetent, illegal, and in excess of the powers of the General Assembly, and alleging in regard to his disposition, (Cond. 21.) "The said deposition, sentence, or proceeding was altogether lawless and unjust. It was a gross and flagrant violation of the contract or constitution of the Free Church, under which the pursuer held his office and emoluments as Free Church minister at Cardross, as also his foresaid office of clerk to the Synod of Glasgow and Ayr. The said meeting or Assembly by which the pursuer was deposed, acted entirely beyond its competency, and in excess of its powers; and in promoting and bringing about the said deposition as aforesaid, the defenders, the Rev. Drs. Beith, Candlish, and Bannerman, were actuated by malice and ill-will towards the pursuer, and their conduct was altogether without probable or reasonable cause."

The defenders stated that the Free Church and its ministers are supported wholly by the voluntary contributions of the members of the church. (Stat. 3.) "The Free Church of Scotland originated in 1843 by the separation from the Establishment of a large body of the ministers and members thereof, who adhered to the Free Church. They renounced the benefits of the Establishment, but they adhered to and recognised the whole standards and acts of the Established Church, except in so far as these are modified by acts of the General Assembly of the Free Church. They separated from the Establishment on the ground of the civil courts interfering with and (as they believed) encroaching on the jurisdiction of the church in matters spiritual. In consequence of that interference and encroachment, the Assembly of the Established Church, in May 1842, resolved and agreed upon a Claim, Declaration, and Protest, for the purpose, *inter alia*, of stating the nature and extent of the jurisdiction which the church claimed to exercise over its members, and the protest of the church against the encroachments of the civil courts. The said Claim, Declaration, and Protest is referred to for its terms, and is held as repeated *brevitatis causa*. It refers to and adopts the Act of Assembly 1582, whereby it is declared—'That none being received to an ecclesiastical office or benefice seek any way by the civil power to exempt and withdraw themselves from the jurisdiction of the kirk, nor procure, obtain, or use any letters or

charges, either by themselves or any others in their name, or at their command or instance, to impair, hurt, or stay the said jurisdiction, discipline, correction of manners, or punishment of their offences and enormities, nor to make any appellation from the General Assembly to stop the discipline and order of ecclesiastical policy and jurisdiction granted by God's word to the office-bearers within the said kirk, under the pain of excommunication, summarily, [1316] and without any process or admonition, to be pronounced by the judgments of the eldership, by minister or ministers to be appointed by them thereto, how soon it is known that any one of the said heads is transgressed.'" To this the pursuer answered:—"The secession and constitution of the association called the Free Church, and their recognition of the whole standards and acts of the Establishment, as also the subsequent acts of the General Assembly, are admitted under reference to the statement by the pursuer in his revised condescendence. *Quoad ultra* denied." They then referred to the Act of Separation and Deed of Demission, and to the Formula signed by the pursuer on his induction at Cardross, and averred (Stat. 7.) "It is part of the constitution of the Free Church, as a church of Christ, that through its courts it has and shall have exclusive jurisdiction in all questions of discipline, or affecting the propriety of the conduct of its ministers and other office-bearers, and in all matters spiritual, including all matters relating to their admission to office, as well as to their suspension and deprivation therefrom; that the judicatories of the church shall be the exclusive interpreters of its laws; that the office-bearers and members of the church shall, in all such questions, and in all matters spiritual, including as aforesaid, abide by, and submit to the sentences pronounced by the church courts, and that they shall in no case and in no circumstances apply to the civil courts for a review or suspension of such sentences. It is a flagrant breach of the constitution, subversive of the church, a direct contempt of her courts, and a high ecclesiastical offence, for any office-bearer or member of the church to make such an application to the civil courts." (Ans. 7.) "Denied, and reference is made to the condescendence." (Stat. 8.) "Every minister of the Free Church, by the fact of becoming and continuing such minister, voluntarily subjects himself to the jurisdiction of the courts of the said church, in all matters connected with the government and discipline of said church as a church of Christ; and every such minister believes and avows that it is a church of Christ, and that the government and discipline thereof, as such, are vested in its courts, to which accordingly the whole members of the church, including the ministers thereof, are subject. Besides kirk-sessions, which it is unnecessary here to refer to, these courts consist of Presbyteries, Synods, and General Assemblies." To which the pursuer answered:—"Admitted that every minister of the Free Church, as such, becomes subject to the meetings called Presbyteries, Synods, and Assemblies, but under this qualification, that the subjection is only according to the contract or constitution under, and in reference to, which they exist and are bound together, and as explained in the revised condescendence. Admitted also that the Free Church is a church, or congregation of persons, professing the Christian religion. In all other respects denied."

After narrating the proceedings in the courts of the Free Church in regard to the pursuer, their concluding averments were, (Stat. 16.) "The fund referred to by the pursuer, and called 'the Sustentation Fund,' consists entirely of voluntary contributions made by the adherents of the Free Church. It is subscribed annually, and the contributions are made only for such as are in each year ordained and officiating pastors of congregations in connection with the Free Church." (Stat. 17.) "The Free Church manse of Cardross is vested in certain trustees for the use of the minister of the Free Church of Cardross, being a minister authorised or appointed by the body, or united body, of Christians called the Free Church, acting through their courts, conform to trust-deed, which is referred to for its terms, and held as repeated. By that deed it is provided that, whensoever any person holding such authority or appointment, and enjoying the permission and sufferance foresaid, shall, by a sentence of the said body, or united body, of Christians pronounced by one or other of its Presbyteries, Provincial Synods, or by its [1317] General Assembly, or Commission of such Assembly, for the time being, or in any other way or manner in use in such matters for the time, by the said body, or united body, of Christians, be deposed, or suspended from office, or cut off from the said body, or united body, of Christians, or declared no longer a minister thereof, his authority and appointment foresaid shall *ipso facto* cease and determine;

and the said trustees or trustee acting for the time shall not only be no longer bound, but be no longer entitled, to permit or suffer him to use or dwell in said manse, and shall be bound and obliged to debar him therefrom. The deed is referred to for its terms." (Stat. 18.) "The Synod clerk is appointed by the Synod, and, according to the constitution and practice of the Free Church and its courts, that office is held at the pleasure of the Synod. The Synod of Glasgow and Ayr, on 16th June 1858, withdrew from the pursuer the appointment which he had held as their clerk." (Stat. 19.) "The General Assembly of the Free Church is elected in each year, and a moderator is elected for each Assembly. The Assembly is not possessed of any funds or estate, nor do the moderator or clerks of the Assembly hold any funds or estate for behoof of the Assembly."

The pleas of parties were as follows:—

For the pursuer;—1. This action having already been found competent and maintainable, and the defenders' preliminary pleas to the contrary having been repelled, the same, or similar pleas, cannot now be entertained or given any effect to in this Court. 2. The acts of suspension and deposition of the pursuer, along with the relative deliverances or sentences, and whole proceedings now challenged and complained of, being in the circumstances and for the reasons condescended on illegal, and in gross violation of the contract or constitution of the Free Church association, and *ultra vires* of the defenders, the pursuer, who has been most deeply and seriously injured by these acts and proceedings, has a good and sufficient right, title, and interest to have them reduced and set aside as concluded for. 3. The acts and proceedings challenged and complained of, being in the circumstances, and for the reasons condescended on, illegal, and in gross violation of the contract or constitution of the Free Church, and *ultra vires* of the defenders, they ought to be reduced and set aside; *separatim*, at least they ought to be reduced and set aside in so far as they are or can be founded on, as a bar to his obtaining reparation and damages as concluded for. 4. The pursuer having through, and in consequence of, the proceedings challenged and complained of, been most deeply and seriously injured by the defenders in his feelings, character, and patrimonial interests, he is entitled to reparation from the defenders, or some of them, as concluded for. 5. The defence stated to the effect that the acts and proceedings complained of are of a spiritual character, being unfounded, they ought to be repelled; and even though it should be held that such is the character of the defenders' acts, these acts are not thereby exempted from inquiry into their legality in this Court, and they cannot stand if they can be shown to be beyond the powers and duties of the defenders, and in violation of the contract or constitution which they, as well as the pursuer, are bound by. 6. A sentence of punishment by the Free Church against the pursuer merely in respect of his having applied for redress to the supreme court of justice, is a flagrant usurpation of power and gross oppression, against which the pursuer is, according to the common law of the land, entitled to protection. 7. The act charged as an offence against the pursuer, and which formed the ground of his deposition, was not an act for which he could be punished, it being the right of all the lieges, under the law and constitution of the country, to seek protection against alleged wrong by application to a court of justice; and hence the punishment, in respect of such an act, by deprivation of offices existing in virtue and under authority of law, is wholly illegal and incompetent. 8. The allegation by the defenders, to the effect that, by the **[1318]** contract or constitution of the Free Church, any application by the pursuer to the civil court was excluded and debarred, not being true in point of fact, the plea founded thereon ought to be repelled; and, *esto*, that the said allegation were true, any plea founded thereon to the effect stated by the defenders, could not be recognised or given effect to, as the same would on the assumption stated be founded on a *pactum illicitum*, contrary to the law of Scotland. 9. In the circumstances stated, the pursuer is entitled to decree as concluded for; and the defences being unfounded, untenable, and irrelevant, ought to be repelled.

For the General Assembly of the Free Church;—1. The sentences complained of being spiritual acts done in the ordinary course of discipline by a Christian church tolerated and protected by law, it is not competent for the civil court to reduce them, and the actions should therefore be dismissed. 2. The pursuer, by becoming and continuing a minister of the Free Church, and by having voluntarily acknowledged and submitted himself to its authority in spiritual matters as final, cannot maintain the

present actions, which should therefore be dismissed. 3. As the actions, in so far as they conclude for reduction of the sentences complained of, do not relate to any question of civil right, the actions cannot be maintained. 4. No statement sufficient in law to support the conclusion for damages against the defenders, or any of them, is set forth on record. 5. As the sentences complained of were pronounced in the exercise of the authority belonging to the courts of the Free Church, as acknowledged by its members, and to which authority the pursuer had subjected himself, no decree for damages can be pronounced. 6. The General Assembly of the Free Church cannot as such be subjected in damages, nor can any decree for money be pronounced against it in the first action. More particularly, the General Assembly of said Church which met in 1858 cannot as such be subjected in damages, nor can any decree for money be pronounced against it in the first action. 7. The moderator and clerks of the said Assembly are not responsible for the acts and proceedings of the Assembly, and cannot be subjected in damages in respect of such acts and proceedings, as representing the Assembly or otherwise.

For Dr. Beith and others;—1. The sentence complained of being a spiritual act, done in the course of discipline by a Christian church tolerated and protected by law, it is not competent for the civil court to reduce it. 2. In any view, reduction is not a proper legal remedy against the sentence complained of. 3. The pursuer, by becoming and continuing a minister of the Free Church, and by having voluntarily acknowledged and submitted himself to its authority as final in spiritual matters, cannot maintain the present action. 4. As the sentence sought to be reduced does not relate to any question of civil right, but only to a spiritual office, the conclusion for reduction cannot be entertained. 5. The statements in the summons are not sufficient in law to support the conclusion for damages and solatium against the individual defenders, or any of them. 6. The defenders, having acted within the line of their duty and competency as members and office-bearers of the church under whose authority the case fell, are not liable to the pursuer in damages or solatium. 7. The claim for damages and solatium being groundless, the individual defenders are entitled to be assoilzied therefrom.

On 13th November 1860 the Lord Ordinary pronounced the following interlocutor:—"Repels the 1st and 3d pleas in law stated on behalf of the defenders, the General Assembly of the Free Church of Scotland, and the office-bearers thereof, and also the 1st, 2d, and 4th pleas in law stated in defence for the Rev. Dr. Alexander Beith and others, as individuals; and, further, in respect that the parties are not agreed as to the terms of the constitution of the said Free Church of Scotland, and as to other matters of fact material to the issue raised under the record, and the pleas in law, **[1319]** other than those hereby disposed of, appoints the cause to be enrolled, that parties may be heard in regard to the manner and form in which probation is to proceed as to such matters; reserving entire the pleas of parties, excepting in so far as expressly dealt with by the present interlocutor, and reserving also all questions of expenses."[1]

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[1] "NOTE.—In the course of the full discussion which took place before the Lord Ordinary, it was maintained, on the part of the pursuer, that the judgment of the Court, of the 23d December last (1859), repelling the defences, as defences against satisfying the production, was in effect a judgment finally disposing of those pleas stated for the defenders, the object of which was to exclude all review or inquiry by this Court into the merits of the sentences complained of; that, consequently, the defenders could not now repeat these or similar pleas, and that the only appropriate course in the stage at which the cause had now arrived was to order issues to be lodged, with a view to probation on the merits of the conjoined actions.

"On the other hand, the respective defenders pleaded that the reservation, contained in the interlocutor in question, being couched in general terms, warranted them to repeat the defences thereby dealt with, for reconsideration by the Court in connection with the merits of the actions.

"It has appeared to the Lord Ordinary, with reference to the terms of the interlocutor of the Court, that the contention of the defenders is at least technically correct, and that they are not now precluded from stating, nor of course from supporting in argument, those pleas to which the reservation bears reference; and he has, therefore, not hesitated in holding that he was bound to hear, and to deal with, those pleas in defence which, by the prefixed interlocutor, he has now repelled, and which, although

[1320] The defenders reclaimed.

For the General Assembly it was pleaded;—The decrees sought to be [1321]

somewhat altered in phraseology, are in substance embraced within the pleas to which the reservation made by the Court was directly applicable.

"The Lord Ordinary has, however, hesitated whether or not, having so heard counsel, he ought, as argued for the pursuer, now to have remitted the case for immediate probation, or to have pronounced a judgment on those pleas for the defence, which, if sustained, would exclude inquiry into the merits of the proceedings here complained of by the pursuer. He has taken the latter course, prompted mainly by the consideration that, if the argument of the defenders on this branch of the discussion be well founded, and that consequently the proceedings here challenged relate to a matter with the merits of which this Court has no authority to interfere, it would, as he thinks, be inexpedient that the Court should embark in the inquiry now sought, without first determining that question of power.

"The argument addressed to the Lord Ordinary, in support of the pleas in defence now referred to, appears to him to be divisible into two leading branches,—the one relating to the more general question, whether, independent of and separate from the particular provisions of the constitution of the Free Church, the subject-matter of this action be one upon the merits of which this Court can competently enter; and the other to the terms of that constitution, and thus involving the more special consideration, whether or not the pursuer, as bound by the constitution, is barred by its provisions from having recourse to the civil courts for the remedy here sought by him.

"It will be seen from the prefixed interlocutor that the former of these has alone been dealt with by the Lord Ordinary as respects matter of judgment and express finding; and that, as respects the latter, he desiderates further inquiry and information.

"The pleas in law for the defenders, which the Lord Ordinary has repelled, purport to have reference solely to the conclusions of the summonses for reduction of the sentences complained of, and appear to be framed with a view to limit the discussion under them to the competency of these reductive conclusions, apart from the farther and consequent conclusions for damages. But, while the Lord Ordinary can see that this form of pleading has its use, in so far as it tends to bring out prominently the position for which the defenders contend, he is of opinion that he cannot with propriety deal with the actions on this footing, but that he is bound, in judging of the questions before him, to look to the whole conclusions, and to the entire scope and character of these actions as laid, before he can determine whether or not the matters embraced therein be such as the Court is entitled, and therefore bound to entertain.

"Viewing the actions in this light, and laying aside for the moment the specialty founded on by the defenders, that the second action contains no conclusion for damages against certain of the defenders called therein, it appears to the Lord Ordinary that the reductive conclusions of the summonses are not intended, and ought not to be taken as standing alone, and that they must be treated in connection with, and as truly inductive to, the conclusions for pecuniary reparation which follow. So reading the summonses, it is apparent that the pursuer comes into Court under them seeking civil reparation as against certain acts alleged by him to be wrongous. These acts consist of sentences pronounced by the constituted authorities of the religious body of which he is a member. It would seem obvious that, were these sentences to stand unchallenged and unreduced, they might be pleaded in bar of any claim for reparation in respect of wrong alleged to be thereby suffered. The pursuer is thus driven to the necessity of challenging these sentences; and, as it humbly appears to the Lord Ordinary, the defenders have failed to show any sufficient ground of objection to the form of proceeding for so doing, which is here adopted,—and, if a competent, it appears to be equally a convenient course, as the defenders are thereby called upon, and enabled at once to meet the pursuer on his leading ground of action, and to plead in defence, either that the pursuer is personally barred from challenging the sentences in question, or that these are well founded on their merits, and to state all other relevant grounds of defence. How far any decree of reduction which the pursuer may obtain

reduced are those of a voluntary church, to whose authority the pursuer submitted. This was the first time that it had been attempted to set [1322] aside in the civil

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shall reach, is scarcely here the question. All that the Court has now to consider is, whether or not the actions be maintainable to the effect of admitting inquiry. It may be, as remarked by the Lord President in his Lordship's opinion, as reported on the preliminary discussion, that the Court cannot reduce the sentences in question to every effect. But it does not follow that they may not be reducible, to the effect of admitting that reparation which is here sought by the pursuer.

"Holding, then, that the pursuer has taken a competent course, and one truly necessary in point of form towards the assertion of his civil claim for reparation, the next question raised under the pleas in defence, with which the Lord Ordinary is now dealing, is, whether or not these sentences, pronounced by a Christian church tolerated by law, can be thus challenged in a civil court?

"It is said for the defenders that, apart altogether from the matter of agreement or contract, a church of Christ, constitutes, as such, a body known to, and tolerated by, the law; that it has, as a body, a known sphere of action, and that the law must respect and concede effect to the judgments of its authorities, acting within that sphere.

"Taken in one sense, this statement is probably correct. But in another, and, as it appears to the Lord Ordinary, the more important sense, as bearing upon the question which he has here to decide, it is not so. A church, such as that spoken of, which is not established by law, but which exists under the wide toleration which the law affords, can be known to the law only in a general sense, as an association which, though formed for the highest and most sacred purposes for which human beings can combine, owes its existence to, and derives its powers from the assent of its members. Therefore, as respects knowledge of the special constitution of such a church, or of the powers vested in the authorities which act within it, the law is necessarily at fault. The Lord Ordinary is not aware that there is any matter connected with the constitution of such a body which, so long as nothing is done contrary to the general law of the state, those who form the religious body or church may not competently deal with, modify, and regulate, according to their will. And if so, a court of law has no warrant to infer that the authorities of the Free Church of Scotland, or of any similar body, are vested with certain specific and determinate powers within the body, to which, in the event of question, it could, without proof or inquiry, give effect.

"It necessarily follows that when, as here, a member of such a body challenges its acts as contrary to the constitution, the terms of that constitution, as forming the measure of the obligation among the members of the body, must be admitted or proved. To hold otherwise would truly be to deny to such an association that power to regulate its own constitution and to frame its own laws in which its liberty consists.

"The Lord Ordinary is relieved, in dealing with this branch of the question, by the reflection that it does not now for the first time form the subject of judicial consideration. The decision of the Court in the case of Dunbar *v.* Skinner, March 3, 1849, whereby, adhering to the interlocutor of the Lord Ordinary (Ivory), their Lordships repelled the defence of privilege there pleaded by the defender, and sustained the competency of the action, and the jurisdiction of the Court to try the same, appears to the Lord Ordinary to afford a precedent analogous in many points to the present question, and a guide which he could not have disregarded, had it stood alone. The opinion of Lord Fullerton, as reported in that case, deals directly with the question now under consideration; and unless the Lord Ordinary altogether misreads the opinions of their Lordships, who advised the present case when the preliminary defences were under discussion, the views of Lord Fullerton on this point are by them substantially adopted. It is true, no doubt, that, under the reservation made by the Court, this question is, with others, left open for reconsideration. But as the Lord Ordinary has been unable to see that it has been presented to him in circumstances materially different from those in which the Court had to consider it, he would not be warranted to disregard opinions so expressed, and which appear, in his humble judgment, to be consistent with the principles of law, as previously recognised.

"If, then, it be held, as the Lord Ordinary thinks it must be here, that the Court

court the decrees of a voluntary church, and there were here none of those elements which on former occasions gave this Court [1323] power to control church sentences,

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cannot refuse to enter on the inquiry sought by the pursuer, so far as to ascertain and examine the terms of the constitution of the particular church of which the parties are members, and which are here brought into question, the matter next for consideration is, what is the constitution of the Free Church of Scotland, by which, as forming the measure of the rights and obligations of its members, in any question with each other as such, or with the general body, the decision of the present question must be regulated?

"Both parties still appeal to that constitution: The pursuer, with a view to shew that the proceedings of which he complains are not warranted by and are at variance with its provisions; the defenders, for the purpose of proving that the pursuer is thereby precluded from the present appeal to the civil court.

"On this very important branch of the present case, and which was under the consideration of the Court in dealing with the preliminary defences, their Lordships were then desirous of having more full information. But, so far as the Lord Ordinary has been enabled to discover, nothing very material has been since disclosed, or has been brought before him in such a shape as would entitle him at once to deal with it, which was not before the Court on the occasion of the former discussion. The sentences complained of are, it is true, now formally produced; but their terms do not throw such light on the question as to the power to pronounce them as, in the view of the Lord Ordinary, to remove the difficulty. On the other hand, the Lord Ordinary feels himself placed, as regards grounds for present judgment, in a position in some respects more disadvantageous than that of the Inner-House, when the question was argued under the preliminary defences. There, for the purposes of the discussion then raised, probation was renounced; and thus, on the question submitted as regarded matter of fact, the Court was in a position, had it seen fit, to deal with it, so far, as in a concluded case. But, as respects the questions with which the Lord Ordinary has now to deal, neither party has renounced probation; and, although a suggestion was thrown out on the part of the pursuer, in the course of the debate, that, as respected the terms of the constitution of the Church, such a course might be again followed, this was not assented to or adopted on the part of the defenders.

"The Lord Ordinary has, therefore, now to look to the averments of parties, and to the documents founded on or admitted by them. With reference to these, it was pressed in argument on behalf of the defenders, that it clearly appeared *ex facie* of the constitution, even as admitted by the pursuer, that the civil courts were not, on any ground whatever, to interfere with ecclesiastical sentences; and that as such sentences had, before the separation from the Established Church, been set aside by the civil courts, on the ground of an excess of jurisdiction on the part of the church, such ground of challenge should, under the constitution of the Free Church, be entirely excluded, and that no inquiry, even as to the alleged excess of power, should be competent in the courts of law.

"Had the Lord Ordinary seen this admitted, or plainly set forth in the documents which are admitted to form portions of the constitution of the Free Church, his duty here might have been comparatively a simple one. But he cannot say this is so, although he is by no means to be taken as saying that the terms of that constitution, so far as yet before him, excludes such an interpretation, or are incapable of being so explained by extraneous and additional proof of practice under it or otherwise.

"That facts are still unascertained which may have a material bearing upon this question, can scarcely admit of doubt. The contents of certain documents only are set forth, to which the parties appeal, as forming important and essential elements in the constitution of the church. But it is set forth, even by the pursuer, that these documents do, in their own terms, refer to the constitution and standards of the Church of Scotland as heretofore understood, except as modified by the writings specially condescended on, as being imported into, or as having authority within, the Free Church. But the constitution and standards of the Established Church are not fully set forth or admitted. Again, in support of the sentence of deposition complained of, reference is made by the defenders (Stat. 15) to the practice of the church, which is met by a denial on the part of the pursuer.

and to reduce church decrees. There was no civil right necessarily or by any legal tie connected with holding the ministerial office, and there were no lay duties which the ecclesiastical courts of the country undertake to perform, and which made these courts amenable to the civil court.[1] What is asked is reduction *in toto*, and to be restored against the sentence *in integrum*. What other redress the pursuer may have against the continuance of the sentence it is not necessary now to consider. The only question

"It appears, therefore, to the Lord Ordinary, that he would not be justified in proceeding on any merely inferential interpretation of the documents already produced and founded on, while matters of fact bearing on this question, the importance of which cannot now be estimated, thus remain unascertained, and, consequently, that he ought to ensure that proof is exhausted or probation renounced before he shall pronounce any judgment founded on the terms of the constitution of the church. It may be right, however, as indicating the leading difficulty which has as yet presented itself to the Lord Ordinary on this branch of the subject, to explain that, while the documents produced appear to him to contain a distinct and strong protest against what was considered by the parties to them to be acts in excess of jurisdiction on the part of the courts of law in the instances set forth, and further to shew that in the estimation of these parties the civil power had interfered in matters of a character purely ecclesiastical, they do not equally or distinctly provide, in the event of the exercise of powers, on the part of the ecclesiastical authorities of the Free Church itself, in excess of those committed to them under the constitution of the Church, that all remedy at common law against such excess shall be excluded. But if the view be correct which the Lord Ordinary has already taken as to the position which such a church occupies in the eye of the law, it would appear to follow, of necessity, that the exclusion of such common law right, if intended, must be provided in some distinct and unequivocal form. Here the pursuer denies the existence of the immunity claimed for the defenders; and, in the absence of conclusive evidence the other way, the Lord Ordinary, so viewing the matter, can see no alternative but to allow the investigation to proceed.

"In what he has as yet said, the Lord Ordinary has drawn no distinction between the case of the Assembly of the Free Church as a body and that of the individual defenders called under the second action, for whom a separate defence and argument have been submitted. He trusts he is not insensible to the ability and force with which the defence for those parties, alike with that of the leading defenders, has been maintained. But it has appeared to him that, although it be true that the defences for these parties are in some respects special, the questions raised under them can scarcely fail to be affected by the issue of the inquiry as to the terms of the constitution of the Free Church, and that it would consequently be premature to pronounce a judgment now, dealing with the special defences for these parties.

"Again as respects the special defence formerly adverted to, pleaded by the General Assembly of the Free Church and its office-bearers against the second action, that that action in particular cannot be maintained against the body, because the summons under which it commences contains no conclusion for damages against the body, it appears to the Lord Ordinary that the pursuer was warranted in challenging the sentence of deposition with a view to support his claim for reparation against individual members, to call the body by which the sentence was pronounced, so that, if so advised, it might defend its own act when thus impugned. But should this special ground be held insufficient to support the action as against the Assembly and its office-bearers, the Lord Ordinary would still be prepared to hold that, in consistence with the views to which he has already given expression, he would not be warranted in throwing out the action in its present stage, even as respects these defenders.

"The Lord Ordinary must, in conclusion, explain that he has appointed parties to be heard in regard to the matter of probation, because, while on the one hand the pursuer moved for an order for issues, he understood the counsel for the defenders, on the other hand, to object to that motion, and to any investigation by means of jury trial in the present position of the cause. And, as the course of procedure to be now adopted for the ascertainment of the disputed facts must be a matter of material interest to the parties, the Lord Ordinary has thought it right to afford to them an opportunity of being heard thereon, should they so desire."

[1] 1 Bell's Ap., p. 662 (2d Auchterarder case).

now is, whether the pursuer is entitled to that redress which alone he asks? But this Court is not competent to reduce the sentence. The suspension was pronounced by the superior court of a body to which the pursuer belonged, and whose authority he acknowledged. It was pronounced exclusively in reference to spiritual things, and especially in reference to the congregation of Cardross, and with reference to a matter as to which the body who pronounced it were not only entitled but bound to inquire, viz., a matter of church discipline. The pursuer avers that it made an error in point of form, in having pronounced sentence on a matter which was not properly before it, and which by its own form of process it was not competent for it to dispose of, and he proposes to reduce that sentence on the ground that he shall establish as matter of fact that such was the form of process as he avers it to be. Surely that is asking this Court to sit in review of these proceedings, so that if the Assembly were to receive, as good evidence, evidence which was bad, or to reject as bad evidence, evidence which was good, this Court might competently review such proceeding. The principle is the same. Further, an appeal to the civil court was made by the constitution of the Free Church an offence summarily punishable, and the pursuer having signed the document which enacted that, is barred from now repudiating it. Further, there is no civil right here involved. The pursuer does not say who gave him his salary. It was not given him by the Free Church, but by the Sustentation Fund, and by the persons who choose to contribute to that fund. The pursuer only says that he held certain emoluments when he was minister of the Free Church, and in respect of the sentence he has been deprived of them. He also says he has been deprived of the office of clerk. But by whom? By the Synod of Ayr, who conferred it. They may have so done in consequence of the sentence of the supreme **[1324]** tribunal of the church to which the pursuer belongs; but that will not of itself give him right to reduce the sentence of the supreme tribunal. He may bring into the field the proper debtors in any civil obligation, but these are third parties to the General Assembly who pronounced the sentence in conformity with the tenets of the church to which the pursuer belonged. Again, damages cannot be exacted from the General Assembly of 1858. That was a voluntary meeting of a few members of the church. When it was dissolved, the component parts were scattered to the wind. It was not a statutory meeting, and therefore damages might be asked as well against any other meeting.

Membership of the Free Church imposes no obligation of civil right on the one hand, and on the other hand gives no civil right. In a question with the members of the church, it gives what is called church privileges, but nothing more. Any civil right must depend on some collateral right or contract. The office of minister is nothing more than a spiritual status within that particular body, but confers no civil right. A party having that status may have civil rights. But he can only possess them in virtue of a special contract. But if the office of minister does not of itself confer civil right, it cannot be the subject of civil contract, any more than church membership. Undoubtedly within the church itself the office carries rights. But if these rights are not civil they must be vindicated within the church itself; and it is the law and policy of this country that courts of law shall not take cognisance of those rights. The pursuer, however, says he was by contract the minister of the church of Cardross, with certain temporalities as his reward for officiating as minister. But it is impossible to represent this action as an action upon that contract. It is not disputed that a contract between a congregation and minister may be the subject of action in this Court. That is a civil contract. It is not necessarily a spiritual one; and in such an action to vindicate temporalities the Court may have to inquire into the fact whether or not the pursuer was ever deposed from the ministry, and for that purpose to look into and examine the proceedings which are alleged to have deprived him of the status, which, according to the terms of the civil contract, is necessary to the continuance of his civil rights under it. But then that is only for the purpose of ascertaining the civil rights conferred by the contract, and no farther. If on such an inquiry here the Court were to find that the pursuer had been sought to be deprived of his status by the sentence of an Episcopalian bishop, or the General Assembly of the Established Church, the Court would disregard it, if this were an action on civil contract, and for the purpose of vindicating civil rights under it. This is not an action of that sort. It is a reduction of a sentence suspending the pursuer from the office of the holy ministry. Temporalities are only referred to for the purpose of

showing that civil rights under contracts with third parties may be affected by a spiritual sentence. But the thing complained of is a spiritual sentence. It is sought to be set aside because the existence of it may affect these civil rights under contracts with third parties. But that is totally different from an action under a civil contract to enforce a civil right. It does not follow because the loss of civil rights follows the loss of spiritual status that the spiritual status is itself a civil right. *Prima facie* the sentence of the church courts does not touch a civil right. It may possibly affect civil rights founded on civil contract. To the limited extent of inquiring whether it does or does not, the Court may inquire, but no farther.

Now, this is an action of damages against the General Assembly for pronouncing an efficacious sentence in regard to spiritual matters, against which this Court cannot restore the pursuer. It may be assumed that by that sentence the pursuer has been injured, and has suffered damage. He has **[1325]** in consequence lost his situations and their temporalities, but he has not suffered any legal wrong. The General Assembly is not answerable to this Court for withdrawing a mere spiritual status from anybody. There is no question here as to the authority of the Assembly. This is not like the case of Skinner *v.* Dunbar. The authority of the General Assembly is admitted—assuming that it was dealing with a purely spiritual matter, whatever civil consequences might follow. But the Court is now asked to inquire into the regularity of these proceedings. The pursuer here wants damages against the General Assembly because they decided that an appeal was sufficient to bring before them what, if they had reasoned rightly, they could not have looked at; and he makes this matter of contract. It is the necessity of the case that the spiritual body that conferred the status shall be the supreme judge in regard to that matter.

Then, as to the sentence of deposition, it was the pleasure of those who had absolute power in the matter that the pursuer should be deposed, and that is enough. It may be an extravagant view, but the Free Church hold it as an article of their creed that any one who comes to this Court in the way in which this pursuer did shall not remain a member of that church. These are the views of this religious body, and they are not and cannot be matter of contract, and cannot form the subject of reduction for the purpose of giving damages against those who enforced them.

Pleaded for Dr. Beith and others;—It is not said that in the pursuer's citation to attend the General Assembly any of these defenders were concerned. It is not said that Dr. Candlish uttered one word to recommend the motion to the Assembly, or said anything against the character of the pursuer, nor that Dr. Beith did so. The motion was unanimously agreed to. It is not said that there was any conspiracy against the pursuer. The offence with which the pursuer was charged was serious in the Free Church. It was contempt of court, and subversive of the principle on which the Free Church rests, and also of the Act 1582. The kind of procedure referred to in that Act is to be summary and without process, and the sentence is to be the highest which the church can pronounce, viz., excommunication. It was competent for the Assembly to deal with the offence,—no matter whether they decided rightly or wrongly in regard to it. And what is it that is charged against the moderator? It is that he gave effect to the resolution of the Assembly. It is not said that he was present when any of these things were done; but even if it were so averred, then he did nothing but his duty. He was there as the servant of the Assembly. If he only did his duty, then, although it should be averred that he did it maliciously, no damages will lie. All persons in the exercise of judicial functions, are protected when they are wrong, for this reason, that they are made judges and have a discretion committed to them, and it is of no consequence whether the judge derives his authority from the Crown or a Christian community.[1] A reduction was not necessary in order to found an action of damages. It is necessary where the judge derives his authority from the State, because there it is the law of the case. But here that is unnecessary, provided you have the averment that each individual against whom damages are claimed has acted from wilful and corrupt motives. This is truly a discussion on relevancy. This is a question with a dissenting church, whose sentence of deposition does not involve a question of civil right at all.

[1] Moon *v.* Anderson, 25th February 1842, *ante*, vol. iv. p. 786; Hamilton *v.* Anderson, 11th June 1856, *ante*, vol. xviii. p. 1003, H. of L., 1st June 1858, 3 Macqueen, 363; Ferguson *v.* Kinnoul, 1 Bell's Ap., 662.

What is to be the effect of the decree now asked for? Is it to readmit the pursuer to the pulpit of his parish? If not, it is a fallacy to say that the sentence complained of is reduced and set aside. And what [1326] would be the status of the pursuer between the date of the sentence of deposition and of that decree? Would he, during that time, be a minister of the Free Church? Would he be so restored as to make him amenable to the jurisdiction of the Free Church for anything which he may have done during that interval? If the conclusion cannot be carried out in its entirety, a modified view of it cannot be taken. It is said that a claim of damages is a civil matter. But the right to claim damages here must hang on the merits of that deposition, and, therefore, the Court cannot move a step in regard to damages, without judging of that deposition. The damage is merely the remedy. There is here alleged to be a wrong, and that is the foundation of the damage. But all the damage arising from the loss of emoluments is consequential, or rather accidental. It is said that the Court is not asked to consider this deposition on its merits. The pursuer does not undertake to say whether he was innocent or guilty; and the argument proceeds on the footing that, assuming that the pursuer was guilty, that will not justify the deposition, and still in respect thereof, he shall get his damages. The case of the Archbishop of Canterbury *v.* Poole,[1] clearly establishes the distinction between established and voluntary churches, and, without in the least supporting the view of ecclesiastical prerogative, this is a matter with which the civil law does not concern itself. In regard to the question of malice, if the conclusion for damages is not well founded otherwise, the allegation of malice will not make any difference in regard to the present discussion. It can neither change the character nor subject of the present action. There is no averment of anything separate from the proceedings of the General Assembly. Besides, the averment of malice will not make a spiritual act civil.

It was replied;—It was to be kept in mind that the case was only in its initiatory stage, and the Court could know nothing, and were not entitled to know anything of the constitution and the contract by which the pursuer and the defenders became bound and were linked together. The Court could only look at the allegations of the pursuer. The Free Church was nothing more than a private association tolerated by law. Its rules and constitution had yet to be investigated. But both parties appealed to them, and, therefore, in order to do justice between the parties, it was absolutely indispensable that these rules and the constitution should be before the Court. The mode of investigation would be afterwards determined. At present, the only question was, whether or not there was to be any investigation. The argument for the defenders really amounted to this, that because *they* said the sentences complained of were spiritual acts, all investigation was to be excluded; and being spiritual acts, their conduct was unassailable—no matter how flagrant their violation of the contract may have been. That reduced the case to a very limited and simple issue. But, on the other hand, it was to be understood that the pursuer did not ask this Court to consider the merits of the case that was before the Free Church Assembly. That was for that Assembly themselves to deal with. This Court could only interfere for the redress of civil rights. But both parties here admitted there was a contract; but a contract necessarily implied—for it imposed—certain obligations upon the parties to it, and it was incomprehensible how there could be a violation of a contract without a violation of civil rights. At all events, the pursuer averred that, by the violation of it, he had suffered patrimonial wrong, such as this Court could take cognisance of; and he set forth, (1) special damage, inasmuch as a necessary consequence was, that he lost his living as minister of Cardross, and his clerkship to the Synod of Glasgow and Ayr; (2) general damage, consequent upon his degradation, the disgrace to his character, and injury to his feelings.

[1327] On the whole, it was contended,—

"1. The present action is maintained in respect of gross excess of powers and violation of contract on the part of the defenders, whereby the pursuer has suffered loss, injury, and damage in his civil rights and interests, and more especially whereby he has been wounded in his feelings, and disgraced in his character and status, and deprived of his means of living.

"2. The action contains no conclusion that the pursuer should be restored to his

[1] 27th January 1851, 20 Law Journal (Chancery), 113.

position as a minister of the Free Church, and he does not contend that the Court could either admit him into the holy office of the ministry, or suspend him from the office.

"3. The pursuer does not ask the Court to review the sentences or proceedings complained of on the merits, nor does he maintain that the Court could competently do so.

"4. Neither does the pursuer contend that his action should be sustained on the ground of any mere formal irregularity or defect in the proceedings complained of. His contention is that these proceedings must be held to be null and ineffectual in this Court, in respect that they were *ultra vires* of the defenders, a violation of the first principles of justice, and a gross breach of the contract or constitution which was binding alike on them and him.

"5. Finally, the pursuer does not maintain that the contract or constitution under which he and the members of the Free Church associated themselves, is to be held as not binding on him, or that it is in any respect whatever to be disregarded by this Court in dealing with the present action. On the contrary, he unreservedly and unqualifiedly admits that the contract or constitution of the Free Church, in so far as it is not contrary or repugnant to the law of the land, must be given full effect to."[1]

At advising,—

LORD PRESIDENT.—In this case we are to dispose of the reclaiming notes presented against an interlocutor of Lord Jerviswoode, pronounced in the conjoined actions of reduction and damages raised by the Rev. John M'Millan, one of them directed against the General Assembly of the Free Church and certain office-bearers, and the other against the same body, and against certain individual members of the body. The one of these actions—the one I first mentioned—which is directed against the General Assembly of the Free Church and its office-bearers, is an action arising out of a sentence of suspension pronounced by the General Assembly against Mr. M'Millan; and it concludes for the reduction of that sentence, and for damages. The other is an action raised by him against the Free Church Assembly, and against certain individual members, in respect of a sentence of deposition which was pronounced against him; and in that action he seeks to reduce the sentence, and he seeks to obtain damages. The production has been satisfied, and the actions have been conjoined, and a record has been made up in the conjoined actions, and it was upon considering that record and hearing counsel upon it that Lord Jerviswoode pronounced the interlocutor which we are now considering. The Assembly of the Free Church have reclaimed against that interlocutor on certain points, and three of the individuals against whom the second action was directed have also reclaimed.

[1328] In these actions, which were raised by Mr. M'Millan, he alleges that the proceedings by which he was first suspended and afterwards deposed were not warranted by the constitution and rules of the association to which he belongs, and to which the rest of the defenders belong; that the General Assembly of that body had no power to pronounce these sentences, and that they have been productive to him of great loss, injury, and damage; that he has suffered in his character and reputation, and in his patrimonial interests, in consequence of these sentences, and he seeks to have redress here in the form of reduction and damages. He appeals to the Court for redress, and he asks to have the sentences declared null and void, and he asks reparation, involving damages. The defenders deny the accuracy of the pursuer's allegations in point of fact; and, in particular, they deny that the proceedings adopted by the defenders against the

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[1] Ersk. 4, 1, 18; Gibb *v.* Baggot, 1st June 1827, 5 S., 739 (opinion of Lord Gillies); Ferguson *v.* Malcolm, 14th February 1850, *ante*, vol. xii. p. 732; Ferguson *v.* M'Ewen, 11th February 1852, *ante*, vol. xiv. p. 457; Smith *v.* Presbytery of Auchterarder, 11th December 1849, *ante*, vol. xii. p. 296; Dunbar *v.* Presbytery of Auchterarder, 11th December 1849, *ante*, vol. xii. p. 284; Swan *v.* Ranken, Dict. 13,495; Dunn *v.* Craig, 11th March 1824, 2 S. & D., 797; Tait *v.* Patton, 19th Nov. 1825, 4 S., 211; Banks *v.* Smith, 29th June 1837, 9 S., 803; Wilson *v.* M'Lennan, H. of L., 4 W. & S., 398; Cruikshank *v.* Gordon, 10th March 1843, *ante*, vol. v. p. 934; Knox's Works (Wodrow Society), 4, 461; Dauvers *v.* Rivaz, 29 Law Journal (Chancery), p. 685, 24th January 1860.

pursuer were not conformable to the constitution and rules of the association of which he was a member, and to which constitution and rules he had submitted, and had subjected himself. And the defenders further contend that, whether the proceedings were conformable to the constitution and rules of the association, or were in violation of the constitution and rules of the association, the actions cannot be maintained in this Court, and ought to be dismissed.

The pleas with which the Lord Ordinary has dealt are some of those which we have at pp. 29, 30, and 31 of the record. The first plea for the General Assembly is thus expressed:—"The sentences complained of being spiritual acts, done in the ordinary course of discipline, by a Christian church, tolerated and protected by law, it is not competent for the civil court to reduce them, and the action should therefore be dismissed." And the third is, "As the actions, in so far as they conclude for reduction of the sentences complained of, do not relate to any question of civil right, the actions cannot be maintained." The pleas in the other case, in so far as the Lord Ordinary has disposed of them, are substantially the same. These pleas, it will be observed, have reference to the conclusions of reduction only, and to them the interlocutor of the Lord Ordinary now reclaimed against has been confined. There are other pleas applicable to the conclusions for damages. There is the second plea for the General Assembly, that the pursuer, "by becoming and continuing a minister of the Free Church, and having voluntarily acknowledged and submitted himself to its authority in spiritual matters as final, cannot maintain the present action, which should therefore be dismissed." There are also pleas to the same effect in the other case; and there are, further, pleas for the individual defenders, in which they say the statements in the summons are not sufficient to support the conclusions of the action, and that, having acted in the line of their duty, they are not liable. These pleas the Lord Ordinary has not dealt with. The defenders submitted some argument upon them; and upon the whole matter the defenders ask the Court to sustain their pleas and defences, and to dismiss the action. I cannot accede to that demand. I think that the interlocutor of the Lord Ordinary, so far as it goes, is right, and that the reclaiming notes fall to be refused. I shall state briefly the grounds of that opinion.

This question does not arise out of the proceedings of any established judicatory of the land, civil, criminal, or ecclesiastical—out of the proceedings of any institution on which the state has conferred jurisdiction, or to which it has delegated power or authority of any kind. The question arises out of the proceedings of a voluntary association—a numerous body, certainly, of Christians—associated for purposes of religion—forming a religious society called, and perhaps not inappropriately, a church, though we could get no accurate definition of that word; and it is a body of professed Christians, tolerated by law, and enjoying the protection of the law in the expression and promulgation of their religious opinions and doctrines, and in the performance and exercise of their religious rites. That body has a constitution and rules by which the society is governed, and to which its members have voluntarily subjected themselves; and in so far as they have subjected themselves to these rules, and to that constitution, the civil courts will not hold that they are entitled to complain when these rules are observed, unless there is something in them contrary to the public law of the land. It is not necessary, in the view I take of this case at present, to go into the question whether any of these matters that are said on this side to form part of the rules of this association, and on the other not to be part of them, are of that character or not. It has certainly not been made out that they are.

[1329] But this association, formed for that proper and laudable purpose, is an association which has temporalities as well as spiritualities. It has stipends, manses, offices of emolument, to the possession and enjoyment of which certain of its members are eligible. The status which constitutes that eligibility also is a status which commands respect and position in the world, and therefore it may be justly regarded by men of ability and piety as an object of ambition leading to honourable independence, and to the attainment of which, of course, many may be disposed or induced to devote their time and their talents, and their prospects in life. It is, in short, in that view, an honourable profession, and a means of livelihood, although, undoubtedly, piety and religious feeling may point the way to it, and dictate the choice of that profession. But, in proportion to the time, and talent, and character required to obtain that position and that status, and the importance and respectability of that status, and the

benefits derived from it, are the feelings, the poignant feelings, that must be entertained, and the misery and the ruin that must be created by being deprived of that status and of these interests. Now, I do not allude to these things for the purpose of raising any question as to the absolute power of this association to qualify or disqualify any of its members, and thereby either to cement or dissolve the link that unites them to the temporalities to which I have alluded, or their power to strip them of the status and position to which I have referred; but the fact that the existence of such interests depends upon the possession of that status, is, in my opinion, not immaterial with reference to the pleas of parties in this case.

The pursuer avers that, according to the constitution and rules of this association —the General Assembly, which is the body possessing the greatest power according to the rules of that association—the General Assembly, in pronouncing the sentences in question, exceeded its powers, and violated the constitution and rules under which the pursuer placed himself when he was received into the association; and that, by so doing, they subjected him necessarily to loss of emolument, and also subjected him to injury as regards his character and feelings. The parties are at variance as to the constitution and rules of the association. The statements made by them are totally opposed to each other. I do not detain your Lordships by going through the record, but they are absolutely contradictory of each other. What is asserted by the one party is denied by the other, and the facts have not yet been investigated. The Lord Ordinary desires that they should be investigated; and it is plain that, until the facts are investigated, we cannot know whether the constitution and rules of the association have been violated or not, and whether the terms of the contract have or have not been broken by the defenders, to the injury of the pursuer.

I cannot assent to the proposition which was contended for on the part of the defenders, that, whatever may have been the constitution and rules of this association, and however flagrantly they may have been violated by the Assembly, no redress can be obtained in the civil courts. I think that for injury done by gross violation of the contract redress may be given, and in the form in which it is asked—that is to say, in the form of damages; and I think that there is no incompetency, but, on the contrary, that there is expediency in accompanying the claim for damages with a conclusion for reducing the sentence, and having it declared null and void. There is no proposal here to review this sentence on its merits, or to review it at all in any technical or proper sense of that term. The object is to have it declared null, and to have the pursuer reponed and restored against it. That conclusion, I apprehend, must be construed with reference to the objects of the action, and the powers of the court to which it is addressed. The Court may not have the power to repone and restore the pursuer to the ministry, but it does not thence follow that the Court may not repone and restore him to the effect of depriving the sentence of which he complains of any validity as an obstacle to the prosecution of his civil rights and interests, whatever they may be.

It is contended for the defenders that, as the General Assembly had absolute power to deprive him of the status of a minister, they cannot be made responsible for the consequence of the exercise of that power—that, having only exercised a lawful right, the pursuer, albeit he may have suffered damage thereby, has, nevertheless, sustained no legal injury or wrong. It appears to me that this proposition assumes rather too much that the defenders were exercising a lawful right. They **[1330]** were exercising an absolute and uncontrolled power, but the question of right as between them and him is another matter. At all events, I am not disposed to sustain the plea until I know whether that which is called a lawful right was exercised in a lawful manner. A party may, in the exercise of an absolute right, exercise it in an unlawful manner, so as to give a right of redress to the party against whom it is exercised. The pursuer says that this was not exercised in a lawful manner; and that again depends on the provisions of the contract. It was argued that the Court would only inquire into the contract, when it is appealed to in reference to its provisions as to temporalities, in an action laid upon those provisions, and demanding enforcement of them, or complaining of the violation of them, and that there is no such action here at present. There can be no such action here or anywhere, if the plea of the defenders is well founded. Their plea is, that the civil court has no power to interfere at all, and that the contract with them is not with them as to the civil interest of the party—is no contract by them, by which they mean as to the pecuniary advantages which it confers; and that, if the party with whom he

so contracts has violated the contract with them, he must seek redress against that party, and that the Court may disregard the sentence now complained of by these parties. But the case of the pursuer is, that the contract between him and the defenders—as to the compact into which they entered, and by which this association is bound together—the conditions on which he subjected himself to them—have been violated. This is his case; and he says that, by a violation of the contract, and not by the exercise of the powers which he committed to these parties, they have disqualified and disabled him from fulfilling certain duties, and that they have inflicted serious wrong upon him by injuring his character, and destroying his usefulness and his ability in future to do good for himself. Well, I cannot doubt that damages may be claimed, if that is the result of a departure from the agreement between the parties, and a violation of the conditions of the contract which existed between them; and if the injury to his character has flowed directly from that violation of the contract, it is no answer to say that there was an absolute power to pronounce this sentence in another way by which he could get no redress, or that there is an absolute power to keep him excluded from the functions of the ministry; even that, I do not think, is any answer to the plea maintained by the pursuer. It always comes back to this, has the pursuer sustained injury by the act of the defenders in violation of the agreement which they entered into with him? Has that injury accrued to him in violation of the agreement? It may be that there was no violation of the agreement. It may be that the pursuer and other members of this association have submitted themselves absolutely to the uncontrolled power, or it may be the caprice, of other members of the association. It may be, as was contended on the part of the defenders, that they are entitled, without being called in question, to do what they like with any of the members—that is to say, that their rules are in no way binding upon themselves—they may be binding on the individual members, but not binding on the body; that they are no protection to the individual members composing the association. If that shall be made out as part of the constitution of this body—if they are entitled at any time, as was the case put—if the General Assembly may any morning draw any ten names from the ballot-box and declare them to be no longer ministers of the body—for that was the legitimate consequence fairly admitted by the defenders—if that be part of the rules and constitution of this association, then this pursuer cannot obtain the redress which he asks, because he has submitted himself to such conditions and such control. But until it is established that such is the contract—until we see what the contract is—until the pursuer shows that the contract has been violated—we cannot take for granted either that it has or has not been violated. We must take the averments as they are made at present; and when we see the results of the investigation, which is what the Lord Ordinary has desired to inquire into, we shall then know how the case is to be further dealt with. If they could do that without violating their compact—if they could do all that is contended for—I think there would probably be an end of this case, unless there was something in it that was contrary to morality and propriety. One can fancy in the contract of a body of this kind something which the law will not recognise at all. I do not say there is anything of the kind here. If there were, it might still be open to the pursuer to obtain [1331] redress. But I do not say whether that is so here. It is not necessary to go into that question now.

Then there were certain pleas which were not dealt with by the Lord Ordinary. These pleas are directed more against the conclusion on the matter of damages. But these also, I think, cannot be dealt with satisfactorily until the constitution of this body is ascertained. Indeed, they are pointedly rested on the terms of the constitution by the defenders themselves. Then, again, in regard to the individual defenders, for whom it was pleaded that there is no allegation against them of malice and want of probable cause, and that they are not responsible for the acts of the Assembly, because they were only individual members of it, I am not much moved by that plea at this stage of the case. I want to see what are the facts of the case. It may be a question raised in an issue, if issues are to be adjusted; or if the facts are to be investigated without an issue, there may be a question raised as to the degree of privilege that any of these parties may have, but I do not think this is the stage for it. In short, I think that, so far as the Lord Ordinary has gone, he has gone in the right direction, and that his interlocutor should be adhered to, and that the case should go back to him in order that the facts may be further ascertained.

LORD IVORY.—I have on more than one occasion, in dealing with this case, called the attention of the Court to a peculiarity in the procedure which I deem of very great importance. It has never yet been thought right by the Court to deal with that matter, but as it appears to me to enter deeply into the validity and regularity of the process, I feel it to be my duty, although perhaps at the risk of the imputation of being a little obstinate in my own view with reference to it, to bring it before your Lordships' notice. The whole pleadings in this case for the defenders, and the instance of the action on the part of the pursuer, are directed for or against the Free Church of Scotland and its Assembly. I cannot look back to the case in the Episcopalian Church of Mr. Abernethy Drummond,[1] who brought an action in regard to getting some obligation with reference to a manse, &c., carried out, in the name of a bishop of the Episcopalian Church, without being satisfied that the Free Church, under the designation which has been employed against them, and under which they are pleading, is not a *nomen juris* which the Court can or ought to sustain. In Mr. Drummond's case, the Court *ex proprio motu* took the objection that in the name of a bishop of the Episcopalian Church (there are certain statutes which have since rendered that designation less objectionable that it was then), he had no *persona standi*, and they directed the designation to be struck out. Fortunately, there were other matters within the cause that did not allow that to destroy the action, and it went on; but here we have not yet dealt with the matter at all, and I feel it my duty to bring it before your Lordships' notice, it appearing to myself that the Free Church has no *persona standi*, that they ought not to be allowed to plead under that name, and that the Court should give them no recognition whatever as an established body under that designation. Having said this, I now leave the remark to receive such fate as it deserves.

With reference to the merits of the case, I may just say, almost in a single word, that I look upon the matter, as it is now before the Court—upon the preliminary and incidental point, which alone the Lord Ordinary has dealt with—as standing very much in the same position in which it stood when, before the production was satisfied, we had occasion to investigate the same pleas that have since been more fully argued, and to dispose of that question of the liability of the defenders to satisfy the production upon the grounds which have again been maintained for them against the jurisdiction and the competency of the Court to deal with this case. I have not seen occasion to alter, in any respect, the opinion which I then gave. It appeared to me that the question of what was the constitution of this Church lay at the bottom of the whole of that matter, and that it was impossible, with any satisfaction or safety, to deal with the question which was raised then, or with the question which is raised now, whilst that question of the constitution of this body was not completely settled—that in short we could not **[1332]** know what we were to address ourselves to, until we had the facts clearly ascertained in regard to that matter.

Perhaps with that observation I might content myself with saying that I adhere substantially to the grounds and reasoning on which your Lordship has arrived at the conclusion that this interlocutor ought to be adhered to. But I will not so deal with it in a question of this importance, but will, as briefly as I can, state the grounds which appear to me to justify that result. Before proceeding to do so, I may take the liberty of expressing my surprise that this question has given rise to so much feeling and temper, as it is impossible to live in this country without perceiving that it has been attended with, in the different sections of the public mind. It seems to me an absolute delusion on the part of the members of the Free Church to speak of the interference of this Court in these proceedings as implying in the most distant degree an interference with the freedom of religious opinion or religious status in congregations or other combined bodies—as interfering in the slightest degree with their full and perfect freedom of action and toleration. The Free Church on this question is in precisely the same predicament with any other dissenting church, and it is not necessary that that church should be a Christian church in order to entitle them to the freedom and toleration which the law of this country gives to all bodies associated in such a manner, so long as they do not interfere with or infringe the public law of the land. It is a very broad question, and it is impossible to approach it without seeing the necessity and the

[1] 6th July 1809, F.C.

propriety of watching over the principles upon which such questions are to be dealt with, because justice demands that the same course shall be followed, and the same judgment pronounced, in regard to the rights of other tolerated bodies as in regard to the rights of this tolerated Free Church.

Now, with reference to one and to all, I beg, for my own part, that I be distinctly understood as recognising the fullest right in the Free Church, and other dissenting churches, to deal with their own constitution. They are free within themselves to frame their constitution, and to set forth its principles and its limits, and to point out the duties and the course of conduct to be expected within the association. They may hold their own opinions, they may settle their own doctrines, they may regulate their discipline, they may regulate the appointment and the deposition of their officers. They may make what nobody will object to call their own judicatories, and in certain respects they are entitled also to settle and regulate their own forms of proceeding. All this they may do in the most complete manner; and when they have done so, if they will only add the virtue of remaining together, and not differing and contending with each other, they have the power of doing everything which any person whatever ought to wish in a free land to be entitled to do. They may also pronounce their sentences and decrees, and if they pronounce them within the powers given by the constitution, no man will interfere with them or say that they have done wrong. But if they are not conforming to the constitution,—if they act against the powers which they have vested in their judicatories,—if their sentences are pronounced by those who are not judicatories to that effect, it is a very different affair. Then what has been so done will have been done against law, will have been done so far against law that this Court must be entitled to interfere, and it will do so, because such proceedings will be an infringement and violation of the constitution, without which they cannot exist as a body at all. The moment they proceed beyond the powers vested in their officers, whoever these officers may be, within their courts, whatever may be the decrees of subordination and succession of the tribunals, the moment they go beyond the constitution they are acting *ultra vires*, they are acting in breach of their own solemn compact, and the proceedings which they thus perform may be quashed, and declared to be void.

Their sentences and decrees in such a case will not be reviewed upon their merits. That has never been hinted at. It has never been attempted; it would be beyond the jurisdiction of this Court or of any other Court to interfere as to that. But, apart from that, the sentence may be bad for reasons of inherent invalidity, as well as for unsoundness in the reasonings upon which it is propounded. But if the parties have power by the constitution to deal with the question, and if they deal with it in the manner pointed out by their constitution, then, although they may err in the conclusions to which they may come, although they may err in the **[1333]** amount of proof with which they are satisfied, or although, in any other manner, they may pronounce an erroneous and unsatisfactory judgment, being within their power, being within that which the defender in the case has submitted to bear at their hands, it will not be interfered with.

There has, in the course of this discussion, been a remark oftentimes repeated, that in regard to matter of process every judicatory is entitled to enforce its own rules, and that what they do in that respect is not reviewable at all. That is partly true, and partly not so. The case of Lockhart is a clear case. That was a case within the Established Church, and it must be kept in mind that the Established Church and its judicatories form a recognised institution of the land—that the judicatories are of the description which exercise jurisdiction by authority of the country—that their courts are supreme and independent courts in ecclesiastical matters—that they are just as much supreme as the Justiciary Court is in regard to criminal questions, or this Court in regard to civil questions,—and, therefore, as every independent judicatory has inherent within itself the power of doing all which is necessary to follow out its proper jurisdiction, they may make their own forms of proceeding, and no other court can interfere, because no other court is more independent than themselves, and while they are proceeding within their proper functions, they are as supreme as this Court. But there is this important distinction in the present case, and I do not think it should be overlooked—it is too much overlooked, I am afraid, by these defenders—that even in the matter of process they have no jurisdiction. In the proper sense of the term

they have none, but in the matter of process they have no power, and no jurisdiction, and no right to make rules, and these rules, when made, have no other authority than by the constitution consented to by all the parties, and made effectual in consequence of the agreement of the individuals composing that body. It is that, that is the measure of the form of process; and if, in the body of the constitution, it is expressed in distinct and intelligible terms what are the forms of process, then the members of the Church are entitled to have these forms followed out as much in regard to process as in regard to anything else. The measure of everything in a voluntary society is this, that the parties have gone throughout under the permission of the law, and embodied themselves together on certain conditions; and, with the form of proceedings, or the nature of the judicatories, or the course of appeal and review, or any other thing, definitively set down in that constitution, anything which goes against what is so set down is an infringement of the compact, is a breach of the contract, and it is not a thing that can be defended on the *sic volo sic jubeo* of the body. I have thought it right to say so much, because I think it is a sad thing to see so much misunderstanding and misapprehension, if not something stronger, existing so widely and spreading so far on a question of this sort, where there should have been a more Christian temper manifested.

I have done with that part of my observations, and I now come to the matter of spiritualities. That word has been vaguely, indefinitely, and I think somewhat loosely employed. I am not sure that the parties have assigned any very definite meaning to it in various portions of the discussion that has taken place. Sometimes, and more in the beginning of the cause than in the more recent parts of it, it was mixed up with the power of the keys, with the notion of a Divine Head, and with the tribunals being only answerable under extreme doctrines, which we have nothing to do with in the present legal question. They may hold all these opinions, and give effect to them within their own body. An Erastian body will have other notions on the subject—they may have a different constitution, and they will give effect to their views within their body. The Catholic Church will, in like manner, have different notions upon all of these subjects, and they will be entitled to follow out within themselves those notions of theirs just as much as the other bodies. Unitarians, who are not a Christian church at all, or Mussulmans, if there be any such persuasion here, may equally do the same. And Jews—for we have Synagogues amongst us here—and others, have the same freedom of dealing with their own body on their own agreed-on constitution. Well, but that is not the kind of spiritualities which this defence considers. The spiritualities in this defence are the spiritualities with which we have been all along familiar in the Establishment in competing presentations, &c., where the spiritualities might go one way, and the temporalities might go another. That we were familiar with; but the spiritualities **[1334]** in that sense do not point at any doctrinal matter. It is the holy office conferred, and the privileges connected with it, as against the pounds, shillings, and pence, and other things of that kind on the other side. There is nothing in doctrine, there is nothing attaching to Christian people, there is nothing peculiar to any one church more than another in regard to that, and least of all with that with which this matter was connected in the earlier portions of this discussion. I put aside, therefore, the matter of the spiritualities as a matter which I do not see my way to a very distinct appreciation of, in its bearing upon the present question.

The present question is a question which applies simply to the interpretation and enforcement of a constitution entered into by the different members of this body of the Free Church, and nothing else. It surely cannot be said that after framing this constitution it was to be of no use, that it was to have no binding qualities, that the parties who took so much trouble to frame it, and bring it to a bearing, were no sooner to come to act under it than they were to fly in the face of it. That nobody has said—nobody could be so extravagant as to say. But, therefore, it is necessary to see what is the constitution, what it permitted, what it ordered, and what would be an infringement or violation of it,—it being agreed that there is such a constitution, although the parties cannot agree on the other equally important point, what it is. But its existence not being disputed, there surely must be some way of arriving at what is within the constitution. What is within the constitution is lawful. What is without it is unlawful in regard to that question. And who is to ascertain what is lawful and what is unlawful with reference to the constitution or bond of union entered

into by a private voluntary body or association? I can make no distinction between one private voluntary union or association in regard to that question and another. It may be an association for civil purposes, or it may be an association for ecclesiastical purposes; but equally, if there be a constitution which the parties have agreed upon, and if that constitution be the measure of their mutual and respective rights, it is the civil court which must say what the contract is between these parties; and that is the basis of the jurisdiction of this Court in the case.

As to the extent of the Court's powers in exercising jurisdiction in regard to such a constitution, it is perfectly clear that this Court is not to touch matters of doctrine, is not to review sentences of discipline, is not to depose clergymen or suspend them. Nobody would dream of that. This Court is not to appoint, any more than it is to depose, ministers. But it is to consider whether the constitution has been acted upon or not, who has gone beyond it, and, in regard to its violation, who has been affected by that violation, if a violation has taken place. That this Court is entitled to do, that this Court is bound to do, and it is bound to do it to the effect of setting aside and quashing what is inconsistent with the constitution, leaving the parties to find their other remedies—their spiritual remedies as they are called—within the body itself, when the body has been put right as to what the constitution really is.

Now, this is not an invasion of the freedom of the church. This is not a violation of the privileges belonging to a church well constituted, as this truly is. It is a defence of the church, inasmuch as it is a defence and protection of its constitution. A constitution under which no party knows what is to happen to him to-morrow, who is to sit over him in judgment, and what is to become both of his spiritual and temporal rights, is no constitution at all. But the constitution properly constituted, thoroughly obeyed, giving rights to all and sundry, in their respective provinces, regulated by their own several consents—that is a different matter; and when the Court steps forward to defend the constitution as thus agreed to, they are serving the interests, and not at all encroaching upon the rights of the body whose constitution has been submitted to them for discussion and determination.

The defence with which the Lord Ordinary has dealt, is substantially a defence which denies the power of the Court to entertain this action to any effect. It is a defence which insists on the dismissal of the action; it is a denial of the power of the Court to carry the constitution of the body itself into effect. Now, is it possible to deal with any such matter in any other way than the Lord Ordinary has done? We cannot very well say whether this action may ultimately stand or fall. We cannot at all say, till we have ascertained what is the constitution, what is the **[1335]** matter we are dealing with, what are the rights of parties under it, &c. The jurisdiction and the power of the Court in such a question does not arise either from spiritualities or temporalities. It arises in this situation: that there is a contract entered into between two parties, and that the parties differ as to what that contract is. In the question which alleges there has been a breach of the contract, the Court's jurisdiction is based on the necessity of deciding between these two parties. I think that this preliminary question is a question which more or less approaches to the merits, if it does not somewhat mix up with them. And I confess, for my own part, I would have been better pleased to-day, if, in place of being asked to deal with that question in its preliminary shape, the interlocutor had gone further than it does; and, without dealing with that question at present,—the judgment of which may perhaps more or less hamper the shape of the case hereafter, when it receives its shape (for until then it has no shape) from the construction of the constitution—that we should have allowed before answer a general proof as to what was the constitution, and then taken, upon the proof being reported, both the effect of that proof and those preliminary questions as bearing upon the final result. If the constitution is proved as the pursuer alleges it, the result will be one thing. If the constitution is proved as the defenders maintain it, the result may be quite the opposite way. And, according as it is the one or the other, it may be necessary or it may not, to deal with that which has here been argued and disposed of as preliminary. I should like to have disposed of that matter when I saw whether it was in the case or not, for the Court may not have jurisdiction if the parties have been proceeding within their powers. The Court will have jurisdiction if they have been infringing the contract; and I see no good to arise from the separation, but I mention that, by-the-by, for from the course the case has taken, and

from your Lordships being all agreed, as I understand, that that was the proper course in which to continue, I am tied up to deal with the preliminary question as it is presented, and if I am to decide now, I agree with your Lordship (and, as I understand, with the opinions of the rest of my brethren), that it is impossible to dismiss the action now; and so far, therefore, I concur with your Lordship's judgment.

LORD CURRIEHILL.—By the interlocutor which we are now reviewing, the Lord Ordinary, while he has appointed the question on the merits of these two conjoined actions to be put in train for ascertaining the truth as to the disputed matters of fact, has repelled certain pleas which the defenders have stated, in order to preclude such an investigation, and we have now to determine whether or not, in virtue of these preliminary defences, or any of them, the actions ought to be dismissed without such an inquiry. In order to determine this question, we must see what is the precise nature of these two actions, and of these pleas; and I think this will be most satisfactorily done by considering the two actions separately. The first of them is an action of reduction and damages at the instance of the pursuer, a minister of the Free Church of Scotland, against the General Assembly of that body of the year 1858. What the pursuer complains of in that action is, that the defenders, on 24th May 1858, pronounced a sentence whereby they, *inter alia*, found him guilty of conduct of a scandalous description therein set forth, in reference to a married woman; and also, in consequence of that alleged offence, suspended him from the office of the ministry *sine die*, and declared the charge of his congregation vacant. And he alleges that, in consequence of that proceeding, he was injured, not only in his feelings and reputation, but also in his patrimonial interests, inasmuch as he was thereby exposed to the loss of his emoluments as a minister of the Free Church, and as clerk of one of the Synods, to the extent of L.214 per annum. The main ground upon which the pursuer challenges that proceeding is, that the defenders had not power to pronounce that sentence. In support of that ground of action he sets forth, and offers to prove, allegations to the effect—That the defenders had no powers excepting those intrusted to them by the contract, by which the voluntary association denominated the Free Church of Scotland had been constituted; that, according to a condition of that constitution, the defenders, who formed the General Assembly of that association, had no power to adjudicate in any offence against a minister of the body unless he had been served with a libel before the Presbytery to which he belongs, setting forth the nature and grounds of the charge, and unless that charge should be regularly brought be- **[1336]** -fore the General Assembly by complaint or appeal; that the charge, however, which was made against the defender, so far as it relates to the particular scandal just referred to, was never brought before them in conformity with that condition of the constitution; that, on the contrary, although in a libel which had been served upon him in the Presbytery to which he belonged, such a charge, along with others, had been made against him, the charge in question had been found to be not proven, and that finding not having been complained of by any party, had become final in the Presbytery; that, although certain other offences had been included in the same libel, and the Presbytery found them to be proven to some extent, and these other matters had been submitted to the review, first of the Synod of the bounds, and thereafter to the defenders as the General Assembly, yet that part of the libel of which he had been acquitted by the sentence of the Presbytery itself, had never been carried in any way either to the Synod, or to the General Assembly; and that, therefore, the latter body acted in excess of their power, and in contravention of the constitution of the association, when they pronounced sentence against him on that charge. The pursuer alleges that the defenders contravened the conditions of that constitution in this other respect, that they pronounced that sentence against him without his being heard or allowed an opportunity of being heard in his defence. Thus, the import of the pursuer's allegations as to the sentence of which he complains is, that it is not within the power of the defenders to pronounce it, and that, consequently, it never had any validity, but was essentially and *ab initio* a nullity. The next thing to be attended to is the nature of the remedy for which the pursuer is suing by the present action. It is limited to two things—first, he concludes for a decree reducing and declaring to be null and void the sentence complained of, and reponing him against the same *in integrum;* and, secondly, he concludes for a decree for a sum of money, as reparation for the loss and damage alleged to have been sustained by him in the premises. It appears to me that two fallacies have pervaded the argument of the

defenders as to the nature of the remedies to which these conclusions are limited. One of these is an assumption that these conclusions include also the question, whether or not the pursuer was guilty or innocent of the offence imputed to him as above mentioned? Had there been a conclusion to that effect in the summons, it would, in my opinion, have been incompetent. But no such thing is sought in this action; and even supposing that decree were ultimately to be pronounced in terms of the actual conclusions of this action, that decree would not affect the question of the pursuer's guilt or innocence. The other erroneous assumption of the defenders to which I have referred is, that, by the conclusion for reduction of the sentence and for restoring the pursuer against it *in integrum*, the pursuer calls upon this Court to replace him in an office from which he has been removed, and which he does not at present hold. As I read the summons, this is not the case. The fallacy upon which this assumption rests consists in overlooking a broad distinction which exists between two different kinds of actions of reduction. Those of the one class are in effect declaratory actions. Their object is merely to have it declared by the judgment of the Court that what is complained of never has had any validity or effect, and has been *ab initio* null and void. Reductions of the other class have the effect of creating a nullity in deeds or proceedings which are effectual so long as they are not rescinded. As examples of rescissory actions of the former class, reference may be made to the cases of reduction of deeds granted by persons in a state of insanity or of pupillarity, and of decrees-arbitral pronounced *ultra vires compromissi*. As examples of rescissory actions of the other class, reference may be made to reductions of deeds granted by minors beyond the years of pupillarity on the ground of minority and lesion, or of deeds granted on death-bed. The distinction between the two classes of reduction is also illustrated by those which are instituted for rescinding decrees of inferior courts. When the ground of reduction is only that the inferior court has exceeded its powers, the effect of the decree of reduction is merely to declare judicially the inherent nullity of the decree of the inferior court, and to leave entire the merits of the matter on which that court may have so incompetently adjudicated; and, accordingly, such an action of reduction is competent in this Court, even although the question on the merits be excluded from its jurisdiction. But if, in such a case, the summons should also conclude that this Court should pronounce a judgment **[1337]** on the merits of the question itself, that conclusion would be dismissed as incompetent. In the present case, what is sued for is merely a decree reducing the proceeding complained of as having been *ab initio* a nullity, and not a judgment on the merits of that proceeding. The remedy, therefore, which the pursuer is seeking by this action is not of the nature and import which has been assumed by the defenders in their argument, but is limited to a demand for having the sentence reduced, as having been *ab initio* null for want of power in the defenders to pronounce it, and for reparation for loss and damage alleged to have been sustained by the pursuer in consequence of its having been so pronounced. What, then, are the defences which are pleaded against this action? The defenders deny the more important of the allegations of the pursuer as to the constitution of the church; and make counter allegations that, by that constitution, the ministers and the members individually of the association bound themselves to submit implicitly to the sentences of the defenders, whatever these might be, and not to seek redress from a civil court, however much the defenders might exceed the power or contravene the conditions of their constitution. If the defenders aver, as I understand they do, that by their constitution the ministers and members individually of the Free Church have intrusted such arbitrary power to them, I am not prepared to hold that these averments would be irrelevant as a defence against this action. If, by the constitution of the Free Church, its members and ministers individually have thought it right or proper to surrender their right to challenge in a civil court any acts of their governing bodies, even although these should be contraventions of the condition of that constitution itself, I do not see why they should not be bound by that agreement. In the record the pursuer pleads that such a condition would be *pactum illicitum*. But I do not see that there would be anything *contra bonos mores* in such an agreement, even if its members had agreed to a condition that their General Assembly should, in the exercise of an unlimited discretion, and without assigning any reason for their conduct, be empowered to deprive any of their office-bearers of their offices, or even to expel

from the association. I do not think there would be anything unlawful in such a contract. But as the allegations of the defenders are denied by the pursuer, I think that the Lord Ordinary is quite right to institute an inquiry into the truth of these disputed matters. But while the defenders admit in their argument in this case that the constitution of their association is not only the source, but likewise the measure, of their powers over their members and ministers, they notwithstanding maintain that, although they should transgress the powers so committed to them in their proceedings against any of their members or ministers, the parties so wronged would not be entitled to have the nullity of the proceedings adjudged by this Court. The grounds upon which they maintain this doctrine in the present action are embodied in two of their preliminary pleas now under consideration. They are—first, that the proceedings are "spiritual acts done in the ordinary course of discipline of a Christian church, tolerated and protected by law;" and, secondly, that "the actions, so far as they conclude for reduction of the sentences complained of, do not relate to any question of civil right." These pleas raise a question of vast importance to all the individual members and office-bearers, not only of the Free Church, but also of all the religious associations in Scotland; for, while the questions raised upon the conditions of the constitution of the Free Church would affect the rights of the ministers and members of its own communion, the far wider question raised by those preliminary pleas would affect the rights of the ministers and members of all the religious associations in Scotland. That is a question between the members and office-bearers individually of these associations, on the one hand; and the bodies to whom they intrust the supreme power of governing them, on the other. And the question is, whether the former can have no redress whatever against the proceedings of the latter, however unlawful and unconstitutional these may be; for, if these pleas be well founded, no limits nor conditions which, in framing their constitutions, the members of such associations may think fit to place upon the powers of the bodies to whom they intrust the supreme power of managing their spiritual affairs would be practically available to them; because, in such cases, however much the proceedings of such ruling bodies might be beyond the power entrusted to them by their constituents, no redress could be obtained by the latter either *extra judicially*—because there **[1338]** would be no other tribunal within the association itself to whom application for relief could be made—or *judicially*, because the proceedings would, according to the plea, be spiritual acts, and would not relate to matters of civil right. The defenders avow that the plea they are now urging might lead to this practical result, their counsel having admitted, in answer to a question from your Lordship, that even if they were to exceed their powers by deposing a certain number of ministers by ballot, and without any cause, the aggrieved parties could have no redress. Is this, then, truly the predicament in which the ministers and members of the religious communions in Scotland are placed, in virtue of the operation of such principles as are embodied in these two preliminary defences?—The plea that a reduction of such a proceeding as is the subject of complaint in this case is not competent in this Court, in respect of its being a spiritual act done in the ordinary course of discipline by a Christian church, might be well founded if the defenders were found to be in that predicament in which, by the constitution of their association, they were empowered to perform what they call spiritual acts. For example, this might be the case if the alleged scandalous conduct imputed to the pursuer had been brought under their cognisance in the manner prescribed by the constitution of the Free Church, and if they had heard him in his defence against the accusation before pronouncing the sentence complained of. If it should be found in the investigation appointed by the Lord Ordinary's interlocutor that this was truly the case, that sentence would not be challengeable in this Court, on the ground of its being erroneous on its merits. But the pursuer alleges, and offers to prove, that the accusation of his having been guilty of the particular offence above referred to was never brought under the cognisance of the defenders in the manner prescribed by that constitution; that, on the contrary, in virtue of the conditions of that constitution, it was excluded from their cognisance by a final sentence of the Presbytery; and that, in contravention also of another condition of the constitution, they pronounced that sentence without giving him an opportunity of being heard in his defence. And as, in the face of the pursuer's offer to prove these allegations, the defenders call upon us to dismiss the action on preliminary pleas, we are bound, in considering

such pleas, to assume in the meantime the truth of the allegations which the pursuer makes in support of his action. And, assuming the truth of these allegations, then the conditions under which alone the defenders have any power of performing even spiritual acts—such as suspending or deposing their ministers—did not exist. Dealing with the case on this footing, as we are bound to do in the present stage of the proceedings, the sentence pronounced by them in the matter was *ultra vires* of the defenders, and the party aggrieved is entitled to have the nullity of the sentence judicially declared by the Court. But still no action is competent in this Court in reference to that sentence, except for the purpose of setting it aside as a nullity, and awarding indemnification for such damage, if any, as the proceeding may have caused to the pursuer. The fallacy of the reasoning of the defenders on this point consists in their overlooking the broad distinction already referred to between an action of reduction of such a sentence, on the ground of its having been essentially and *ab initio* a nullity, and a reduction on the ground of the sentence being erroneous on its merits. This is a distinction which has always been fully recognised as to proceedings of all kinds, whether civil or ecclesiastical. Even when the General Assembly of the Church of Scotland has pronounced a sentence of deposition in circumstances in which it had not power to do so, this Court, in several cases, has been held to have jurisdiction to reduce the sentence as being *ultra vires* of the Assembly, even although it is one of the constituted tribunals of the country. In one of those cases (Cruikshank *v.* Gordon, 10th March 1843, D. 909) the principle was thus stated by Lord Medwyn:—"That, even where the exercise of their jurisdiction is confined within the province of the church, if the established form of procedure has not been attended to, and injustice has been the consequence, there, too, the civil court must review the proceedings. But, as the cause is essentially ecclesiastical, and the issue the exercise of a spiritual power, the civil court has no jurisdiction in the matter, and does not review the question on its merits, but only considers the procedure to see if the ecclesiastical court has followed the course which the law has prescribed as essential to procure a probability of justice. The civil court, it is usually said, in this case does not judge the cause, but the process." And in another of these cases (the Presbytery **[1339]** of Strathbogie, 16th February 1840, 2 D. 591) the principle was thus stated by Lord Gillies:—"In spiritual courts a limited jurisdiction exists, and then proceedings cannot be reviewed and set aside in the civil courts unless there be an excess of powers committed by them. By usage and statute there are powers in the church courts to make certain rules of their own, which cannot be brought under review; but it is an inherent condition, essential to the exercise of these powers, that the rules which are made shall be consistent with the law of the land, otherways they are void. The spiritual courts have no jurisdiction to enforce illegal rules, though made by themselves; and any person injured by an attempt to do so in his person, property, status, or reputation, may apply to a civil court for redress, just as in the case of any lawless wrong." The principles which thus apply to sentences pronounced by judicatories of the Established Church in excess of their powers apply *a fortiori* to sentences pronounced by the governing bodies of voluntary religious associations, because, while the former derive their authority from the law, and have power to some extent, as stated by Lord Gillies in the case of Strathbogie, to make rules for themselves, which, if consistent with the laws of the country, are binding on the office-bearers and members of the church, the case is different as to the latter, who have no powers whatever except those conferred upon them by the members of their associations, and whose proceedings, therefore, can be of no force or effect against their ministers and members, unless they be exercised within the bounds and in conformity with the conditions prescribed by their constituents in the contract of the association. In this respect the powers of the governing bodies of all voluntary associations are effectually limited by the conditions of their constitution, whether the purpose for which they are entered into be sacred or secular. This was the principle of the judgment in the case of Dunbar *v.* Skinner, 3d March 1849. In that case a bishop of the Protestant Episcopal Church in Scotland, sitting with his clergy in Synod, pronounced a sentence of deposition against one of his clergymen. The latter instituted an action in this Court against the bishop, concluding, as the report bears—1. That the sentence should be found and declared to be null and void, as having been pronounced "illegally, irregularly, and without

authority; and 2. That the bishop should be found liable in L.2000 of damages." The action, therefore, although different in its circumstances, was in effect of the same character as the present. The bishop, besides other pleas on the merits, pleaded, "*in limine*, that the Court had no jurisdiction to try the case, as the ground of action was a spiritual and ecclesiastical act, performed by the defender in his ecclesiastical capacity as the pursuer's bishop." The preliminary defence was also the same in effect as that now urged by the defenders. But the Court unanimously repelled that defence, and appointed (as the Lord Ordinary has done in this case) an inquiry as to the disputed questions of fact. The principle of the judgment was thus stated by Lord Fullerton:—"No office-bearer of this communion, or of any other merely tolerated communion, can lay claim to jurisdiction any more than the office-bearer of any private association. But this goes far to solve the only question now before us. For if there is here no jurisdiction in the proper sense of the term pleadable by the defender, the question truly resolves itself into one of agreement, and that seems to be the import of the second plea in law. Now, there is no doubt that all parties entering into an association for purposes not prohibited by law may effectually bind themselves to submit without appeal to the determination of certain matters, and even to the infliction of censures, by the official authorities, to whom such power is committed by the terms of the association; and if it could be instantly shown, without any further inquiry, that, by the admitted or proved circumstances of the case, the defender had absolutely bound himself to submit to such a sentence as that for which he now seeks redress, the defence in the second plea in law might have been sustained, and the case sent out of Court. But can it be said, with any show of reason, that the case does stand in that situation? or that the Lord Ordinary was wrong in holding that there were various matters of fact here on which the parties were at variance, and which required to be ascertained in the usual way, before the case could be disposed of? In the first place, when the defender's case is put, not on jurisdiction, where, I think, it cannot rest, but on the terms or conditions of that private association, designated the Protestant Episcopal Church in Scotland, the defender cannot advance a step without proving the nature and extent of his **[1340]** rights and powers as a bishop of that church. We, administering the law of Scotland, are presumed to know the nature and limits of the jurisdiction of the various constituted authorities. But of the rights and powers of a bishop in the Scottish Episcopal Church we can know nothing until they are established in evidence, like the terms and conditions of any other association." This principle, it may here be remarked, meets also an argument which the defenders found upon the case of Lockhart, in which it was found that a sentence against a clergyman of the Established Church was not reducible in consequence of mere errors in the forms of procedure. The observance of forms of process is not a condition of the powers or jurisdiction of church courts; and it is not every error of that kind which renders their sentences null and void. But the conditions of powers conferred by members of a voluntary association upon the office-bearers limit their powers; and any proceeding in contravention of these conditions is *ultra vires*, and consequently essentially null and void. On these grounds I am of opinion that the Lord Ordinary's interlocutor is right, in so far as it repels the first plea in law stated for the defenders. The other preliminary defence disposed of by this interlocutor is, that the sentence cannot be competently reduced by this Court, because it does not relate to any question of civil right. But it appears to be a conclusive answer to this defence that the ultimate demand in the action is for a decree against the defenders for payment of L.500, claimed by the pursuer as indemnification for the loss and damage alleged to have been sustained by him in consequence of the proceeding of which he complains. And, according to the pursuer's averments (which, as already said, must *in hoc statu* be assumed to be true), the losses for which he thus seeks pecuniary reparation were of a patrimonial kind, consisting partly of his emoluments as minister of the Free Church at Cardross, and partly of the damage sustained by him in his feelings and reputation by being charged with a scandalous offence. And, although the defenders may be privileged against a claim of damages for making such an accusation, whether their sentence be well founded or erroneous on its merits, if they have acted within their powers, it does not follow that they are so privileged if they be not acting within their powers. In the cases of Robertson *v.* Campbell, 25th July 1781, and Macqueen *v.* Grant, 21st November 1783, it was found that a minister, although he is privileged from responsi-

bility for imputations made against a member of his congregation in the kirk-session or in private admonition to the party himself, he has no such privilege when such imputations are made otherways by him. And, in the case of Dunbar *v.* Skinner, the Court held that if the proceeding there complained of should be found to be *ultra vires* of the bishop, his case would not be a privileged one. The question, therefore, as to the pursuer's claim for damages, as well as his challenge of the sentence itself, depends upon the inquiry ordered by the Lord Ordinary's interlocutor as to the powers conferred upon the defenders by the constitution of their association. This being the case, it is not necessary to inquire whether or not the status of a minister of a voluntary religious association, tolerated and protected by law, is not of itself such a civil right as the law recognises and protects, and whether or not he is entitled to indemnification for being unlawfully suspended from the office or deposed? That status, even when derived only from the contract or constitution of a voluntary association, is an important one in some respects. It confers not only an estimable position in society, but even some important civil privileges, one of which is the privilege of celebrating marriages without incurring the statutory penalties inflicted upon the celebrators of irregular marriages. As this question was not argued to us, I give no opinion upon this question at present, and I mention it now merely for the purpose of stating that I reserve my opinion upon it. I therefore think that the Lord Ordinary has rightly repelled this preliminary defence also, and that his interlocutor on the reduction of the sentence of suspension ought to be adhered to. What is complained of in the second of the conjoined actions is another sentence pronounced by the defenders against the pursuer on 1st June 1858, deposing him from the office of the holy ministry, in respect he had presented to this Court a note praying for a suspension and interdict of the proceeding I have been considering. The ground upon which this sentence also is challenged is, that the defenders in pronouncing it went beyond their powers. And, in support of that ground, the pursuer alleges in the record that, in contravention of the constitution of the Free Church, the defenders pronounced that sentence without a libel against him having been raised—that **[1341]** they did not give him an opportunity of defending himself against the alleged offence for which they so punished him—that what he was accused of was merely an exercise of a right possessed by him with all the lieges, and was not contrary to the contract or constitution of the Free Church, and that, in consequence of this sentence, further loss and damage has been sustained by him. In this case, also, the remedy which the pursuer seeks is—first, a decree reducing the sentence, and declaring it to be null and void; and, secondly, a decree for damages against three individual members of the defenders' body. There is, however, no conclusion that this Court should pronounce a decree which would interfere in any way with such other proceedings (if any there be) which can be adopted by the defenders for the alleged offence in conformity with the powers conferred upon them by the operation of their constitution. In this case, as in the former, the defenders deny that in pronouncing the sentence they exceeded their powers under the constitution, and they set forth in the record what they allege these powers to be. The Lord Ordinary, by the interlocutor complained of, appoints this case likewise to be put in train for having the truth of the disputed facts ascertained, and the pursuer acquiesces in that appointment. The defenders, however, are insisting that this action also shall be dismissed without such an investigation, and maintain that, even if the pursuer's allegation as to their having had no power to pronounce the sentence were true, still the action would be incompetent in this Court, in respect that the sentence was a spiritual act, and that it does not relate to any question of civil right. As these are just the same preliminary pleas as are raised by the pursuer in the other process, and as the pursuer meets them with the same answers, I need only say that, in my opinion, the Lord Ordinary's interlocutor repelling this plea also is correct. It is proper, however, to keep in view that there are two peculiarities in this case which are still more adverse to the pleas of the defenders—1. In considering the present case, the sentence of suspension, the execution of which was sought to be interdicted in the process of interdict, must be assumed *in hoc statu* to have been a nullity. 2. The act of presenting the note of suspension and interdict in this case to this Court, whether or not it was made an offence by the constitution of the Free Church, was at most only a *malum prohibitum*, and not a *malum in se*; and it was not *sua natura* a spiritual matter. The defenders plead that there is this peculiarity in their favour in this case, that, by an Act of the

General Assembly of the Church of Scotland in 1582, it is enacted that no person received into an ecclesiastical office should seek by the civil power to make any appellation from the General Assembly, to stop the discipline and jurisdiction granted by God's Word to the office-bearers within the kirk, under the pain of excommunication, summarily, and without any proofs or admonition; and that, by the standards of the Church of Scotland having been generally adopted into the constitution of the Free Church, this regulation empowered the defenders to pronounce the sentence in question in the manner complained of. But the pursuer denies that that old Act either is of the import and effect alleged by the defenders, or that it is part of the constitution of the Free Church. And he founds upon the case of Cruikshank *v.* Gordon, already mentioned, showing that it is not even a part of the constitution of the Church of Scotland from which it is said to have been adopted. In that case the General Assembly had deposed certain clergymen for, *inter alia*, applying to the civil power for an interdict against church judicatories or others carrying into execution certain sentences of censure pronounced by them. An action of reduction of that sentence of deposition was met with a preliminary defence that the action was incompetent, and the Court had no jurisdiction to entertain it; but it was found "that this Court has jurisdiction to afford to the parties aggrieved adequate redress for the flagrant wrongs complained of, by suspending and rescinding the sentence of deposition, if the pursuers shall establish their allegations on the merits in ulterior stages of the evidence." And as it was thus settled that ministers of the Established Church are not liable to deposition even in a prosecution under a libel for so resorting to the civil courts of the country, it cannot be assumed that ministers of the Free Church are in a worse predicament, unless it be shown that by the constitution of their association they have voluntarily consented to be so dealt with. Whether or not they have done so will be ascertained under the investigation which is to take place under the Lord Ordinary's interlocutor. The remaining **[1342]** plea is stated by the three rev. gentlemen who are called as defenders in this second action, viz., that "reduction is not a proper legal remedy complained of." I think that this plea proceeds upon a misapprehension, which I have already adverted to, as to the nature of the present action of reduction. It does not operate as an appeal to bring under the cognisance of this Court any question of ecclesiastical censure to which the pursuer may be amenable, even were such a decree of reduction as is sued for pronounced, and what is sought is mainly an adjudication of an alleged nullity in the sentences complained of. I think that this plea also has been properly repelled by the Lord Ordinary. At the debate, the defenders stated objections to the conclusions for damages, but these objections were out of place, because all such pleas are expressly reserved entire by the Lord Ordinary's interlocutor, and remain to be disposed of by his Lordship. I therefore think that that interlocutor should simply be adhered to as it stands.

Lord Deas.—Since these conjoined actions were before us in December 1859, revised condescendences and answers have been lodged, and a record closed in each of them. These revised papers are, I am glad to say, greatly more explicit and satisfactory than the original papers. We are now enabled to see pretty clearly how far the parties are at one upon matters of fact, and how far they differ. I shall first notice the material facts which seem to me not to be disputed, and then those which are. Having done this, I shall state my opinion whether the actions should be at once dismissed, which is what the defenders contend for; or whether, as the pursuer contends, the disputed facts should be investigated. The matters of fact which are substantially not disputed appear to me to be these—1st, The pursuer, who had previously been parish minister of Ballachulish, seceded with his party from the Church of Scotland in 1843; and was subsequently inducted as minister of the Free Church congregation at Cardross. In this capacity he had a dwelling-house rent free and certain emoluments mentioned in the record. These, together with his salary of L.40 a-year as clerk to the Free Synod of Glasgow and Ayr, formed his means of livelihood. 2d, The Free Church adopted, at the Disruption, the standards, laws, and rules of the Church of Scotland, in so far as these could be adopted by a voluntary body, subject to the qualifications expressed in the document known as the Claim of Right, of 30th May 1842; the Protest, of 18th May 1843; the relative deed of Separation and Demission, of the 23d of that month; and the Formula, subscribed by the pursuer

and other ministers at their induction as ministers of the Free Church. 3d, The Free Church, accordingly, has its kirk-sessions, presbyteries, synods, and general assemblies —to each of which bodies the same authority is conceded over each other, and over individual ministers, as in the Church of Scotland. 4th, Along with the other laws and rules thus adopted, the Free Church adopted those which related to libels against ministers for ecclesiastical offences, with the same rights of appeal from presbyteries to synods, and from synods to general assemblies, as in the Established Church. 5th, Upon this footing the pursuer was served with a libel, at the instance of the Free Presbytery of Dumbarton, the first count in which charged him with being intoxicated on a particular occasion in spring 1857; the second with having, on another occasion, in December of that year, exhibited symptoms of intoxication in his walk, appearance, breath, and indistinctness of speech; and the third, and only other count, with having, upon this last occasion, endeavoured to kiss a married woman in her own house, and behaved violently and immodestly towards her. 6th, After proof led, the Presbytery found the first charge not proven; the second proven, except the indistinctness of speech; and the third proven, except that he did not attempt to kiss the woman, nor behave immodestly towards her—exceptions which virtually reduced this last charge to a charge of violent conduct under the influence of intoxicating liquors. 7th, No member of Presbytery appealed or dissented and complained against this judgment. But the pursuer appealed to the Synod against it, in so far as adverse to him, and maintained that, on the first count, the deliverance should have been not guilty, in place of not proven, and that no part of the other two counts should have been found proven. 8th, To this appeal the Synod substantially gave effect, by a judgment which discharged the first count entirely, and found the other two counts not proven. 9th, From this judgment of the Synod the Presbytery **[1343]** appealed, and complained to the General Assembly, who, on 24th May 1858, affirmed the Synod's deliverance, discharging the first count entirely, reversed it on the second, and returned, on that count, to the deliverance of the Presbytery; and on the third not only reversed the deliverance of the Synod, but also that portion of the Presbytery's deliverance favourable to the pursuer, which had not been appealed or complained against, and found the whole of the third count proven; and, in respect of these findings, suspended the pursuer from the ministry *sine die*, declared his charge of the congregation of Cardross vacant, and that he could not be restored to the ministry except by the General Assembly. 10th, The pursuer thereupon presented an application to the Lord Ordinary on the bills to suspend the proceedings as irregular and incompetent, and to interdict the parties "from proceeding to the complainer's church at Cardross, and declaring or preaching the charge vacant." The Lord Ordinary, on 28th May 1858, refused this application as incompetent. 11th, That same night the pursuer was cited to appear next day before the General Assembly, to answer for his conduct in making the above application to the civil court. Having appeared, he was interrogated and desired to confine himself to a categorical answer, "yea," or "nay," whether he had authorised the application; and having answered "yea," he was, in respect of this admission, *instanter* deposed from the office of the ministry. 12th, The pursuer, as a necessary consequence of these deliverances (assuming them to be valid), ceased to have any right to occupy the dwelling-house, called the manse, or to draw the emoluments he had previously enjoyed as minister of the Free Church congregation at Cardross, and he became, at same time, incapacitated from holding any other charge or clerical appointment in connection with the Free Church.

Such, I think, are the material facts upon which (subject, no doubt, to much observation) the parties are substantially agreed.

On the other hand, the material facts on which they differ may be comprehended under the three following questions:—1st, Whether, according to the rules of the Free Church, applicable to libels against ministers, the judgment of a Presbytery, in so far as favourable to the accused, is held to become final if acquiesced in by all members of Presbytery; or whether, if the accused, by appealing to the Synod against the findings, so far as adverse to him, gets the adverse findings reversed, and the Presbytery then appeal the Synod's judgment to the General Assembly, the Assembly may, *ex proprio motu*, go back upon the whole matter, and find the charges proved of which the accused had been acquitted by the Presbytery, although no appeal or dissent and complaint had been entered against that acquittal? 2d, Whether it is a rule of the Free Church that

a minister who complains to the civil court, as the pursuer did here, of an ecclesiastical sentence, which he conceives to have been incompetently pronounced, becomes liable to instant deposition? 3d, Upon what particular footing do ministers of the Free Church hold their manses and the emoluments of their office? and upon what footing was the pursuer appointed to and removed from his situation as clerk to the Free Synod of Glasgow and Ayr? Apart from certain details, into which neither party has entered, and which can only affect the amount of damages, if damages shall be held due—these three heads appear to me to comprehend all the material matters of fact upon which the parties really differ upon the face of this record.

The solution of the first of these disputed questions will, to a great extent I think, depend upon what were the rules and usages applicable to procedure upon libels against ministers in the Church of Scotland prior to the Disruption; because I do not understand either party to aver that, in this respect, any new or different rules have been since adopted by the Free Church. The solution of the second question, again, will involve the twofold inquiry, whether the alleged rule, prohibiting application to the civil courts under pain of instant deposition, existed in the Church of Scotland prior to the Claim of Right of 30th May 1842, and Protest of 18th May 1843? and, if not, whether by that Claim of Right and Protest which preceded the Disruption, taken along with the Deed of Separation and Demission, and relative Formula agreed upon at the time of the Disruption, such a rule was introduced as a rule of the association then formed? The solution of the third disputed question of fact must depend, so far as regards the Sustentation Fund and supplementary funds of the Free Church, mainly upon documents within the power **[1344]** of the defenders, which we have not yet seen; so far as regards the manse, upon deeds which were partially read to us, for the first time, in the course of the present argument; and, so far as regards the clerkship of the Free Synod of Glasgow and Ayr, upon the minutes or records of that body, and the general regulations, if there be such, of the defenders' association upon the subject.

The Lord Ordinary has not decided in what manner or form probation ought to proceed upon these or any disputed facts in the case. He has merely decided that proof, in some shape or form, ought to be led; and that the actions are not to be at once dismissed. The disputed matters of fact to which I have particularly alluded, involve peculiarities which may materially affect the mode in which they ought to be investigated. For instance, it may be difficult to say how far we are bound judicially to know the rules and usages of the Established Church courts, which are, within their own sphere, independent tribunals; or how and to what extent these fall to be ascertained by inquiry. And upon the disputed matters generally, under the three heads I have mentioned, so much must turn upon the legal construction of rules and documents, that it may probably be thought right to have a proof by commission upon the matters involved in these three heads, before determining whether any, and if so, what decree of reduction should be pronounced, and whether there ought to be any, and if so, what issue or issues sent to a jury with a view to questions of damages.

All this, however, including the question whether such proof should be before answer, will be open under the interlocutor of the Lord Ordinary. What the defenders contend for is that the actions should instantly be dismissed. On looking at the two pleas (the first and third) for the general body of defenders, which the Lord Ordinary has repelled, it will be seen that, although embracing the alleged incompetency of reduction, the one concludes with the words "the actions should therefore be dismissed," and the other with the words "the actions cannot be maintained." The reclaiming note, accordingly, for these defenders, prays the Court "to sustain the pleas stated for the defenders, and to assoilzie them from the conclusions of the conjoined actions, or at least dismiss the said actions, and to find the defenders entitled to expenses." The relative pleas for the individual defenders, in the second action (being the first, third, and fourth of the separate defences), which have been also repelled, are somewhat differently worded; but that their object is the same appears from the prayer of their reclaiming note, which, like that of the other defenders, is "to sustain the pleas of the reclaimers, to dismiss the action directed against them, and to find them entitled to expenses." Accordingly, the whole argument we have heard upon these reclaiming notes has been directed to the question, whether there shall be investigation of some sort, or immediate dismissal of the actions? The pleas repelled by the Lord Ordinary

are to the effect that reduction of the sentences or resolutions complained of is incompetent, and the actions "should therefore be dismissed." There is here, however, involved a *non sequitur*. The incompetency of reduction, although established, could only go to the dismissal of the conclusions for reduction, and not to dismissal of the actions, which contain conclusions for damages, not made dependent, by the structure of the summonses, on the conclusions for reduction. But we are not come to that stage at which we are called upon to determine whether, and to what effect, reduction is or is not competent. Probation has neither been led nor renounced as to the nature and terms of the contract which these sentences or resolutions purport to have vacated. It is just as necessary, according to our usual course of procedure, to have such probation led or renounced before determining the competency of reduction, as before determining the competency of claiming damages. It would be rash, to say the least of it, to assume, at the present stage of the cause, that redress, in the shape of damages, can just as well be given without reduction as with it. In the case, for instance, of inferior court convictions, objected to as oppressively or irregularly obtained, for breach of a statute, or some common law offence, I do not know how it may be in England, but with us the practice is, before insisting for damages, to get the sentence quashed by suspension (which is the usual Justiciary form), or by reduction. So it is with regard to sentences of any of the Established Church courts when they are alleged to be *ultra vires*; and so also it is in the case of decreets-arbitral, and in many other cases. The whole argument of the defenders necessarily implies that the sentences now **[1345]** complained of, although pronounced solely *ex contractu*, are entitled to a certain presumption of validity; and, if so, the usual way with us of overcoming that presumption is by reduction. Suppose the defenders were to produce these sentences to the Sheriff in support of an application to have the pursuer ordained to remove from the manse, as being no longer the incumbent, could the Sheriff entertain such objections as are now urged against these sentences, as defences against the application, so long as these objections had not been made the groundwork of a reduction? I am not prepared to say that he could. And if there be room to doubt this, or to doubt whether the sentences, while unreduced, do or do not form a bar to the pursuer's claim for damages, he may be entitled to have that doubt removed by reduction. It would be premature, however, to determine any question of this kind at present. We must first know precisely what the contract under which the sentences were pronounced really is, and whether and how far it involves civil rights which have been violated, and then we shall be in a better position to judge whether there is room with or without reduction for a claim of damages.

It is impossible, I think, to say that a civil contract, or the violation of civil rights, is not, to some extent at least, relevantly averred. It is said the defenders' association are a church, and that a church does not imply any civil object or purpose whatever. It may be so. But I know nothing to prevent the contract under which parties associate themselves as a church from embracing civil rights. Men may lawfully make the holy office of the ministry a profession by which they are to live; and in this country they generally do so. The pursuer avers that he did so here. That he had qualified himself by an expensive course of study for being a minister of the Church of Scotland. That he resigned a permanent living in that Church to become a minister of the Free Church association, who admitted him accordingly, and inducted him into the charge of the Free congregation at Cardross. He says he joined the association upon the footing that the status then conferred upon him would qualify him to earn his livelihood, and would not be taken from him except for the causes and by the tribunals, in their order, stipulated by the rules of the association. All this may be shown to be otherwise, or it may be made out that there was no such connection between the emoluments, or means of livelihood, and the clerical status conferred, as to entitle the pursuer to say that he has sustained a civil wrong, for which he is entitled to civil redress. For instance, it may be shown that dismissal from the office of clerk to the Free Synod of Glasgow and Ayr had no other sort of connection with the sentences of suspension and deposition than if it had been dismissal from the situation of tutor or chaplain in the family of a Free Churchman, who chose to employ no one but a Free Church clergyman in these capacities. It may be shown that any benefit which the defender derived from the sustentation and supplementary funds was of the same precarious and purely incidental character. It may be even shown—

although that seems more difficult to reconcile with the defenders' own averments—that this was the case with the pursuer's enjoyment of the manse. And if these things be made out, it may be matter of grave consideration whether there be room either for reduction or damages. But we have not yet before us all the facts necessary to enable us to judge of these matters, and I refrain, therefore, from either expressing or forming any opinion in regard to them. One thing, however, I may say, that the notion that we shall, in any event, reduce these sentences, except in so far as they may form a bar to redress for civil injury, has not, so far as I know, been hitherto countenanced by any of your Lordships. If there has been no civil contract at all—if no civil wrong, for which the law provides redress, has been committed, we shall neither give reduction nor damages. If, on the other hand, a civil contract has been violated, we cannot refuse to the pursuer an opportunity of establishing his claim for damages occasioned by that violation. If the sentences complained of shall be found to carry with them no presumption of validity, and so not to stand in the way of a claim of damages, there may be no necessity for any reduction of them. But if they are to be reduced, it has never occurred to me, and I do not think it has been suggested by any of your Lordships, that such reduction could go further than removing them out of the way as an apparent obstacle to patrimonial redress. Nobody contemplates that the defenders are to be ordained to receive the pursuer back into their association; to allow him to sit and vote in their Presbyteries, Synods, and General [1346] Assemblies; or that the Free Church congregation at Cardross are to be compelled either to listen to his sermons or to absent themselves from the church, and leave him to preach in it to empty benches. The principle upon which we should decline to take that course is a very ordinary principle. If a master unwarrantably dismisses his servant, we give pecuniary redress; but we do not compel the master to take the servant back into his service. If I engage a teacher in any department of science, literature, or art, the law will compel me to pay him, but the law will not compel me to be taught by him. It is not because the office of a clergyman is a holy office—it is not because those who ordained or deposed him did so by divine authority—it is not because the church he belongs to is a Christian church—it is not because the object of the association is a religious object—that we decline to interfere further than I have indicated. It is simply because this Court deals only with civil or patrimonial interests and consequences, and, while vindicating or giving redress for these, refuses to go beyond them.

It is upon the same ordinary principle that, if no civil interests are involved, we refuse to interfere at all. Men may associate themselves together for innumerable purposes under rules and regulations which may be called, if you please, a contract or agreement, but of the breach or observance of which the law will take no cognisance. It is of no moment whether these purposes be trivial or important—temporal or spiritual—scientific or religious—so long as they do not involve civil or patrimonial rights. If our judicial interposition, or non-interposition, turned, to any extent, upon the laudable nature of the association—upon its object being spiritual or religious, or upon the truth or falsehood of its religious principles—it is quite plain that, before determining whether and how far we should interfere or not, we would have to inquire into and judge of the very matters and distinctions which the defenders are so anxious to keep in their own hands, and with which, happily, we have nothing to do. But if parties choose to connect with, or superadd to such objects, or any of them, a lawful civil contract—if they introduce the element of pecuniary or patrimonial remuneration—then our interposition in aid of civil rights, and to redress civil wrong, is just as much a matter of course, irrespective altogether of what may be the object of the association, as our non-interference where the civil element is wanting. There are innumerable compacts or arrangements every day entered into which, although not to be compared in importance with compacts or arrangements as to matters of religion, may materially affect the comfort and happiness of society, and in respect of which, nevertheless, so long as they do not involve civil or patrimonial rights, no action will lie, either for implement or damages. Two persons agree to ride together, to dance together, to sing or play together, to travel together; the one breaks his engagement, and the other shall have no redress. But if the one has agreed to pay the other for the instruction to be derived in riding, dancing, music, or any other branch of study, or for accompanying him as his *courrier* or *valet de place*, the law will give redress to

the party injured by the breach of that agreement. So it is in other matters, less or more important. The case is not varied by the introduction of the religious element. A number of persons agree to constitute themselves an association to read the Bible together, to pray together, to worship together in any form which the law sanctions or tolerates, and the law will not interfere whether they keep or break such engagements. They may call themselves a Christian Church, or a Synagogue, or a Free Church, or a True Church, or any name they please, and the law will not even inquire whether they merit the name they so appropriate, nor whether their doctrines be heterodox or orthodox, provided only their objects be not unlawful. They may assign to certain of their number certain functions—so many to be ministers or office-bearers of whatever kind suits the denomination to which they belong; and if the labours of the minister and other office-bearers are undertaken only by those who are rich enough and generous enough to undertake them gratuitously, the association may enjoy that happy state of freedom in which nobody is bound to anything. But if the association make a compact with certain of its members that, on condition of the latter going through a long course of study and preparation, and devoting themselves exclusively to the labours of the ministry, they shall be held qualified to be inducted, and accordingly do induct them into the charge of particular congregations, with right to certain emoluments as a means of livelihood, and on the footing that the qualification thus conferred shall not be taken away [1347] except for one or more of certain causes, to be ascertained by certain tribunals, acting in a specified order, then the association, or its members, if they break this compact, may become liable for the consequences, precisely as if the emoluments had been attached to a purely secular qualification and employment. A minister is just as much entitled to rely upon his compact for the means of subsistence as any other man. A breach of that compact, whereby he and his family are thrown upon the world to starve, is a wrong which could only be left without a remedy in a country where law is unknown. It was stated by the defenders' counsel, Mr. Young, in answer to questions put, partly by your Lordship in the chair, and partly by me, that the Free Church General Assembly might, at any time, resolve that any given number of ministers, whose names should be first drawn from a ballot-box, should be deposed; and that, if the pursuer had been convicted of being sober in place of being intoxicated, on Christmas day 1857; or if the sentence had borne that he was the ablest man and the best preacher in the Church, and therefore that he was deposed, there would still have been no legal claim for redress. It may be so, if it can be shown either (first), that the pursuer bound himself to such conditions, or (second), that the compact involved no matters of civil or patrimonial right. But if neither of these two things can be shown, the result seems just about as startling as that the Faculty of Advocates should be allowed, with impunity, to expel one of its members because he was the most able and accomplished and successful member of the body. If the ministers of the Free Church choose to agree that a majority of their General Assembly, or any other committee of the association, shall have power to depose all or any of them at pleasure, without cause assigned, let them do so. No man in this country has any power over another, in matters either religious or civil, beyond what the civil law itself confers, except by that other's own consent. But there is great latitude in the extent to which this consent may be carried. It may go the length of enabling any leader of a dissenting presbytery, synod, or assembly, who can command a bare majority at the moment, to have any leading member of the minority at once deposed, without cause assigned; or of enabling the majority at once to depose the whole minority. But such consent, to be effectual, must be clear on the face of the compact. The law will neither presume nor readily infer such consent where civil interests are involved. The liberty of the majority may be the slavery of each individual, and of the whole minority. That is not the kind of liberty which the law of this country favours. Still less does the law favour or even recognise the liberty of one party to a civil contract to break it with impunity, or to interpret it in his own favour to the prejudice of the other party. The interpretation of all contracts belongs to the civil courts, to the effect, in the first instance, of ascertaining whether they involve civil rights; and, in the next place, if they do, of vindicating or giving redress for the violation of these rights; and, although every human tribunal must be fallible, history has shown that nowhere else can these powers be so safely lodged. Rightly viewed, they are, in us, not powers, but

duties, which, when required by any of her Majesty's subjects, be their religion what it may, we have no choice but to perform. The Solicitor-General, in the course of his able and judicious argument, admitted that, to jurisdiction properly so called, the defenders have no claim,—that to compact or consent all their powers must be referred. The Solicitor saw very well that the opposite view was neither maintainable in itself nor consistent with the only line of argument which, in other respects, he fell to maintain; for, if the defenders had jurisdiction, they must keep within it. No consent could enlarge it. Whereas, upon the other view, they may make any lawful compact they please which the members of their association are either wise enough or rash enough (as people may think it) to accede to. If that compact touches no civil interests, the law, as I have said, will neither enforce it nor give damages for the breach of it. But, before we can judge of the compact, we must know precisely what it is; and as its import, so far as disputed, cannot be known and fixed except by investigation, it follows that the Lord Ordinary is right in refusing to dismiss the action (which is really all he has done) without such investigation. Perhaps I could have wished that his Lordship had dealt with more pleas, and struck somewhat deeper into the case than he has done. But to recal his interlocutor on this ground would be to retard and not to forward the progress of the cause. To the extent to which he has decided he has, I think, decided [1348] rightly. And I concur, therefore, in holding that the interlocutor ought to be adhered to.

I have only to add, with reference to the question mooted by Lord Ivory, whether the defenders have appeared under any *nomen juris* which we can recognise, that, looking to the pleas now put on record by the defenders, I think it will be incumbent on the Lord Ordinary to require them to explain more specifically who are the parties for whom these pleas are maintained under the vague denomination of the General Assembly of the Free Church of Scotland, which met in 1858. The necessity for this is apparent. The parties who did the wrong—if a wrong was done—were all the individual members of that Assembly, present at the meetings, who voted for, or tacitly adopted the resolutions or sentences complained of. Every one of these members became individually liable to make good the consequences incurred, if consequences were incurred at all, to the extent of his means and fortune. The regular course would have been to have called all these individuals as defenders in both actions. Of this we have an *a fortiori* example in the action of damages at the instance of the Earl Kinnoul and the Rev. David Young against the Presbytery of Auchterarder (1 Bell's App. p. 662), where the parties called as defenders were the whole members composing the majority of the Presbytery who voted for the resolution complained of, and who were held, both in this Court and in the House of Lords, to be the proper defenders. But, in place of taking a similar course here (except in so far as three individuals are added as defenders in the second action), both parties seem to have thought it expedient, the one to adopt and the other to acquiesce in, a short-hand mode of calling the General Assembly of the Free Church of Scotland, the Rev. Dr. Alexander Beith, their moderator, and the Rev. Patrick Clason, D.D., and the Rev. Sir Henry Wellwood Moncreiff, Bart., their principal clerks, as representing the said General Assembly. Now, this may be all very well, if it be sufficiently clear that the three individuals thus designated as the moderator and principal clerks, and who have appeared accordingly, do appear as representing and responsible for the whole individual members of the General Assembly of the Free Church who passed the resolutions or sentences complained of. It has been repeatedly pointed out, particularly by my brother Lord Ivory and myself, that the plea was open to the defenders that all parties interested had not been called. They have all along declined, and still decline, to avail themselves of that plea. But it is time we should know what such declinature means. For, while the defenders allow the actions to proceed on the only footing on which they could proceed —viz., that all parties interested are in the field—I find two pleas in the record, which seem to me inconsistent with that supposition. The defenders' sixth plea bears—"The General Assembly of the Free Church cannot, as such, be subjected in damages, nor can any decree for money be pronounced against it in the first action." Their seventh plea is in these terms:—"The moderator and clerks of the said Assembly are not responsible for the acts and proceedings of the Assembly, and cannot be subjected in damages in respect of such acts and proceedings, as representing the Assembly or otherwise." Now, if these pleas have any meaning, they seem to import that,

by appearing for the General Assembly of the Free Church of 1858, is not meant appearing for the individual members who composed that body; and that the moderator and clerks do not represent, and are not responsible for, either the individual members or the body. The position in which this leaves matters is, that while the defenders assert a standing *in judicio* to obtain absolvitor on the merits on behalf of all interested, they claim at the same time the privilege of dissolving into a shadow if, by any chance, the judgment is to be against them. That would be a mode of playing fast and loose which I do not suppose can be intended. But, whether it be or not, a door for it cannot be left open. The legitimate plea to take, if views of that kind are contemplated, is, that the proper parties, or all the proper parties, have not been called; and if the defenders will neither state that plea nor take responsibility for the only parties whom they can legally represent under the name of the General Assembly of the Free Church, then, I think, the course will be to appoint the pursuer to call the whole members of that Assembly, so far as known, who sanctioned the resolutions or sentences complained of, leaving it for future consideration upon whom the expense thus occasioned shall fall. It is *pars judicis* to see that all parties appearing to be interested are in the [1349] field, as was held by the House of Lords in the case of Bell *v.* Williamson's Trustees, 8th July 1822 (1 Shaw's App. p. 220). And, accordingly, that view was acted on by this Court in the subsequent case of Bennet and M'Farlane *v.* Burgess, &c., 27th May 1828 (6 S. & D., N.E., p. 854). The expenses of this proceeding may, however, be avoided either by a minute sisting the absent parties, or by the defenders who have already appeared, explicitly assuming their responsibilities. But it concerns the law and the regularity of judicial procedure that, in one way or other, this matter should be put on a proper footing.

The Court pronounced the following interlocutor:—"The Lords having advised the reclaiming note for the General Assembly of the Free Church of Scotland, No. 88 of process, and the reclaiming note for Dr. Beith and others, No. 89 of process, and heard counsel for the parties thereon, and on the whole cause, refuse the desires of the said reclaiming notes, and adhere to the interlocutor reclaimed against: Find the respective reclaimers liable to the pursuer in the expenses incurred by him in reference to their said reclaiming notes respectively since the date of the Lord Ordinary's interlocutor so reclaimed against: Allow accounts thereof to be given in, and remit," &c.

[Sequels, 24 D. 1282; 2 M. 1444. Cf. *Forbes* v. *Eden*, 5 M. (H.L.), 47; *Aitken* v. *Associated Carpenters of Scotland*, 12 R. 1208.]

No. 205. **XXIII. Dunlop 1369.** 28 May 1861. Lord Jerviswoode.

The EARL OF EGLINTON AND WINTON (Disponee of Lady JANE HAMILTON), Pursuer.—*Sol.-Gen. Maitland—Montgomerie.*

The EARL OF EGLINTON and Others, Defenders.—*Young—D. Mackenzie.*

Trust—Construction—Entail (11 *and* 12 *Vict. c.* 36)—*Prescription.*—Trustees directed to entail executed a deed of entail which turned out to be defective under the Entail Amendment Act. The institute, who died a few weeks before completing forty years' possession, granted a *mortis causa* general conveyance of her whole means and estate, heritable and moveable, in favour of the substitute first called, who made up no title under the entail; but, after the completion of the forty years, brought a declarator to have it found that the entail was ineffectual, and that he was entitled to possess under the general conveyance in fee-simple;—*Held* (by Lord Jerviswoode), that it was clearly the intention of the general conveyance by the institute that the entailed lands should be carried; that the pursuer was entitled to found on the conveyance, and plead forty years' possession adverse to the entail; and that the substitute-heirs had, by the negative prescription, lost their right to insist upon a valid entail being executed in terms of the original trust;—therefore that the pursuer was entitled to prevail in his declarator.

Lady Hamilton Cathcart, who died in 1817, conveyed her whole estates, heritable and moveable, to trustees, with directions, *inter alia*, to purchase lands, and dispone them, under limitations which she desired should be guarded "by the most strict prohibitory, irritant, and resolutive clauses, according to the approved mode of creating a strict entail in the law of Scotland, to and in favour of the Lady Jane Montgomerie or Hamilton, and the heirs of her body; whom failing, to Archibald Lord Montgomerie, her nephew, and the heirs whatsoever of his body; whom failing, to certain other persons specified by Lady Hamilton Cathcart in the said trust-disposition," &c.

The trustees accepted, realised the estate, purchased the lands of Blackston, and executed a deed of entail, providing "that the said Lady Jane Montgomerie, and the whole heirs of tailzie above mentioned, shall take and possess the lands and estate above disponed upon this tailzie only, and upon no other right or title whatsoever, and shall use any other right which they may happen to have or acquire as additional and collateral titles thereto, for strengthening and supporting this deed of tailzie only, and for no other purpose whatever," and engross *verbatim* in subsequent charters and infeftments all the conditions, &c., contained in the deed. The usual prohibitions were imposed; but the irritant clause was expressed as follows:—"And it is hereby expressly provided and declared, that all the debts and deeds of the said heirs of tailzie, or any of them, contracted, made, or granted, ... shall not only be void and null, with all that shall or may follow thereupon, in so far as they might anyways affect the said lands and estate, but also the heirs of tailzie respectively, upon whose debts and deeds such adjudications or other diligences have proceeded, shall, *ipso facto*, lose and forfeit their right and title to [1370] the said lands and estate, and the same shall devolve to the next heir of entail," &c.

On this disposition and deed of entail Lady Jane Montgomerie was infeft, and her infeftment was recorded on 14th June 1820. She afterwards married A. Hamilton, Esq., of Carcluie and Roselle, who predeceased her. There were no children of the marriage. Lady Jane died on 23d February 1860. It turned out that she had, on 16th August 1848, two days after the passing of the Entail Amendment Act, executed a disposition and settlement, on the narrative that, "being desirous, in case of my death, to regulate the disposal of all property I may die possessed of, or be entitled to dispose of," she has therefore given, granted, assigned and disponed, "as I do by this, my last will and testament, with and under the burdens, conditions, and provisions aftermentioned, give, grant, assign, and dispone, and appoint to be given, granted, assigned, conveyed, and made over to the Right Honourable Archibald William, Earl of Eglinton and Winton, my nephew, and his heirs, executors, and assignees, All and Sundry lands and heritages, debts and sums of money, and, in general, the whole means and estate, heritable and moveable, real and personal, of whatsoever nature or denomination, or wherever situated the same may be, now belonging or which may belong to me, or to which I shall be entitled at the time of my decease, or be held in trust, subject to my appointment by will or otherwise." By subsequent writings she left all her property to Lady Egidia Montgomerie (daughter of the Earl of Eglinton), thus constituted her sole beneficiary.

In order to make these provisions effectual in favour of his daughter, Lord Eglinton (who made up no title under the entail), as general disponee and executor of Lady Jane, raised, on 14th June 1861, against himself and the other substitutes called in the entail of 1820, an action, to have it found that the irritant clause of that deed was not directed against the debts or deeds of the institute, but only against those of the heirs of tailzie; that the entail became, from the date of the Entail Amendment Act, invalid as regards the prohibitions against Lady Jane Hamilton; and that she had full power to dispose of the lands of Blackston, either onerously or gratuitously, *inter vivos* or *mortis causa*; and, farther, that the pursuer, as her general disponee, had full right to the lands of Blackston, and had right to expede titles thereto, under section 12 of the Titles to Land (Scotland) Act, 1858.

Defences were given in, in which it was pleaded;—1. The entail was not defective. 2. Even supposing it were, it was *ultra vires* and incompetent in the Lady Jane Hamilton to affect the estate, or entail by any gratuitous *mortis causa* deed, in respect the estate was purchased in pursuance of the provisions and directions of the trust-deed of Lady Hamilton Cathcart, and that the Lady Jane Hamilton succeeded to, acquired, and held the estate under the provisions of that trust-deed. 3. The Lady Jane

Hamilton having taken the full benefit of the provisions in Lady Hamilton Cathcart's trust-deed in her favour, was not entitled to defeat the directions and purposes of the testator set forth in that deed. 4. The defenders are, in respect of the trust created, and of their *jus crediti* under, and the directions contained in, Lady Hamilton Cathcart's trust-deed, and in the event of the said entail being found defective, entitled to have the entail reduced, and a new and effectual entail of the lands of Blackston executed. 5. The settlement and codicils of the Lady Jane Hamilton libelled on were not intended by her to alienate, comprehend, or affect the said estate, or to alter the destination or order of succession contained in that deed, and were insufficient for that purpose, more especially seeing that they were gratuitous and *mortis causa*.

On 28th May 1861 the Lord Ordinary pronounced the following interlocutor:—"Having heard counsel, and made avizandum, and considered the closed record, productions, and whole process, Repels the defences: Finds and declares in terms of the conclusions of the summons: Finds no expenses due to either party, and decerns."

"NOTE.—The argument which took place before the Lord Ordinary in this case proceeded on the assumption, although not on any positive admission, 1st, That the disposition and deed of entail executed by the trustees of the deceased Lady M. H. Cathcart is defective as a strict deed of entail, in so far as the irritant clause therein contained is not directed against the debts and deeds of Lady Jane [1371] Montgomerie, the institute in the deed; 2d, That, in the said respect, the deed of entail was not executed in terms of the directions of the truster, the said Lady M. H. Cathcart; and, 3d, That had the substitute-heirs of entail, or any of them, brought an action, appropriate in form, for the purpose to have this error corrected, and to have a strict entail framed in terms of the directions of the deed of 23d July 1813, within the currency of the long prescription, subsequent to the date of the infeftment, on the entail of 1820, such action might have been successful.

"The real matter of controversy, however, was, assuming all these things, whether or not, looking to the lapse of time before the present action was mooted, and to the effect due to the provisions of the 43d section of the statute of the 11 & 12 Vict. cap. 36, the pursuer could now maintain an absolute right to the lands of Blackston, in virtue of the general conveyance in his favour, as contained in the trust-disposition and settlement by Lady Jane Hamilton, which forms Nos. 13 and 14 of process.

"The pursuer, of course, in his character of general disponee of Lady Jane, maintains the affirmative of this proposition; and the substance of his argument is, that as Lady Jane held the lands under a defective entail, she was entitled, after the passing of the statute just mentioned, to affect these lands by her deeds and debts.

"So far the argument of the pursuer seemed to the Lord Ordinary to be entirely borne out by the terms of the statute. But two questions remain on this branch of the case, which are still to be solved. The first of these is, whether a general disposition, in the terms contained in the trust-disposition and settlement of Lady Jane Hamilton, is apt and sufficient to operate as a conveyance of the subjects contained in the deed of entail? or whether there must be an express conveyance of these subjects, so as effectually to vacate and set aside the destination in that deed? The defenders rest their argument on this point, mainly on the principle recognised in the cases of Weir *v.* Steele, Feb. 7, 1745 (M. p. 11,359), and Thomson, Nov. 18, 1836 (15 S. 32). But the Lord Ordinary is not satisfied that these authorities go further than to show (what is otherwise abundantly clear) that the intention of the granter must, in such a matter, rule the question. In these cases there was held to be a strong presumption that a party did not intend, by a general disposition, to vacate a deed of special conveyance which that party had for sufficient reasons himself made, and which, unless by mere implication, he had left altogether unrecalled.

"Here there is no difficulty of that character. Nothing, it is thought, can be more obvious than that the *enixa voluntas* of Lady Jane Hamilton was to convey to her nephew, the pursuer, under her deed of settlement of 1848, every subject of an heritable nature, which her deed of disposition could possibly reach. If, then, it was her intention so to convey, the Lord Ordinary thinks it clear that the general disposition which she has executed was sufficient, in the ordinary case, to give effect to that intention.

"The question, however, remains whether, under the terms of the 43d section of

the 11 & 12 Vict. already referred to, a general disposition of this character is a deed of the class to which it is there declared the estate shall be subject? On this point, reference was made to the recent case of Hepburn *v.* Hepburn, Feb. 10, 1860, where a conveyance of a small subject of forty-five acres, 'and all other lands,' &c., was held not to operate as a conveyance of a considerable entailed estate held by the granter. But there the matter was dealt with as one of intention; and as, in that view, the Court were satisfied there was no intention to dispone, the question which is here in issue did not arise, and could not be decided.

"Holding, then, as the Lord Ordinary is prepared to do, that the deed of 1848 is adequate in its terms to carry the lands in question; the next, and as he thinks the more difficult question is, whether or not Lady Jane had the power to convey, and whether or not the pursuer, as her disponee, is in a position now to plead her conveyance against the defenders, as the heirs of entail called under the deed of 1820?

"As already stated, it was not, as the Lord Ordinary understood, disputed, on the part of the pursuer, that the heirs of entail might, within the years of prescription, have insisted on the execution of an entail in strict terms of the instructions of the original truster.

[1372] "Has, then, this remedy, otherwise competent to these parties, been lost? The Lord Ordinary has come to the conclusion that it has been so. But he is far from saying that the case is free from difficulty.

"In dealing with the question, he thinks it important to consider the position which Lady Jane Hamilton held at the date of the passing of the 11 & 12 Vict. She was then in possession of the property under a deed which, though not drawn in terms of the directions of the trust from which it flowed, was so framed as to leave the estate open to be affected by her deeds and debts. Supposing, then, that she had stood thus vested in the lands for a period of forty years, without challenge of her right, she must, it is thought, have acquired a right to the estate under that deed, free from all obligations or restrictions contemplated in the original trust-deed, which had not been imported into the deed of entail.

"But, further, supposing the prescriptive period had not run, it is thought that she was clearly entitled, *in bona fide*, to hold that the deed of entail which had been executed in her favour by the original trustees was a deed which, while unchallenged, she was warranted to deal with as her title of possession. When, therefore, the statute of 11th and 12th of the Queen, already quoted, was passed, Lady Jane was entitled to hold that the estate in which she was thus vested was, in virtue of that enactment, legally rendered subject to her deeds and debts, and that, in executing a deed affecting that estate, and evacuating the destination, she was performing an act as completely and as justly within her power as if she had all along possessed the estate, under a simple destination, free from fettering clauses.

"The only disability which could have attached to any deed of conveyance which she might have thought fit to execute must have arisen from the power which the heirs called under the destination might have had to have founded upon the provisions of the trust, and thus, by force of them, to compel the execution of a strict entail. But that period had nearly expired before she herself ceased to possess the subjects. Infeftment in her person was taken on the entail on 14th June 1820. She died on or about the 28th February 1860. No challenge or hint of challenge is alleged to have been made during her life. On her death her general disposition and settlement, on which the pursuer now founds, came into operation as a *mortis causa* deed. The summons in the present action at his instance is dated and signeted the 14th June 1860. Had Lady Jane herself survived the latter date, it appears to the Lord Ordinary that she would have completed a prescriptive right under the deed of entail, by virtue of which she possessed the lands which would no longer have been affected by a reference back to the trust-deed from which it had flowed.

"The question therefore now arises whether or not, she having died before the expiry of the prescriptive period, the present pursuer can attribute this subsequent possession to the general conveyance by her as his title to the subjects, or whether the defenders are entitled to insist that the original deed of entail is the only title on which he can warrantably rest his right.

"Here is probably the leading difficulty with which the Lord Ordinary has to deal. But he has, after the best consideration he has been able to give it, come to the con-

clusion that the pursuer ought to prevail. There is not here, as he thinks, a proper question of double title, in the person of the pursuer, raising the difficulty whether or not he shall ascribe his possession to the one or to the other. The question is rather whether the general conveyance in favour of the pursuer be a deed of such a character as to be pleadable as a title of possession of the lands in dispute in the question of prescription. On this point the Lord Ordinary goes along with the argument for the pursuer, which, to a great extent, was rested upon the doctrine to which effect was given in the case of Lindsay Crawford *v.* Durham, Dec. 20, 1822 (F.C.) There a singular successor, founding on a minute of sale by an apparent heir uninfeft, was found to be entitled to plead the positive prescription, if he could connect himself with a sasine. The Lord Ordinary is unwilling here to enter into the details of the case, which are fully reported. But it appears to him that the conclusion to which the Court there came warrants him in holding here that the pursuer, having right under the general disposition, is entitled to trace that right to, and to connect it with, the infeftment in the person of the granter of the general disposition, which, like the minute of sale, [1373] constitutes a valid obligation to convey, and warrants the granter thus connecting his right with a title and sasine in the person of his author, to plead the positive prescription, in terms of the statute.

"Looking to the case as respects the application of the negative prescription, it appears to be indisputable that for a period of forty years and upwards no action has been here pursued upon the original trust by Lady M. H. Cathcart, with a view to enforce its provisions, and thus, in this aspect also, the right of the pursuer appears to be now free from challenge.

"If prescription has thus run on a title adverse to the provisions of the trust-deed of Lady M. H. Cathcart, it must follow that the pursuer is entitled to prevail in the declarator, unless there be here some specialty to interfere with the application of the law. But, looking to the several pleas in law stated on record for the defenders, and which have been fully and fairly pleaded, the Lord Ordinary is unable to see that any of these pleas, which may not have been dealt with in the course of the remarks which he has already made, are of such a nature as to affect his present judgment, if otherwise well founded."

The defenders acquiesced in the judgment of the Lord Ordinary.

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